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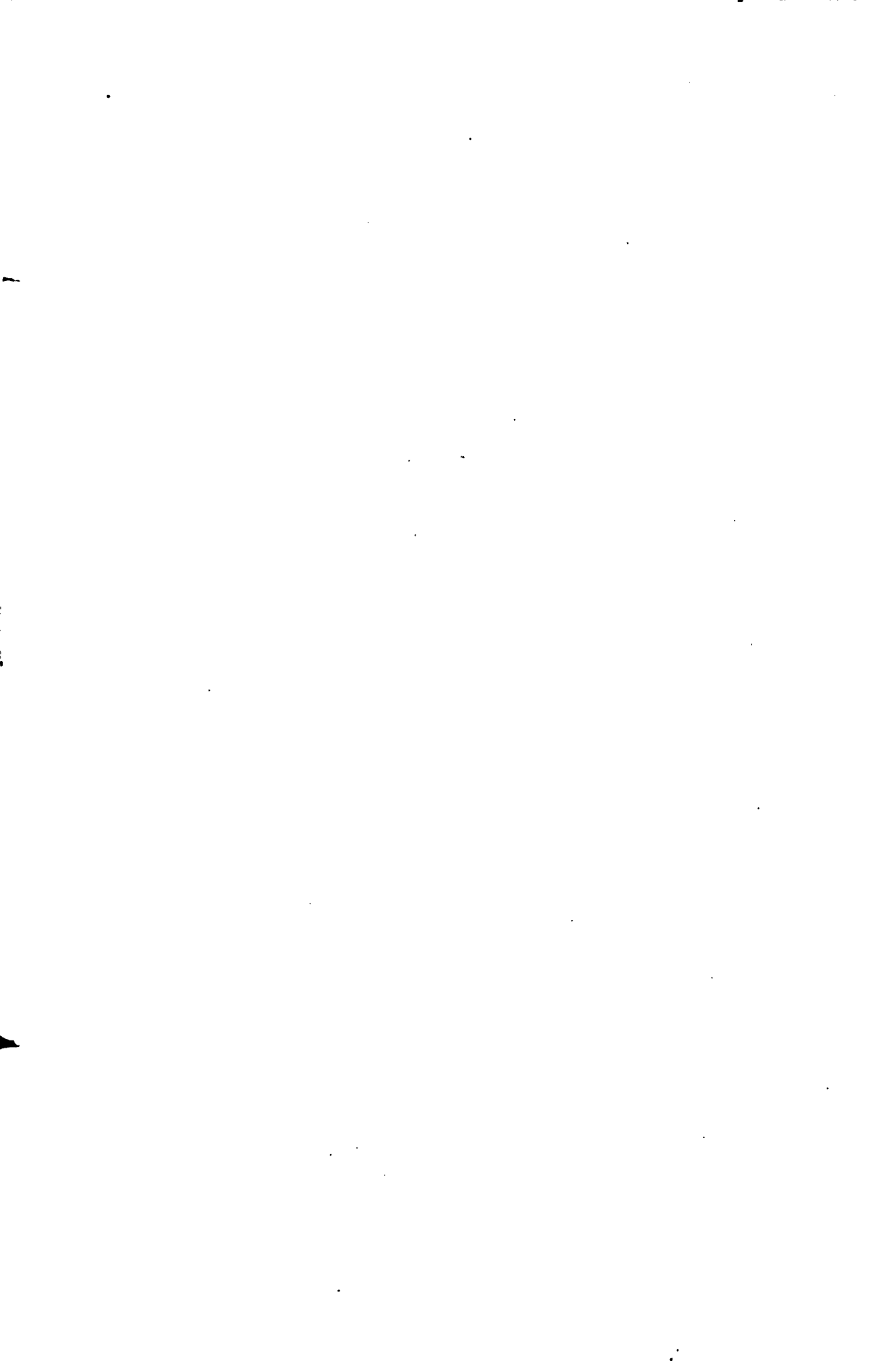
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MINNESOTA PROBATE LAW

67

PROBATE COURTS, DESCENT AND DISTRIBUTION, WILLS,
EXECUTORS AND ADMINISTRATORS, ADMINISTRA-
TION, INHERITANCE TAXES, GUARDIAN
AND WARD, INSANE PERSONS,
AND FORMS

BY
MARK B. DUNNELL

OWATONNA, MINN.
MINNESOTA LAW BOOK COMPANY

1922

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1922

PREFACE

This book has been prepared in the belief that the probate law of this state is now sufficiently developed to justify a separate treatise devoted to its exposition. The Organic Act approved March 3, 1849, provided for probate courts with jurisdiction "as limited by law." The constitution of the state, as originally adopted in 1857, provided for a probate court in each organized county of the state and defined its jurisdiction in general terms. This provision has remained unchanged to the present time, except the recent change extending the term of the judge to four years. Our probate statutes are not original but in the main were copied from the statutes of Wisconsin. Their ultimate source in this country is to be found in the statutes of Massachusetts and New York. Those relating to the administration of the estates of decedents are derived from the early statutes of Massachusetts, while those relating to the estates which may be created by will and to testamentary trusts and powers are derived from the statutes of New York. The probate statutes of Wisconsin were in force in the Territory of Minnesota by virtue of the act of Congress approved March 3, 1849, establishing the Territory. These statutes were adopted, without material modification, by the Legislative Assembly of the Territory of Minnesota at its second session, commencing January 1, 1851, and are found in the Revised Statutes of 1851. They form the basis of our present Probate Code which was adopted in 1889. The Probate Code did not introduce any very radical changes in our probate system, the most important change being that requiring all claims against estates of decedents arising on contract to be presented to the probate court for allowance. Prior to that time such claims were presented to commissioners appointed by the probate court, except in small estates. The Revised Laws of 1905 introduced a radical change in our probate practice by requiring all proceedings in the probate court to be initiated by petition. This overruled several decisions of the Supreme Court holding various notices jurisdictional. Laws 1913, c. 470, providing for the allowance of claims against the estates of persons under guardianship by the probate court, was repealed by Laws 1915, c. 342. Our statutes relating to the commitment of insane, feeble-minded and inebriate persons, were thoroughly revised by Laws 1917, c. 344. It is surprising how few radical changes have been made in our statutes since their original adoption in 1851. We have been far less progressive than the older states from which we took our statutes. While our statutes work fairly well in practice they need to be revised and supplemented. The fundamental distinction which they make between real and personal property as respects devolution, liability for debts and legacies, sale, and authority of the personal rep-

representative, harks back to the feudal days of England and ought to be abolished or very materially modified. A very large number of decisions from other states have been cited in this book, care having been exercised to make sure that the statutes under which they arose were sufficiently like ours to make them pertinent. The probate statutes of Michigan, Wisconsin, Nebraska and Oregon, are in most particulars the same as our own, so that decisions of those states construing their statutes are especially valuable in considering ours. The probate statutes of the New England and western states are generally sufficiently like ours to make the decisions of those states construing their statutes pertinent here. The decisions of New York relating to estates, powers and trusts are well-nigh controlling on our courts. All the probate statutes of this state are printed in this book in full, except in a few cases indicated. All the decisions of the Supreme Court relating to probate matters, published prior to August 15, 1922, are included. The forms in this work are to be used only in the absence of any settled practice in the particular court in which the proceedings are had. Unfortunately there is no uniformity in the practice in the various counties of the state. The forms have been prepared in the hope that they may prove useful to the profession of the state notwithstanding this lack of uniformity of practice. The official forms prepared by the Attorney General for inheritance tax proceedings, and by the Board of Control for proceedings for the commitment of insane, feeble-minded and inebriate persons, are omitted.

MARK B. DUNNELL.

Owatonna, Minnesota.

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PROBATE COURTS

IN GENERAL

1. Establishment—Always open—General and special terms—Statute—A probate court, which shall be a court of record having a seal, is established in each county. The office of the probate judge shall be kept open at the county seat at all reasonable hours, and the court shall always be open for the transaction of business. A general term of such court shall be held on the first Monday in each month, and special terms at such times and places in the county as the judge may deem advisable.¹

2. Judges—Term—Election—Appointment—The constitution provides that probate judges shall be residents of the county at the time of their election and reside therein during their continuance in office, and that they shall be elected by the voters of the county for the term of four years.² Judges of probate need not be members of the bar or learned in the law.³

3. Election of judge—Bond—Statute—There shall be elected in each county a probate judge, who, before he enters upon the duties of his office, shall execute a bond to the county board in the penal sum of one thousand dollars, to be approved by said board, conditioned for the faithful discharge of his duties, and for the faithful application of all moneys and effects that may come into his hands in the execution of the duties of his office, which bond, with his oath of office, shall be filed with the register of deeds.⁴ A judge elected upon a vacancy holds for the full constitutional term and not merely for the unexpired portion of his predecessor's term.⁵ The election of a judge provided for by the last clause of section 10 of article 6 of the constitution is one which becomes necessary by reason of the happening of a vacancy. The clause does not refer to or control elections of judges which come on in the ordinary course of electing judges and which would have been held if no vacancy had occurred.⁶

4. Clerk of court—Appointment—Bond—Statute—Every probate judge may appoint a clerk, who shall perform the duties assigned him by law or such judge. Such appointment shall be in writing, signed by the judge, and filed in the office of the clerk of the district court of the county in which the same is made. Before entering upon the duties of his office, such clerk shall execute a bond to the county board, with

¹ G. S. 1913, § 7200. See Const. art. 6 § 7.

² Const. art. 6 § 7. See, as to appointment of judge by county board in newly organized county, *State v. Falk*, 89 Minn. 269, 274, 94 N. W. 879.

³ *Davis v. Hudson*, 29 Minn. 27, 36, 11

N. W. 136; *Rong v. Haller*, 106 Minn. 454, 119 N. W. 405.

⁴ G. S. 1913, § 7201.

⁵ *Crowell v. Lambert*, 9 Minn. 283 (267); *State v. Black*, 22 Minn. 336.

⁶ *State v. Black*, 22 Minn. 336.

sufficient sureties to be approved by said board, in the penal sum of five hundred dollars, conditioned for the faithful discharge of his duties. Said bond, with his oath, shall be filed and recorded in the office of the register of deeds and an action may be maintained on said bond by any party aggrieved by the violation of the conditions thereof.⁷

5. Compensation of judges, clerks and employees—The compensation of judges, clerks and employees of probate courts is regulated by statute and depends upon the population of the county.⁸

6. Courts of record—Probate courts are courts of record.⁹

7. Superior courts—Records import verity—Probate courts are courts of superior jurisdiction and their records import absolute verity and can be impeached only in a direct proceeding.¹⁰ While probate courts are regarded as superior courts so far as the effect of their records, orders, judgments and decrees are concerned, yet their jurisdiction is limited and to a certain extent they are subordinate to the district courts. No regular adversary action can be maintained in them. There is no right to trial by jury of any issue therein. They are subject to an ancillary jurisdiction in the district courts, and their judgments may be set aside by the district courts for fraud or mistake.¹¹

8. Orders, judgments and decrees not subject to collateral attack for error or irregularity—Probate courts are superior courts and their orders, judgments and decrees are not subject to collateral attack for error or irregularity.¹² This rule ought to be rigorously enforced for the practical reasons pointed out elsewhere.¹³ An exception to the general rule against collateral attack for error or irregularity is made in the case of sales of real property under license from the probate court.¹⁴ A judgment of the probate court has the same force and effect as a judgment of the district court.¹⁵

⁷ G. S. 1913, § 7209.

⁸ See G. S. 1913, §§ 7215-7226; *Laws* 1915, cc. 63, 136; *Laws* 1917, cc. 128, 328, 434; *Laws* 1919, cc. 57, 149, 224, 293, 302, 304, 500; *Laws* 1921, cc. 164, 315, 351.

⁹ Const. art. 6 § 7; *Dayton v. Mintzer*, 22 Minn. 393; *Davis v. Hudson*, 29 Minn. 27, 35, 11 N. W. 136; *Kurtz v. St. Paul & Duluth R. Co.*, 61 Minn. 18, 22, 63 N. W. 1; *McNamara v. Casserly*, 61 Minn. 335, 341, 63 N. W. 880.

¹⁰ *Dayton v. Mintzer*, 22 Minn. 393; *Davis v. Hudson*, 29 Minn. 27, 11 N. W. 136; *Curran v. Kuby*, 37 Minn. 330, 33 N. W. 907; *Logenfiel v. Richter*, 60 Minn. 49, 61 N. W. 826; *Kurtz v. St. Paul & Duluth R. Co.*, 61 Minn. 18, 22, 63 N. W. 1; *Fridley v. Farmers & Mechanics Sav-*

ings Bank, 136 Minn. 333, 162 N. W. 454; *Amundson v. Hanson* (Minn.) 185 N. W. 252.

¹¹ See §§ 24, 29, 1082.

¹² *Dayton v. Mintzer*, 22 Minn. 393; *Simpson v. Cook*, 24 Minn. 180; *State v. Probate Court*, 40 Minn. 296, 41 N. W. 1033; *O'Brien v. Larson*, 71 Minn. 371, 74 N. W. 148; *Aho v. Republic Iron & Steel Co.*, 104 Minn. 322, 325, 116 N. W. 590; *Pierce v. Maetzold*, 126 Minn. 445, 148 N. W. 302; *Amundson v. Hanson* (Minn.) 185 N. W. 252. See title "Collateral Attack" in index and *Dunnell, Minn. Digest and Supplements*, § 5145.

¹³ See § 34.

¹⁴ See § 908.

¹⁵ *Schmitz v. Martin*, 149 Minn. 386, 183 N. W. 978.

9. Duty of judge to deliver books to successor—Statute—Whenever the term of office of any probate judge expires he shall deliver over to his successor in office all books and papers in his possession relating to his office, and upon failure so to do within five days after demand by his successor he shall be guilty of a gross misdemeanor.¹⁶

10. What books of record to be kept—Statute—The court shall keep the following books of record, each of which shall be properly indexed:

1. A register, in which shall be entered minutes of all proceedings of the court; those pertaining to the estate of a deceased person under the name of the decedent; those pertaining to guardians under the name of the ward; those pertaining to an insane person under his name; with a notation of all papers filed in each case and the date of filing; also a reference to the volume and page of other books wherein any record shall have been made in such matter.

2. A record of wills, in which shall be recorded all wills admitted to probate, with the certificate of the probate thereof.

3. A record of bonds, in which shall be recorded all bonds filed and approved by such court.

4. A record of letters, in which shall be recorded all letters testamentary, or of administration or guardianship, issued by such court.

5. A record of claims, in which shall be entered, under the title of the estate, all claims filed in favor of or against such estate; it shall contain the number of the claim, the date of filing, name of claimant, nature and amount of claim, amounts allowed and disallowed, and the date of such allowance or disallowance; it shall also state the nature and amount of any offset, the amount thereof allowed and disallowed, with the final balance.

6. A record of orders, in which shall be recorded all orders, decrees, and judgments made by the court, except orders allowing or disallowing claims; orders directing the publication of notices, and interlocutory and non-appealable orders.¹⁷ The records of the probate court are not within the recording statutes.¹⁸

11. Entries in records—Files—Evidence—In making entries in the records it is not necessary to use the seal of the court.¹⁹ Entries may be made by the clerk under the direction of the judge. They should be made promptly, but a delay, even of years, is not fatal, at least if made during the term of the judge.²⁰ Letters of guardianship should be recorded in the "record of letters," and such record is competent evidence of the letters without the production of the originals and without account-

¹⁶ G. S. 1913, § 7202.

¹⁷ G. S. 1913, § 7203.

¹⁸ *Butterwick v. Fuller & Johnson Mfg. Co.*, 140 Minn. 327, 168 N. W. 18.

¹⁹ *Tidd v. Rines*, 26 Minn. 201, 207, 2 N. W. 497.

²⁰ *Davis v. Hudson*, 29 Minn. 27, 38, 11 N. W. 136.

ing for their absence.²¹ An order granting or denying the application of a person under guardianship to be restored to capacity should be recorded in the "record of orders." Interlocutory orders, within the meaning of G. S. 1913, § 7203(6), include orders appointing representatives, orders for hearing on intermediate petitions, and the like.²² Files are on the same footing as entries in the minutes.²³

12. Copies of records and papers on file—Statute—The probate court shall furnish a certified copy of any paper on file or of record in such court, upon payment therefor at the rate of ten cents per folio, and twenty-five cents for each certificate.²⁴ The clerk may authenticate and certify copies of the records.²⁵

13. What disqualifies judge to act—Statute—Every probate judge shall be disqualified from acting as such in any matter in which he, or his wife, or any of his or her kin nearer than first cousins, shall be interested as heir, executor, administrator, guardian, devisee, legatee, or creditor; in any matter involving the probate or interpretation of any will drawn or witnessed by him; in the determination of any question in which he shall be a necessary witness; and in any matter involving the property right of any person in respect to which he is or has been the attorney or counsel of such party.²⁶

14. Who to act when judge disqualified or absent—Statute—Whenever so disqualified any probate judge may, and when it is made to appear by the verified petition of any person interested or his attorney that such ground of disqualification exists he shall, make an entry in his records, reciting such grounds, and by order appoint the probate judge of an adjoining county to hear, try, and determine the matters as to which such disqualification relates. Whenever, by reason of necessary absence, any probate judge shall be unable to act, he shall request, in writing, the probate judge of an adjoining county to act in his place in all matters arising during such absence. And the judge so appointed or requested shall attend for that purpose at such times as may be necessary. The expenses of the judge so acting shall be paid by the county in which he shall be so called to act.²⁷

15. When judge becomes insane—Statute—Whenever the verified petition of five voters of any county is presented to a judge of the district court of such county, stating that the probate judge of such county is insane, such judge shall examine into such alleged insanity in the manner provided by law for like examinations by probate judges. If upon

²¹ *Davis v. Hudson*, 29 Minn. 27, 38, 11 N. W. 136.

²² *State v. Probate Court*, 73 Minn. 58, 60, 85 N. W. 917.

²³ *Dayton v. Mintzer*, 22 Minn. 393.

²⁴ G. S. 1913, § 7212. See G. S. 1913, § 1087.

²⁵ *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140, 148, 90 N. W. 378.

²⁶ G. S. 1913, § 7206.

²⁷ G. S. 1913, § 7207.

the examination such probate judge is found to be insane or incapacitated to act by reason of mental disability, the district judge shall certify such findings to the Governor, who shall thereupon declare the office of such probate judge vacant, and fill the same by appointment.²⁸

16. Judge or clerk not to act as counsel or attorney—Statute—No judge or clerk of any probate court shall be counsel or attorney in any action or proceeding for or against any legatee, heir, creditor, executor, administrator, guardian or ward over whom, or whose estate or accounts, he has jurisdiction by law, nor shall either of them give counsel or advice or draw or prepare any paper relating to any estate which is or may be brought before such court except citations, orders, decrees, executions, warrants, or subpoenas issuing out of such court. Nor shall any such clerk, or the law partner of any probate judge or clerk, appear or practice as attorney in any matter or proceeding before such probate court. Nor shall any probate judge keep or hold his official office with any practicing attorney.²⁹

17. Time within which decisions must be filed—Statute—The decision of any issue of law or fact shall be in writing, and filed in said court within ninety days after submission unless prevented by sickness or unavoidable casualty. This provision shall be construed as mandatory, and the county auditor shall not sign or issue a warrant for the salary of the probate judge, or any instalment thereof, unless the voucher for such warrant is accompanied by an affidavit of the judge that all matters submitted to him for decision ninety days or more prior to the filing of such affidavit have been decided as herein required, unless a decision has been prevented by sickness or casualty, in which case the reasons for the delay shall be specifically stated, and the making of a false affidavit shall be sufficient cause for complaint to the Governor.³⁰

18. Definitions—Representatives—Minors—Statute—The word "representative," when used in these laws with reference to probate courts and proceedings therein, shall be construed as including executors, administrators, special administrators, administrators with the will annexed, administrators de bonis non, and guardians. The word "minor" means a male under the age of twenty-one years, or a female under the age of eighteen years.³¹ Females become of age when they are eighteen years old.³²

²⁸ G. S. 1913, § 7208.

²⁹ G. S. 1913, § 7210.

³⁰ G. S. 1913, § 7213.

³¹ G. S. 1913, § 7214. See § 630.

³² Cogel v. Ralph, 24 Minn. 194; National Biscuit Co. v. Nolan, 138 Fed. 6; Ex parte Petterson, 166 Fed. 536.

JURISDICTION

19. **In general**—The constitution of the state defines the jurisdiction of probate courts as follows: "A probate court shall have jurisdiction over the estates of deceased persons and persons under guardianship, but no other jurisdiction, except as prescribed by this constitution."³³ There is a marked distinction between the jurisdiction and powers of our probate courts under the constitutional provision giving them jurisdiction over the estates of deceased persons and that of similar courts of some other states, which derive all their jurisdiction and powers from statute.³⁴ It is not a common-law or statutory jurisdiction.³⁵ It is expressly limited and restricted by the constitution to the estates of deceased persons and persons under guardianship.³⁶ The jurisdiction of probate courts is general and as respects the subjects committed to them they have all the powers that any court has.³⁷ Their powers are not only general but plenary in cases where they are authorized to act. They are not courts of limited jurisdiction in the ordinary sense of that term. Their jurisdiction is to be liberally construed.³⁸ They have implied power to do whatever is reasonably necessary to carry out the powers expressly conferred.³⁹ They may exercise such powers as are conferred upon them, though their exercise involves an incidental consideration of the same issues that may be considered and decided by other courts.⁴⁰ They have no general equitable or common-law jurisdiction in the exercise of which

³³ Const. art. 6 § 7.

³⁴ *Culver v. Hardenbergh*, 37 Minn. 225, 234, 33 N. W. 792; *Fiske v. Lawton*, 124 Minn. 85, 91, 144 N. W. 455; *Woerner*, Am. Law of Adm. (2 ed.) §§ 141-144; 11 Cyc. 791.

³⁵ *State v. Probate Court*, 84 Minn. 289, 292, 87 N. W. 783.

³⁶ *Peterson v. Vanderburgh*, 77 Minn. 218, 221, 79 N. W. 828.

³⁷ *Davis v. Hudson*, 29 Minn. 27, 35, 11 N. W. 136; *McNamara v. Casserly*, 61 Minn. 335, 341, 63 N. W. 880; *Buntin v. Root*, 66 Minn. 454, 457, 69 N. W. 330; *Harrison v. Harrison*, 67 Minn. 520, 521, 70 N. W. 802; *Fiske v. Lawton*, 124 Minn. 85, 91, 144 N. W. 455; *State v. Probate Court*, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234; *State v. Probate Court*, 140 Minn. 342, 168 N. W. 14; *Woerner*, Am. Law of Adm. (2 ed.) § 144.

³⁸ *Harrison v. Harrison*, 67 Minn. 520, 70 N. W. 802; *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140, 146, 90

N. W. 378; *Fiske v. Lawton*, 124 Minn. 85, 144 N. W. 455; *State v. Probate Court*, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234; *State v. Probate Court*, 140 Minn. 342, 168 N. W. 14.

³⁹ *State v. Ueland*, 30 Minn. 277, 15 N. W. 245; *Culver v. Hardenbergh*, 37 Minn. 225, 233, 33 N. W. 792; *Mousseau v. Mousseau*, 40 Minn. 236, 41 N. W. 977; *State v. Probate Court*, 66 Minn. 246, 68 N. W. 1063; *Levi v. Longini*, 82 Minn. 324, 327, 84 N. W. 1017, 86 N. W. 833; *Betcher v. Betcher*, 83 Minn. 215, 218, 86 N. W. 1; *Wellner v. Eckstein*, 105 Minn. 444, 454, 117 N. W. 830; *Fiske v. Lawton*, 124 Minn. 85, 91, 144 N. W. 455; *State v. Probate Court*, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234; *State v. Probate Court*, 140 Minn. 342, 168 N. W. 14. *Woerner*, Am. Law of Adm. (2 ed.) § 154.

⁴⁰ *Levi v. Longini*, 82 Minn. 324, 327, 84 N. W. 1017, 86 N. W. 333.

they may determine contested claims or title to real property asserted by those claiming by will or descent against strangers to the estate or asserted by strangers against those claiming through the estate; but in the exercise of their jurisdiction to ascertain and impose an inheritance tax upon real property belonging to the estate, but not inventoried therein, there being no adjudication or proceeding looking to an adjudication of ownership in a court of competent general jurisdiction, they may determine the fact of ownership in the decedent at the time of his death upon which fact the right to impose a tax rests.⁴¹

20. Historical statement—Formerly in England the settlement of the estates of deceased persons was an important branch of the jurisdiction of courts of equity, a large proportion of the suits in chancery being administration suits. As then administered in that country, the jurisdiction of equity courts included nearly everything pertaining to the settlement of decedents' estates, except the probate of wills and the issue of letters testamentary and letters of administration, and, as incident thereto, the enforcement of the payment of legacies of personal property, of which the ecclesiastical courts had jurisdiction. The court of chancery or the chancellor, as the general delegate of the authority of the king as *parens patriæ*, had exclusive jurisdiction over the persons and estates of infants, lunatics, and all persons under guardianship. All guardians were appointed by that court, and it alone had power to commit the person and property of all such persons to the custody of guardians. Persons under guardianship were the wards of that court. But in most of the American states, courts called probate, surrogate, or orphans' courts were established at an early day for the settlement of the estates of decedents, and the determination of all questions arising in the course of administration, to the practical exclusion of equity jurisdiction over such matters. In many of the states jurisdiction was given to these probate courts over the persons and estates of all persons under guardianship, with power to appoint and remove guardians, and to control the persons and estates of the wards. Thus an important branch of equity jurisdiction, as formerly administered, was transferred to these courts. In some states, theoretically, courts of equity retained concurrent jurisdiction over these matters, although in practice they would not, in the absence of some distinctive equitable principle, assume to exercise it, but leave the matter to the special probate tribunals. In other states, the jurisdiction thus conferred upon the probate courts was held to be exclusive. The latter was the doctrine which prevailed in this territory and in the states from which it borrowed its probate system; and the provisions of the constitution defining the jurisdiction of the district court and probate court must be understood and construed with reference to this state of things then existing. To hold that the equity ju-

⁴¹ *State v. Probate Court*, 140 Minn. 342, 168 N. W. 14.

jurisdiction given by the constitution to the district court extends to everything which pertained to equity jurisdiction as formerly administered in England would be utterly inconsistent with the grant of jurisdiction to the probate court. Such a construction would limit the judicial power of the latter court over the estates of deceased persons to the mere probate of wills and the issuing of letters testamentary and of administration, and would deprive it entirely of all jurisdiction over the persons or estates of persons under guardianship.⁴² Prior to 1857 the ecclesiastical courts of England had practically exclusive jurisdiction over the probate of wills of personalty and the granting of letters of administration. They also had considerable jurisdiction over the payment of legacies, but they had no jurisdiction over devises of land. Prior to 1857 there was no provision whatever in England for the probate of wills of realty. In any trial at common law or in equity involving title to devised land the original will had to be produced and proved, as any other disputed instrument.⁶¹ The probate court of this state not only exercises the jurisdiction formerly exercised by the courts of common law and equity over the real estate of deceased persons, but it also exercises a jurisdiction over such real estate never exercised by those courts. The jurisdiction of the courts of common law and equity over such real estate was exercised by proceedings in personam. This was wholly inadequate to a complete and proper administration of such real estate. The legislature deemed it proper that the whole world should be bound by administration proceedings, and to accomplish this provided a proceeding in rem. This proceeding is not according to the course of the common law, and is not a mere substitute for any proceeding known to the common law in the administration of such real estate, but its scope and purpose are wholly different. The change from the proceeding in personam to one in rem is not a mere evasion of the constitutional rights of parties who would be entitled to personal notice under the old form of procedure. On the contrary, the legislature has a right to say that when the owner dies the court shall seize his property, and by constructive notice make the whole world parties. Where all the world are in fact proper or necessary parties, the doctrine of due process of law does not prevent the legislature from adopting a more appropriate, adequate, and complete remedy than that known to the common law.⁴³

21. Legislative control—The jurisdiction of probate courts is fixed in general terms by the constitution and the legislature cannot change it, but the constitution does not define jurisdiction over the estates of de-

⁴² *State v. Ueland*, 30 Minn. 277, 15 N. W. 245; *McNamara v. Casserly*, 61 Minn. 335, 342, 63 N. W. 880. See *Woerner*, *Am. Law of Adm.* (2 ed.) §§ 137-149.

N. W. 245; *Schmidt v. Schmidt*, 47 Minn. 451, 50 N. W. 598; *Woerner*, *Am. Law of Adm.* (2 ed.) §§ 137-140.

⁴³ *McNamara v. Casserly*, 61 Minn.

⁶¹ *State v. Ueland*, 30 Minn. 277, 15

335, 63 N. W. 880.

ceased persons and persons under guardianship. To determine the scope of such jurisdiction reference must be had to the law at the time the constitution was adopted. The legislature may give to the probate courts any powers or duties that are appropriate to administration or guardianship. The constitution defines the subjects of the jurisdiction. It is left to the legislature to define the extent of the subjects.⁴⁴ The jurisdiction of probate courts is derived from the constitution and cannot be enlarged or diminished by the legislature. Their jurisdiction over the estates of deceased persons is for the purpose of administering such estates, and includes all matters necessarily pertaining to the proper administration of them. What shall be done in the course and for the purpose of administering such estates is to some extent in the power of the legislature to prescribe. It may provide for some things which, though not necessary to administration, are appropriate to it; such as the partition of the real estate among heirs and devisees for the purpose of assigning it to them. Some things necessarily belong to administration, and the jurisdiction to do or cause to be done those things is beyond the power of the legislature to curtail; while other things are clearly foreign to administration, and jurisdiction over them cannot be conferred on the probate courts by statute. Thus, to take charge of and preserve the personal estate, to direct the payment of debts and legacies, and distribute the remainder of the personal estate among legatees and next of kin according to law, have always been regarded as, and are, necessarily matter of administration; and jurisdiction to determine who are creditors, legatees, and next of kin belongs appropriately to the court that controls administration. On the other hand, the determination of the rights of strangers to the estate, not interested in its administration, is clearly foreign to legitimate administration.⁴⁵ The legislature may prescribe modes of procedure to be followed by the probate courts in the exercise of the jurisdiction conferred by the constitution, including the process or proceedings by which the jurisdiction shall attach to a particular estate.⁴⁶

22. Exclusive—Within its sphere the jurisdiction of probate courts is exclusive. The constitution gives to probate courts the exclusive original jurisdiction over the estates of deceased persons and persons under guardianship, in the same manner and to the same extent that it gives to the district courts jurisdiction over civil cases in law and equity

⁴⁴ *State v. Ueland*, 30 Minn. 277, 15 N. W. 245; *Mousseau v. Mousseau*, 40 Minn. 236, 41 N. W. 977; *Comstock v. Matthews*, 55 Minn. 111, 56 N. W. 583; *State v. Probate Court*, 103 Minn. 325, 115 N. W. 173; *State v. Probate Court*, 112 Minn. 279, 128 N. W. 18. See § 22.

⁴⁵ *Mousseau v. Mousseau*, 40 Minn. 236, 41 N. W. 977.

⁴⁶ *In re Mousseau's Will*, 30 Minn. 202, 14 N. W. 887; *Culver v. Hardenbergh*, 37 Minn. 225, 232, 33 N. W. 792; *Mousseau v. Mousseau*, 40 Minn. 236, 41 N. W. 977; *Foreman v. Hennepin County*, 64 Minn. 371, 67 N. W. 207; *State v. Probate Court*, 112 Minn. 279, 128 N. W. 18.

arising out of other matters of contract and tort.⁴⁷ The probate court has exclusive original jurisdiction of the construction of wills for the purposes of administration. A bill in equity will not lie in the district court for that purpose.⁴⁸ When a will has been duly proved and allowed in the probate court, and proceedings involving its construction and effect are pending therein, a district court is not authorized to construe the will upon a disclosure of a representative as garnishee. The district court should stay the garnishment proceedings pending a construction of the will by the probate court.⁴⁹ The exclusive jurisdiction of the probate court cannot be interfered with by an injunction issued out of the district court.⁵⁰ The district court cannot indirectly exercise original jurisdiction over a matter within the exclusive jurisdiction of the pro-

⁴⁷ *Paine v. First Div. etc. R. Co.*, 14 Minn. 65 (49) (granting license to sell real estate for purposes of administration); *State v. Ueland*, 30 Minn. 277, 15 N. W. 245 (election of surviving spouse to take under will or statute); *Wiswell v. Wiswell*, 35 Minn. 371, 29 N. W. 166 (what may or ought to be done with assets of an estate and to whom they should be distributed); *Culver v. Hardenbergh*, 37 Minn. 225, 233, 33 N. W. 792 (estates of deceased persons); *Reiser v. Gigrich*, 59 Minn. 368, 377, 61 N. W. 30 (what may or ought to be done with assets of an estate and to whom they should be distributed); *Boltz v. Schutz*, 61 Minn. 444, 64 N. W. 48 (claims against estates of decedents); *Luse v. Reed*, 63 Minn. 5, 11, 65 N. W. 91 (to what extent, if any, the statutory interest of a surviving spouse is subject to the debts of the deceased spouse); *Brandes v. Carpenter*, 68 Minn. 388, 391, 71 N. W. 402 (accounting of guardian); *Starkey v. Sweeney*, 71 Minn. 241, 244, 73 N. W. 859 (accounting of representative and distribution of estate); *O'Brien v. Larson*, 71 Minn. 371, 373, 74 N. W. 148 (allowance of claims); *Betcher v. Betcher*, 83 Minn. 215, 218, 86 N. W. 1 (accounting of representatives—control of administrators and executors); *Duxbury v. Shanahan*, 84 Minn. 353, 87 N. W. 944 (construction of will for purposes of administration); *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140, 147, 90 N. W. 378 (settlement of estate—determination of heirship); *Appleby v. Watkins*, 95 Minn. 455, 104 N. W. 301 (construction of will

for purposes of administration); *Hanson v. Nygaard*, 105 Minn. 30, 117 N. W. 235 (estates of deceased persons); *Werner v. Eckstein*, 105 Minn. 444, 453, 117 N. W. 830 (id.); *Brown v. Strom*, 113 Minn. 1, 129 N. W. 136 (id.); *Pierce v. Maetzold*, 126 Minn. 445, 148 N. W. 302 (accounting of representative); *State v. Probate Court*, 130 Minn. 269, 153 N. W. 520 (estates of deceased persons); *State v. Probate Court*, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234 (id.). See *Kosmerl v. Snively*, 85 Minn. 228, 88 N. W. 753 (determination of heirship); *Wilson v. Erickson*, 147 Minn. 260, 180 N. W. 98 (guardianship). The following cases contain intimations that there might be concurrent original jurisdiction in the probate and district courts over some subjects: *State v. Ueland*, 30 Minn. 277, 242, 15 N. W. 245; *Mousseau v. Mousseau*, 40 Minn. 236, 242, 41 N. W. 977; *Peterson v. Vanderburgh*, 77 Minn. 218, 222, 79 N. W. 828; *Levi v. Longini*, 82 Minn. 324, 327, 84 N. W. 1017, 86 N. W. 333; *Duxbury v. Shanahan*, 84 Minn. 353, 355, 87 N. W. 944; *McAlpine v. Kratka*, 98 Minn. 151, 155, 107 N. W. 961. These intimations were repudiated in *Appleby v. Watkins*, 95 Minn. 455, 104 N. W. 301.

⁴⁸ *Appleby v. Watkins*, 95 Minn. 455, 104 N. W. 301. See 129 Am. St. Rep. 78.

⁴⁹ *Duxbury v. Shanahan*, 84 Minn. 353, 87 N. W. 944.

⁵⁰ *O'Brien v. Larson*, 71 Minn. 371, 373, 74 N. W. 148. See, however, *Brown v. Strom*, 113 Minn. 1, 129 N. W. 136, and § 24.

bate court, by allowing a judgment or order of the latter court to be attacked collaterally in the district court for error or irregularity.⁵¹ While the jurisdiction of the probate court over the estates of deceased persons is exclusive, it is exclusive only for purposes of administration. In determining the scope of administration proceedings reference must be had to the law at the time of the adoption of the constitution. The constitution specifies the general subject of the jurisdiction of the probate court without defining its extent, which is left, under certain limitations, to be fixed by statute. The jurisdiction of the probate court to determine claims against the estates of deceased persons is not exclusive except as provided by statute. Where the claim is *ex delicto* or does not mature within the time limited for the presentation of claims in the probate court the district court has jurisdiction. The determination of claims against an estate is not an essential feature of probate jurisdiction.⁵²

23. District court cannot interfere with probate court—The district court cannot interfere with the probate court in the exercise of its exclusive jurisdiction, either by injunction or otherwise, except by virtue of its appellate and remedial jurisdiction.⁵³

24. Ancillary jurisdiction of district court—The district court, as a court of equity, may not interfere with the constitutional powers of the probate court, but in furtherance of justice it may exercise an ancillary jurisdiction to aid the probate court in the performance of its proper functions. When a situation presents itself to which by its nature the probate court is not equal a court of equity may step in and see that justice is done. Where an executor sold shares of a bank belonging to an estate to certain stockholders with the fraudulent design of giving them control of the bank to the exclusion of the heirs of the estate, it was held that the district court, in an action by the heirs, had jurisdiction, in order to preserve the property *in statu quo*, to restrain the executor as an individual and the stockholders and the bank from disposing of the shares pending the administration proceedings.⁵⁴ The law is not so much concerned with working out an abstract and ideal harmony between the respective jurisdictions of the probate and district courts as it is with the efficient administration of practical justice.⁵⁵ A court of equity will entertain an action brought by an executor on

⁵¹ *Pierce v. Maetzold*, 126 Minn. 445, 148 N. W. 302. See § 8.

⁵² *Comstock v. Matthews*, 55 Minn. 111, 56 N. W. 583; *State v. Probate Court*, 103 Minn. 325, 115 N. W. 173. See *State v. Ueland*, 30 Minn. 277, 15 N. W. 245; *Foreman v. Hennepin County*, 64 Minn. 371, 374, 67 N. W. 207, and §§ 870-941.

⁵³ *Jacobs v. Fouse*, 23 Minn. 51; *Davis v. Hudson*, 29 Minn. 27, 35, 11 N. W. 136;

O'Brien v. Larson, 71 Minn. 371, 74 N. W. 148; *State v. Bazille*, 89 Minn. 440, 95 N. W. 211. See *Brown v. Strom*, 113 Minn. 1, 129 N. W. 136, and cases under §§ 22, 24.

⁵⁴ *Brown v. Strom*, 113 Minn. 1, 129 N. W. 136. See § 1017.

⁵⁵ *Brown v. Strom*, 113 Minn. 1, 129 N. W. 136; *Fiske v. Lawton*, 124 Minn. 85, 144 N. W. 455.

the part of the estate against a co-executor to determine the amount of a disputed claim, or to force an account, or to foreclose a mortgage, or in any other case, where justice requires it, if there is no remedy at law.⁵⁶

25. No general equity jurisdiction—Equitable powers—Probate courts have no general equity jurisdiction such as district courts have, but they have all the powers, legal or equitable, essential to the due exercise of the jurisdiction conferred upon them by the constitution.⁵⁷ They have jurisdiction to determine questions of fraud incidental to any matter involved in administration.⁵⁸ They may apply the equitable doctrine of estoppel in any matter involved in administration.⁵⁹ They may likewise apply the equitable doctrines of subrogation, election, conversion, setoff and retainer.⁶⁰ They have full equity powers necessary to the settlement and distribution of estates. They may apply the law to the facts whether the law is statutory, common law, or the principles of equity.⁶¹ Their equity jurisdiction is merely incidental to the administration of estates. They have no independent jurisdiction in equity over controversies between representatives of an estate, or those claiming under it, with strangers claiming adversely, nor of collateral actions.⁶²

26. Of estates of deceased persons—Under the constitution the jurisdiction of the probate courts over the estates of deceased persons is exclusive.⁶³ The scope of this jurisdiction is not defined by the constitution. To determine its scope reference must be had to the law at the time of the adoption of the constitution.⁶⁴ It includes every matter necessarily connected with the administration of estates, as well as the conduct and duties of executors and administrators.⁶⁵ The jurisdiction of the probate court over the estates of deceased persons is for the purpose of administering them and includes all matters pertaining to ad-

⁵⁶ *Peterson v. Vanderburgh*, 77 Minn. 218, 79 N. W. 828.

⁵⁷ *Appleby v. Watkins*, 95 Minn. 455, 462, 104 N. W. 301; *State v. Probate Court*, 103 Minn. 325, 115 N. W. 173; *Wellner v. Eckstein*, 105 Minn. 444, 446, 454, 117 N. W. 830; *Brown v. Strom*, 113 Minn. 1, 11, 129 N. W. 136; *Fiske v. Lawton*, 124 Minn. 85, 91, 144 N. W. 455; *State v. Probate Court*, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234; *State v. Probate Court*, 140 Minn. 342, 168 N. W. 14; *Wilson v. Erickson*, 147 Minn. 260, 180 N. W. 93. See *State v. Ueland*, 30 Minn. 277, 15 N. W. 245; *Ritzer v. Bobo*, 39 Minn. 18, 21, 38 N. W. 609; *Mayall v. Mayall*, 63 Minn. 511, 517, 65 N. W. 942; *Kleeberg v. Schrader*, 69 Minn. 136, 139, 72 N. W. 59; *Peterson v. Vanderburgh*, 77 Minn. 218, 79 N. W. 828; *Haataja v. Saarenpaa*, 118 Minn. 255, 136 N. W. 871.

27 A. & E. Ency. of Law (2 ed.) 553; 11 Cyc. 795; *Woerner, Am. Law of Adm.* (2 ed.) § 149.

⁵⁸ *Wade v. Laddell*, 4 Cnsh. (Mass.) 510. See title "Fraud" in index.

⁵⁹ *Brook v. Chappell*, 34 Wis. 405. See title "Estoppel" in index.

⁶⁰ See these titles in index.

⁶¹ *State v. Probate Court*, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234; *Wilson v. Erickson*, 147 Minn. 260, 180 N. W. 93; *In re Prerost's Estate*, 40 S. D. 536, 168 N. W. 630. See §§ 806, 1039, 1071, 1326.

⁶² *Wilson v. Erickson*, 147 Minn. 260, 180 N. W. 93.

⁶³ See § 22.

⁶⁴ See § 21.

⁶⁵ *State v. Probate Court*, 112 Minn. 279, 128 N. W. 18; *State v. Probate Court*, 140 Minn. 342, 168 N. W. 14.

ministration.⁶⁶ To give rise to this jurisdiction there must be a death and the ownership of property by the decedent.⁶⁷ The power and duty to determine to whom property passes by will or descends by inheritance is vested exclusively in the probate court.⁶⁸ The allowance of claims against the estates of deceased persons is not a necessary incident of administration proceedings and is not within the exclusive jurisdiction of the probate courts.⁶⁹ The payment of legacies is not a necessary incident of administration proceedings, but in this state it is made so by statute.⁷⁰ The chief features of administration proceedings in this state are the probate of the will of the decedent, if any, the appointment of an executor or administrator, the collection and management of the assets of the estate, the allowance and payment of claims against the estate, the construction of the will for purposes of administration, the sale of property of the estate for the payment of debts and expenses of administration and legacies, and the distribution of the remainder of the estate in accordance with the terms of the will or the statutes of descent and distribution. These things are done either by the probate court itself or through executors or administrators, who are officers of the court and subject to its direction, supervision and control.⁷¹ The theory of our statutes governing the administration of estates of deceased persons is that the rights and claims, with certain exceptions, of all persons interested in the estate of a decedent are to be determined, in the first instance, by the probate court.⁷² Whether a probate court of this state has jurisdiction of the estate of a Chippewa Indian residing on the White Earth Reservation, and maintaining tribal relations, where he dies after an allotment to him but before a patent is issued therefor, is an open question.⁷³ A probate court of this state

⁶⁶ *Culver v. Hardenbergh*, 37 Minn. 225, 234, 33 N. W. 792; *Mousseau v. Mousseau*, 40 Minn. 236, 41 N. W. 977.

⁶⁷ *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140, 146, 90 N. W. 378. See §§ 615, 616, 662.

⁶⁸ *Odenbreit v. Uthelm*, 131 Minn. 56, 59, 154 N. W. 741. See §§ 1059, 1071.

⁶⁹ *Comstock v. Matthews*, 55 Minn. 111, 56 N. W. 583; *Woerner*, *Am. Law of Adm.* (2 ed.) § 153. See §§ 22, 881.

⁷⁰ *Huntsman v. Hooper*, 32 Minn. 163, 20 N. W. 127.

⁷¹ *Palmer v. Pollock*, 26 Minn. 433, 439, 4 N. W. 1113; *State v. Ueland*, 30 Minn. 277, 282, 15 N. W. 245; *Balch v. Hooper*, 32 Minn. 158, 160, 162, 20 N. W. 124; *Huntsman v. Hooper*, 32 Minn. 163, 20 N. W. 127; *State v. Probate Court*, 33 Minn. 94, 95, 22 N. W. 10; *Culver v. Hardenbergh*, 37 Minn. 225, 233,

33 N. W. 792; *Mousseau v. Mousseau*, 40 Minn. 236, 41 N. W. 977; *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140, 146, 90 N. W. 378; *Betcher v. Betcher*, 83 Minn. 215, 218, 86 N. W. 1; *Duxbury v. Shanahan*, 84 Minn. 353, 87 N. W. 944; *Granger v. Harriman*, 89 Minn. 303, 305, 94 N. W. 869; *Appleby v. Watkins*, 95 Minn. 455, 104 N. W. 301; *Brown v. Strom*, 113 Minn. 1, 5, 129 N. W. 136; *First Nat. Bank v. Towle*, 118 Minn. 514, 523, 137 N. W. 291; *Beaulieu v. Ain-E-Waush*, 126 Minn. 321, 148 N. W. 282. See §§ 613, 723.

⁷² *Huntsman v. Hooper*, 32 Minn. 163, 20 N. W. 127; *Wiley v. Lockwood* (Minn.) 186 N. W. 699.

⁷³ *Beaulieu v. Ain-E-Waush*, 126 Minn. 321, 148 N. W. 282. See *Vachon v. Nichols-Chisholm Lumber Co.*, 126 Minn. 303, 144 N. W. 223, 148 N. W. 288.

has no jurisdiction to determine heirship and the descent of land allotted to a Chippewa Indian upon the White Earth Reservation, under the acts of Congress of February 8, 1887, and January 14, 1889, where the allottee dies before the approval of his allotment.⁷⁴ The Clapp amendment of June 21, 1906, as amended March 1, 1907, emancipated adult mixed-blood Indian allottees from federal guardianship, and by implication gave to the probate courts of this state jurisdiction to administer the estates and determine the heirs of such mixed-blood allottees, whether death occurred before or after the passage of the amendments.⁷⁵

27. Of persons under guardianship—Under the constitution the jurisdiction of the probate courts over persons under guardianship is exclusive.⁷⁶ In the constitutional grant of jurisdiction to the probate courts the word "estates" is used only with reference to deceased persons and not to persons under guardianship. The jurisdiction over persons under guardianship embraces jurisdiction over their affairs in general, including the management and disposition of their property. It includes authority to put persons under guardianship and does not cease when the guardianship ceases, but continues so far as matters of guardianship are concerned, such as the settlement of the accounts of a guardian, after a minor ward becomes of age.⁷⁷ Probate courts have jurisdiction to put all persons under guardianship who are proper subjects for it, including minors, insane persons, idiots, drunkards, spendthrifts and incompetents.⁷⁸ Jurisdiction over persons under guardianship includes not only the appointment of guardians and the control of their official action, but the care and protection of the estates of wards, formerly vested in the court of chancery.⁷⁹ The constitution confers on the probate courts jurisdiction of the general subject of guardianship, but does not define its scope. To determine its scope reference must be had to the law at the time of the adoption of the constitution.⁸⁰ Though the probate courts are invested with a general authority in matters of guardianship the manner and conditions of its exercise in a particular case are regulated and controlled by statute.⁸¹ Laws 1895, c. 156, providing for the treatment of inebriates by counties, is unconstitutional in that it assigns to the probate judge powers and duties beyond the jurisdiction authorized by the constitution.⁸²

⁷⁴ *Holmes v. Praun*, 130 Minn. 487, 153 N. W. 951.

⁷⁵ *Baker v. McCarthy*, 145 Minn. 167, 176 N. W. 643.

⁷⁶ *Brandes v. Carpenter*, 68 Minn. 388, 391, 71 N. W. 402. See § 22.

⁷⁷ *Jacobs v. Fouse*, 23 Minn. 51; *State v. Wilcox*, 24 Minn. 143; *Kelly v. Kelly*, 72 Minn. 19, 74 N. W. 899.

⁷⁸ *State v. Wilcox*, 24 Minn. 143.

⁷⁹ *State v. Ueland*, 30 Minn. 277, 282, 15 N. W. 245.

⁸⁰ *Jacobs v. Fouse*, 23 Minn. 51; *State v. Wilcox*, 24 Minn. 143; *Foreman v. Hennepin County*, 64 Minn. 371, 67 N. W. 207.

⁸¹ *Davis v. Hudson*, 29 Minn. 27, 32, 11 N. W. 136.

⁸² *Foreman v. Hennepin County*, 64 Minn. 371, 67 N. W. 207.

28. Held to have jurisdiction—To construe wills and determine the validity of their provisions for purposes of administration;⁸³ to determine the amount of distributive shares;⁸⁴ to make an election for an insane or otherwise incompetent surviving spouse to take under a will or statute;⁸⁵ to compel an accounting by an executor after his discharge, the estate not being fully administered;⁸⁶ to determine heirship as provided by Laws 1897, c. 157;⁸⁷ to determine a claim to an estate on a contract by the decedent to make a will in favor of the claimant;⁸⁸ to allow an accounting as to the claim of a third party on a share of a distributee of an estate;⁸⁹ to entertain administration proceedings solely for the purpose of prosecuting an action under the statute for death by wrongful act;⁹⁰ to determine to what extent, if any, the statutory interest of a surviving spouse is subject to the debts of the deceased spouse;⁹¹ to compel non-residents who have been appointed executors or administrators in this state to submit to the service of a summons in a civil action brought in this state for the purpose of determining the liability of the estate they represent on a claim not provable in the probate court in the due course of administration;⁹² to determine the amount of an inheritance tax under Laws 1905, c. 288;⁹³ to determine who are the persons beneficially entitled to an estate;⁹⁴ to determine to whom an estate reduced to personalty should be apportioned, including the rights of a child adopted by the decedent by an agreement valid under the laws of the state where made;⁹⁵ to determine whether a pretermitted child is entitled to inherit under G. S. 1913, § 7260;⁹⁶ to order a representative to pay to a surety of a creditor of the estate, whose claim had been allowed, a certain amount of the claim which had been paid by the surety to the creditor and who was therefore entitled to be subrogated pro tanto to the rights of the creditor against the estate, the creditor consenting to the order;⁹⁷ to determine the fact of ownership of land by the decedent for the purpose of fixing liability for inheritance taxes;⁹⁸ to determine the boundaries of

⁸³ *State v. Ueland*, 30 Minn. 277, 15 N. W. 245; *Duxbury v. Shanahan*, 84 Minn. 353, 87 N. W. 944; *Appleby v. Watkins*, 95 Minn. 455, 104 N. W. 301. See §§ 724, 1071.

⁸⁴ *Huntsman v. Hooper*, 32 Minn. 163, 166, 20 N. W. 127. See § 1071.

⁸⁵ See § 517.

⁸⁶ *Betcher v. Betcher*, 83 Minn. 215, 86 N. W. 1.

⁸⁷ *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140, 90 N. W. 378.

⁸⁸ *Kleeberg v. Schrader*, 69 Minn. 136, 72 N. W. 59. See § 152.

⁸⁹ *Starkey v. Sweeney*, 71 Minn. 241, 73 N. W. 859. See § 1071.

⁹⁰ *Hutchins v. St. Paul, etc., Ry. Co.*, 44 Minn. 5, 46 N. W. 79.

⁹¹ *Luse v. Reed*, 63 Minn. 5, 65 N. W. 91.

⁹² *State v. Probate Court*, 66 Minn. 246, 68 N. W. 1063.

⁹³ *State v. Probate Court*, 112 Minn. 279, 128 N. W. 18; *State v. Probate Court*, 140 Minn. 342, 168 N. W. 14.

⁹⁴ *Sprague v. Stroud*, 114 Minn. 64, 129 N. W. 1053; *Fiske v. Lawton*, 124 Minn. 85, 144 N. W. 455.

⁹⁵ *Fiske v. Lawton*, 124 Minn. 85, 144 N. W. 455.

⁹⁶ *Odenbreit v. Uthelm*, 131 Minn. 56, 154 N. W. 741.

⁹⁷ *State v. Probate Court*, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234.

⁹⁸ *State v. Probate Court*, 140 Minn. 342, 168 N. W. 14.

the homestead of a decedent in order to segregate it from the rest of the estate for purposes of administration;⁰¹ to determine the validity of an antenuptial agreement, as affecting the right to a distributive share and statutory allowance;⁰² to order paid out of the estate of an insane person the witness' and attorney's fees incurred in proceedings for his restoration to capacity;⁰³ to compel a representative to deliver to a widow her statutory allowance.¹

29. Held not to have jurisdiction—To determine controversies over property involved in an estate between heirs, devisees or legatees and third parties not claiming as heirs, devisees or legatees;² of an action for a tort committed by the decedent;³ of an action by a representative to recover a debt owing by a third person to the estate;⁴ to control the distribution of money recovered by a representative under the statute for death by wrongful act;⁵ to approve a settlement of a claim for death by wrongful act;⁶ of an action to determine and discharge equitable mortgages and liens;⁷ of an action to enforce and administer a trust estate in real property;⁸ of an action to recover the purchase price of land belonging to minors sold by a guardian;⁹ of an action of ejectment;¹⁰ of an action by distributees against personal representatives for shares of an estate assigned to them by the probate court;¹¹ to compel a representative to make a further accounting after a final decree, such decree being unreversed and unmodified;¹² to declare and enforce a trust arising from the purchase by a guardian of real property with money of the ward, the guardian dying after the purchase;¹³ to order a payment to be made to an executor in his individual capacity;¹⁴ of an action for

⁰¹ *Rux v. Adam*, 143 Minn. 35, 172 N. W. 912.

⁰² *In re Malchow's Estate*, 143 Minn. 53, 173 N. W. 915.

⁰³ *Kelly v. Kelly*, 72 Minn. 19, 74 N. W. 890.

¹ *Fischer v. Hintz*, 145 Minn. 161, 176 N. W. 177.

² *State v. Probate Court*, 33 Minn. 94, 22 N. W. 10; *Farnham v. Thompson*, 34 Minn. 330, 336, 26 N. W. 9; *Mousseau v. Mousseau*, 40 Minn. 236, 41 N. W. 977; *Hause v. O'Leary*, 136 Minn. 126, 161 N. W. 392; *State v. Probate Court*, 140 Minn. 342, 168 N. W. 14; *Rux v. Adam*, 143 Minn. 35, 172 N. W. 912; *Woerner*, *Am. Law of Adm.* (2 ed.) § 151. See § 1071.

³ *Comstock v. Matthews*, 55 Minn. 111, 56 N. W. 583. See *First Nat. Bank v. Strait*, 65 Minn. 162, 167, 67 N. W. 897 (determination of claim for tort by consent of parties on appeal to the district court from probate court).

⁴ *State v. Probate Court*, 33 Minn. 94, 22 N. W. 10.

⁵ *Mayer v. Mayer*, 106 Minn. 484, 119 N. W. 217.

⁶ *Aho v. Republic Iron & Steel Co.*, 104 Minn. 322, 116 N. W. 590.

⁷ *State v. Probate Court*, 103 Minn. 325, 115 N. W. 173.

⁸ *Mayall v. Mayall*, 63 Minn. 511, 517, 65 N. W. 942.

⁹ *Peterson v. Baillif*, 52 Minn. 386, 54 N. W. 185.

¹⁰ *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140, 147, 90 N. W. 378.

¹¹ *Schmidt v. Stark*, 61 Minn. 91, 63 N. W. 255; *State v. Probate Court*, 84 Minn. 280, 294, 87 N. W. 783.

¹² *State v. Probate Court*, 84 Minn. 280, 87 N. W. 783. See § 1018.

¹³ *Bitzer v. Bobo*, 39 Minn. 18, 38 N. W. 609.

¹⁴ *Wrigley v. Watson*, 81 Minn. 251, 254, 83 N. W. 989.

the specific performance of a contract to convey real property;¹⁵ to make partition of real property after it has been assigned to those entitled to it and administration is closed;¹⁶ to determine a claim to property under a deed from the decedent;¹⁷ to determine what taxes will accrue in the future, in assigning an estate to trustees for the beneficial use of another;¹⁸ to enforce contracts to make a will;¹⁹ to determine the rights of parties growing out of a conveyance of land with a condition for the support of the grantor for life;²⁰ of an action by a representative to determine the right to real or personal property;²¹ to determine the boundaries of a homestead as against one claiming adversely to the estate;²¹ of an action for the specific performance of a contract by which a deceased owner of land had agreed to devise it to plaintiff, and plaintiff sought to impress property acquired with the proceeds of the sale of the land with a trust in his favor;²² of an action by a ward against his guardian and purchasers from him to set aside a fraudulent sale by the guardian;²³ to issue writs of habeas corpus;²² to determine conflicting claims to a fund from a benefit certificate, the fund not being an asset of the estate.²³

30. Court first acquiring jurisdiction has exclusive jurisdiction—Statute—Jurisdiction acquired by a probate court shall preclude the subsequent exercise of jurisdiction by any other probate court over the same matter, except as otherwise specially provided by law.²⁴ The court whose jurisdiction is first properly invoked has jurisdiction of the entire estate of the decedent within the state regardless of county lines.²⁵ Where the probate court of the county wherein a resident decedent was domiciled at the time of his death has first acquired jurisdiction over his estate, the probate court of the county wherein he was temporarily abiding at the time of his death is not thereafter entitled to take jurisdiction of the same estate.²⁶

¹⁵ *Mousseau v. Mousseau*, 40 Minn. 236, 41 N. W. 977; *Comstock v. Matthews*, 55 Minn. 111, 113, 56 N. W. 583; *Svanburg v. Fosseen*, 75 Minn. 350, 364, 78 N. W. 4; *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140, 147, 90 N. W. 378. See §§ 1009–1016.

¹⁶ *Hurley v. Hamilton*, 37 Minn. 160, 33 N. W. 912.

¹⁷ *Mousseau v. Mousseau*, 40 Minn. 236, 239, 41 N. W. 977. See *Order of St. Benedict v. Steinhäuser*, 179 Fed. 137.

¹⁸ *State v. Probate Court*, 112 Minn. 279, 128 N. W. 18.

¹⁹ See §§ 152, 1071.

²⁰ *Haataja v. Sarenmaa*, 118 Minn. 255, 136 N. W. 871.

²¹ *State v. Probate Court*, 33 Minn. 94, 96, 22 N. W. 10.

²¹ *Rux v. Adam*, 143 Minn. 35, 172 N. W. 912.

²² *Colby v. Street*, 146 Minn. 290, 178 N. W. 599.

²³ *Wilson v. Erickson*, 147 Minn. 260, 180 N. W. 93.

²² *In re Lee*, 1 Minn. 60 (44).

²³ *Finn v. Walsh*, 19 N. D. 61, 121 N. W. 766.

²⁴ G. S. 1913, § 7204.

²⁵ *Chadbourne v. Alden*, 98 Minn. 118, 107 N. W. 148.

²⁶ *State v. Probate Court*, 130 Minn. 269, 153 N. W. 520.

31. When and how jurisdiction attaches—Petitions—The jurisdiction of the probate court over an estate of a decedent or other matter attaches when its general jurisdiction is invoked by the presentation to the court of a proper petition by some person showing a *prima facie* right to take such action.²⁷ The constitution of the state confers upon the probate courts general and exclusive jurisdiction over the estates of deceased persons and persons under guardianship. This jurisdiction in the abstract is conferred upon the probate courts of the state as a whole; but it can only be exercised by a particular court in a particular instance, and over a particular estate, when it has been invoked in the manner prescribed by the statutes. When thus invoked by a person entitled to take such action, the jurisdiction of that court attaches to the estate for the purpose of supervising, directing, and controlling its administration and settlement according to law.²⁸ When jurisdiction is once acquired by a proper petition it continues throughout the administration proceedings. Subsequent petitions are not jurisdictional. The want of a subsequent petition does not render the proceedings void and subject to collateral attack, but merely voidable on direct attack.²⁹ After administration proceedings have terminated the rights acquired thereunder cannot be affected by new proceedings unless the court acquires jurisdiction anew and generally by personal service of notice on residents of the state.³⁰

32. Administration one whole proceeding—Jurisdiction once acquired continues throughout—The jurisdiction given by the constitution is what is sometimes called general jurisdiction, or jurisdiction in the abstract, and may be termed capacity in the court to acquire jurisdiction over particular cases of the class mentioned. In order to the exercise of it in a particular case, it must be attached to it, or the particular case brought within it. The court must be called upon or invoked in the

²⁷ G. S. 1913, § 7227; *Hanson v. Nygaard*, 105 Minn. 30, 117 N. W. 235; *Bombolls v. Minneapolis & St. Louis R. Co.*, 128 Minn. 112, 150 N. W. 385; *Fridley v. Farmers & Mechanics Savings Bank*, 136 Minn. 333, 162 N. W. 454; *In re Barlow's Estate* (Minn.) 188 N. W. 282. See *In re Mousseau's Will*, 30 Minn. 202, 14 N. W. 887; *Culver v. Hardenbergh*, 37 Minn. 225, 33 N. W. 792; *McNamara v. Casserly*, 61 Minn. 335, 63 N. W. 880.

²⁸ *Culver v. Hardenbergh*, 37 Minn. 225, 33 N. W. 792; *Hanson v. Nygaard*, 105 Minn. 30, 117 N. W. 235; *Bombolls v. Minneapolis & St. Louis R. Co.*, 128 Minn. 112, 150 N. W. 385; *Fridley v. Farmers & Mechanics Savings Bank*, 136 Minn. 333, 162 N. W. 454.

²⁹ *Montour v. Purdy*, 11 Minn. 384 (278); *Rumrill v. First Nat. Bank*, 28 Minn. 202, 9 N. W. 731; *In re Barlow's Estate* (Minn.) 188 N. W. 282. See cases under § 32. There is some language in *Bombolls v. Minneapolis & St. Louis R. Co.*, 128 Minn. 112, 150 N. W. 385, that might suggest that petitions at the various stages of administration proceedings are jurisdictional, but the proceeding in that case was initial and the court probably did not intend to hold that jurisdiction must be acquired anew at each stage of administration proceedings for this would be contrary to the well settled principle that administration is one whole proceeding. See § 32.

³⁰ *McNamara v. Casserly*, 61 Minn. 335, 63 N. W. 880.

proper manner to exercise its jurisdiction in the particular case, over the particular estate. When that is done, the jurisdiction of the particular court attaches to the particular estate for the purpose contemplated by the constitution, to wit, for the purpose of supervising, directing, and controlling its administration and settlement according to law. By the proceedings for the probate of a will and its probate, or, in case there be no will, for the appointment, and the appointment, of an administrator being the first step towards the administration and settlement of the estate, the constitutional jurisdiction of the court attaches to the estate. The jurisdiction given by the constitution is entire "over the estates," and where it has once attached it must continue (unless legally terminated) until its purpose is accomplished; that is, until the estate is administered and settled. Unless the administration of an estate is an entire proceeding, so that the jurisdiction of the court to direct and control it, once attaching, continues until its close, then it is or may be split up into an almost infinite number of subjects of jurisdiction, and the probate court, whenever it is necessary for it to take any action, must acquire jurisdiction to do the particular thing required of it, as though it were an original, independent proceeding. If the jurisdiction acquired by the proceedings for the probate of the will, or for the appointment of the first administrator, ceases with the probate or appointment, then the court cannot appoint commissioners or appraisers, nor extend the time for creditors to present claims, nor require an administrator to renew his bond, nor direct him to pay debts, or sell personal property, or take possession of real estate, or commence an action, or render his accounts nor do any of the scores of things that may be necessary for a probate court to do in the course of directing the administration of an estate, without acquiring anew jurisdiction to do the particular thing. On the other hand, if the jurisdiction originally acquired continues beyond the probate or appointment, then there is no stopping place short of the close of the administration. The difficulties that might arise, and the uncertainties that would (in many cases, at least) adhere to titles derived through the action of probate courts, if it be held that such courts must acquire jurisdiction anew for every successive step they may be called on to take in the course of the administration and settlement of an estate, must be apparent. We hold therefore, that when a probate court legally probates a will, or appoints a first administrator, it thereby acquires jurisdiction to direct and control the administration of the estate; and that such jurisdiction (unless previously legally terminated) continues over the administration, as one proceeding, until its close; and that all the court may do in the course and for the purpose of the administration, including the removal or discharge of administrators, and the appointment of new administrators, is sustained by the jurisdiction thus acquired.³¹

³¹ *Culver v. Hardenbergh*, 37 Minn. 225, 234, 33 N. W. 792; *Rice v. Dicker-* man, 47 Minn. 527, 50 N. W. 698; *Boltz v. Schutz*, 61 Minn. 444, 64 N. W. 48;

33. When jurisdiction terminates—When jurisdiction once attaches it continues throughout the administration proceedings. It is not necessary to acquire jurisdiction anew at different stages of the proceedings.³² Prior to the enactment of Laws 1903, c. 195, it was held that the jurisdiction of the probate court was terminated by a final settlement and decree of distribution, unless the decree was set aside on motion or reversed on appeal.³³ The jurisdiction of the probate court over the guardianship of a minor is not terminated by his becoming of age.³⁴ When administration proceedings are closed by the discharge of the representative the probate court loses jurisdiction of the estate except to open it for cause. So long as it remains closed the probate court has no more jurisdiction over the estate, or the property belonging to it, or which once belonged to it, than if there had never been any administration or attempt to institute one. The jurisdiction of the court has been fully exhausted and it can do nothing further unless the estate is reopened for cause.³⁵ Jurisdiction is not terminated by a final decree of distribution, but the court may set aside the decree for cause, if rights of bona fide purchasers have not intervened.³⁶ After a final decree of distribution no proceeding can be had for a partition of the property. The property has passed out of the jurisdiction of the court, subject only to the right of the court to set aside the decree for cause.³⁷ After a probate court has made an order for the sale of real property of an estate, and it has accordingly been sold, the sale confirmed by the court, and a deed executed to the purchaser as directed by the order of confirmation, and the representative has been discharged, the matter is out of the jurisdiction of the probate court, and it cannot entertain an application to review and set aside the sale proceedings.³⁸ Where a will had been probated, it was held that the court had lost jurisdiction of that matter except to set aside the order for cause as provided by statute, and could not entertain a petition for a re-probate of the will and the appointment of a guardian ad litem.³⁹ The assets of an estate are not regarded as administered until they have been collected and applied as required by law or the will of the testator; until that time the jurisdiction of the probate court remains.⁴⁰

Hanson v. Nygaard, 105 Minn. 30, 117 N. W. 235; *In re Barlow's Estate* (Minn.) 188 N. W. 282. See *In re Mousseau's Will*, 30 Minn. 202, 14 N. W. 887; *McNamara v. Casserly*, 61 Minn. 335, 344, 63 N. W. 880; *Bombolis v. Minneapolis & St. Louis R. Co.*, 128 Minn. 112, 150 N. W. 385.

³² See § 32.

³³ *State v. Probate Court*, 84 Minn. 289, 87 N. W. 783.

³⁴ *Jacobs v. Fouse*, 23 Minn. 51.

³⁵ *State v. Probate Court*, 33 Minn. 94, 96, 22 N. W. 10.

³⁶ See §§ 1081, 1082.

³⁷ *Hurley v. Hamilton*, 37 Minn. 160, 33 N. W. 912.

³⁸ *State v. Probate Court*, 33 Minn. 94, 22 N. W. 10. See § 996.

³⁹ *In re Mousseau's Will*, 30 Minn. 202, 14 N. W. 887.

⁴⁰ *Lafferty v. People's Sav. Bank*, 76 Mich. 35, 50, 43 N. W. 34; *Michigan Trust Co. v. Ferry*, 228 U. S. 346.

34. Presumption of jurisdiction—Collateral attack on orders and judgments for want of jurisdiction—The probate court is a court of superior jurisdiction and enjoys the same presumptions of jurisdiction as superior courts of common-law jurisdiction. Its order, judgments and decrees with reference to matters over which it has general jurisdiction are presumed to be within its jurisdiction in the particular case, and are not subject to collateral attack for want of jurisdiction not affirmatively appearing on the face of the record. The mere absence from the record of facts essential to jurisdiction does not render an order, judgment or decree subject to collateral attack. In other words the presumption of jurisdiction on collateral attack is conclusive, unless the want of jurisdiction affirmatively appears from the record itself.⁴¹ There are cogent practical reasons for this presumption and for applying it rigorously. The business of our probate courts is very large and is constantly increasing. In the course of a few years the proceedings therein affect almost every person in the community. The title to a very considerable portion of the private real property in the state passes through these courts every year, and in a period of twenty or thirty years nearly all of it. The probate judges are not required to be, and as a general rule they are not, men learned in law. Though the business of these courts is commonly administered with integrity and good sense, and with due regard for the interest of those concerned, it is not and it cannot be expected that it ordinarily will be administered with strict regularity, as respects forms and modes of procedure, or, what is more in point, that its proceedings will be fully and accurately entered of record, or its records preserved with the care which the real importance of its business demands. The consequence is that many important documents are mislaid or lost, and the records are not usually quite perfect. In such circumstances the security and certainty of titles to real property appear to demand that the proceedings of probate courts should be upheld, whenever they fairly can be, by the aid of such presumptions as the law in general applies to courts of superior juris-

⁴¹ *Davis v. Hudson*, 29 Minn. 27, 11 N. W. 136; *Culver v. Hardenbergh*, 37 Minn. 225, 230, 33 N. W. 792; *Curran v. Kuby*, 37 Minn. 330, 33 N. W. 907; *Menage v. Jones*, 40 Minn. 254, 41 N. W. 972; *Stahl v. Mitchell*, 41 Minn. 325, 332, 43 N. W. 385; *Burrell v. Chicago, etc., Ry. Co.*, 43 Minn. 363, 364, 45 N. W. 849; *Logenfiel v. Richter*, 60 Minn. 49, 61 N. W. 826; *Kurtz v. St. Paul & Duluth R. Co.*, 61 Minn. 18, 22, 63 N. W. 1; *McNamara v. Casserly*, 61 Minn. 335, 340, 63 N. W. 880; *State v. Kilbourne*, 68 Minn. 320, 322, 324, 71 N. W. 396; *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140,

90 N. W. 378; *Hadley v. Bourdeaux*, 90 Minn. 177, 95 N. W. 1109; *Aho v. Republic Iron & Steel Co.*, 104 Minn. 322, 325, 116 N. W. 590; *Hanson v. Nygaard*, 105 Minn. 30, 32, 117 N. W. 235; *Doran v. Kennedy*, 122 Minn. 1, 141 N. W. 851, 237 U. S. 362; *Wilkowske v. Lynch*, 124 Minn. 492, 145 N. W. 378; *Fridley v. Farmers & Mechanics Savings Bank*, 136 Minn. 333, 162 N. W. 454; *Schmitz v. Martin*, 149 Minn. 386, 183 N. W. 978; *Woerner*, *Am. Law of Adm.* (2 ed.) § 145; 19 *Ency. Pl. & Pr.* 838; 17 *A. & E. Ency. of Law* (2 ed.) 1076; 11 *Cyc.* 694. See title "Collateral Attack" in index.

diction.⁴² This presumption does not apply in the case of foreign courts.⁴³ The presumption of jurisdiction applies only when the court has general jurisdiction of the subject-matter.⁴⁴ An exception to the general rule is made by statute with reference to sales of real property under a license from the probate court.⁴⁵ Where the facts showing want of jurisdiction appear upon the face of the record, or are conceded, an order, judgment or decree of the probate court may be attacked collaterally for want of jurisdiction.⁴⁶

PRACTICE

35. Petitions—Statute—Every proceeding in the probate court shall be commenced by petition, briefly setting forth the ground of the application, and signed by or on behalf of the party making the same, and be verified as in the case of pleadings in civil actions.⁴⁷ A petition is essential to the original acquisition of jurisdiction over the estate of a deceased person or other matter. If it affirmatively appears from the records or is conceded that no petition was presented all subsequent proceedings are void and subject to collateral attack.⁴⁸ The jurisdiction of a probate court over the estate of a deceased person or other matter attaches when its general jurisdiction is invoked by the presentation to it of a proper petition by some person showing a prima facie right to take such action.⁴⁹ Informalities in a petition do not invalidate the proceedings.⁵⁰ All petitions relating to a particular subject-matter may be heard and disposed of at once.⁵¹

36. Pleadings—In probate practice there are no pleadings.⁵² Provision is made for pleadings in the district court on appeal from the probate court in certain cases.⁵³

37. Examination of parties and witnesses—A probate judge may examine parties and witnesses under oath concerning any matter on which

⁴² *Davis v. Hudson*, 29 Minn. 27, 36, 11 N. W. 136.

⁴³ See §§ 299, 305, 647.

⁴⁴ *Davis v. Hudson*, 29 Minn. 27, 11 N. W. 136. See, where the supposed decedent is in fact living, §§ 616, 662.

⁴⁵ See § 998.

⁴⁶ *Culver v. Hardenbergh*, 37 Minn. 225, 33 N. W. 792; *Hanson v. Nygaard*, 105 Minn. 30, 117 N. W. 235; *Bombolis v. Minneapolis & St. Louis R. Co.*, 128 Minn. 112, 150 N. W. 385.

⁴⁷ G. S. 1913, § 7227. See § 31.

⁴⁸ *Bombolis v. Minneapolis & St. Louis R. Co.*, 128 Minn. 112, 150 N. W. 385. See § 31.

⁴⁹ *Hanson v. Nygaard*, 105 Minn. 30, 117 N. W. 235; *Bombolis v. Minneapolis & St. Louis R. Co.*, 128 Minn. 112, 150 N. W. 385; *Fridley v. Farmers & Mechanics Savings Bank*, 136 Minn. 333, 162 N. W. 454; *In re Barlow's Estate* (Minn.) 188 N. W. 282.

⁵⁰ *Fridley v. Farmers & Mechanics Savings Bank*, 136 Minn. 333, 162 N. W. 454.

⁵¹ *Chadwick v. Dunham*, 83 Minn. 366, 86 N. W. 351.

⁵² *Chadwick v. Dunham*, 86 Minn. 366, 86 N. W. 351.

⁵³ See § 68.

he is called upon to exercise his judgment and may compel their attendance for that purpose.⁵⁴

38. Hearing several motions at once—Several motions relating to a particular subject-matter and all petitions relating thereto may be considered together.⁵⁵

39. Informalities disregarded—Things that are mere formalities are not required of probate courts in the discharge of their powers and duties.⁵⁶

40. Notice—How far jurisdictional—Administration proceedings are in rem and jurisdiction is not acquired by notice to interested parties. Notice may be made jurisdictional by statute, but it is not a requirement of due process of law. If a statute requires a notice, but does not make it jurisdictional, the want of notice does not render subsequent proceedings void and subject to collateral attack, but merely renders them voidable on direct attack.⁵⁷ Notice is made jurisdictional by statute in public sales of realty by a representative under license from the probate court.⁶¹ After administration proceedings have terminated the rights of residents thereunder cannot generally be affected by fresh proceedings in the probate court without personal notice if they can be found, and the rights of non-residents thereunder probably cannot be affected without some form of notice.⁵⁸

41. Notice of hearings—When required—Statute—Before proceeding, the court shall require notice to be given to all persons interested, in the following cases:

1. In granting letters of administration.
2. In the allowance of any last will and testament, and granting letters thereon.
3. In hearing the account of an executor or administrator.
4. In distributing any estate to heirs, legatees, or devisees.
5. In licensing the sale, mortgage, or lease of real estate.

In all other cases, unless in this chapter otherwise provided, such notice shall be given as the court may direct.⁵⁹

42. Notice by citation—Publication—Further notice—Statute—For the purposes of such notice, the court shall issue its citation, requiring all persons interested to show cause, if any they have, at a time and place specified, why the petition therein referred to should not be

⁵⁴ G. S. 1913, § 7211 (1); *Lafferty v. People's Savings Bank*, 76 Mich. 35, 70, 43 N. W. 34.

⁵⁵ *Chadwick v. Dunham*, 83 Minn. 366, 86 N. W. 351.

⁵⁶ *In re Scheffer's Estate*, 58 Minn. 29, 34, 59 N. W. 956. See *Davis v. Hudson*, 29 Minn. 27, 36, 11 N. W. 136.

⁵⁷ *Hanson v. Nygaard*, 105 Minn. 30, 175 N. W. 235; *In re Barlow's Estate* (Minn.) 188 N. W. 282. See *McNamara v. Casserly*, 61 Minn. 335, 63 N. W. 880.

⁶¹ See §§ 976, 998.

⁵⁸ *McNamara v. Casserly*, 61 Minn. 335, 63 N. W. 880. See § 33.

⁵⁹ G. S. 1913, § 7228.

granted; and such citation shall be served by three weeks' published notice. The court, in its discretion, may cause other or further notice to be given to such persons as it may deem proper.⁶⁰

43. Designation of newspapers for publications—Statute—Whenever published notice or citation is required to be given in any proceeding in probate court, the judge of probate shall order such notice or citation to be published in such legal newspaper within the county as shall be designated by the petitioner in such proceedings or by his attorney; provided, that a notice to creditors to present claims against an estate shall be published in such legal newspaper within the county as shall be designated by the representative of the estate in which such notice is given, or by his attorney. If such designation is not made, a judge of probate may order the notice to be published in any legal newspaper within the county.⁶¹ The publication of a notice in a newspaper not qualified to publish legal notices is a mere irregularity not affecting the jurisdiction of the court and does not render the proceedings subject to collateral attack.⁶¹

44. Personal service—When necessary—Statute—Every citation to an individual requiring him to perform a particular duty, if he resides in the state and his residence is known, shall be served upon him personally eight days before the day of hearing, or such less time as the court in such citation shall direct.⁶²

45. Probate of will of alien—Notice—Statute—Whenever application for letters of administration with the will annexed shall be made by any person other than the widow or kin of a decedent, and such decedent was a native of any foreign country, notice of the time and place of hearing shall be served by mail on the consular representative of such country, if there be one in this state; otherwise upon the secretary of state, who shall forward the same to the chief diplomatic representative of such country at Washington.⁶³ Whenever an application is made for administration on the intestate estate of a foreigner dying in this state the notice provided by this statute should be given.⁶⁴

46. Further notices—Statute—The court may require notice to be given in addition to the notices hereinbefore provided for, to designated parties known to be interested, by mailing the same, or by publication in a newspaper printed in other than the English language, or in such other manner as it may order.⁶⁵

47. Premature hearings—Curative act—That any hearing or proceeding heretofore had or held in any probate court in this state, under

⁶⁰ G. S. 1913, § 7229.

⁶¹ Laws 1917, c. 151.

⁶¹ *In re Barlow's Estate* (Minn.) 188 N. W. 282.

⁶² G. S. 1913, § 7230.

⁶³ G. S. 1913, § 7231.

⁶⁴ *Austro-Hungarian Consul v. Westphal*, 120 Minn. 122, 139 N. W. 300.

⁶⁵ G. S. 1913, § 7232.

the provisions of the probate code relating to the probating of a will, the appointment of an executor or administrator, or the issuance of a final decree, where the notice of such hearing or proceeding was published the requisite number of times in a legal and proper newspaper, but such hearing or proceeding was prematurely held, and no action or proceeding has heretofore been instituted to set aside or invalidate the action of the probate court in such hearing or proceeding, is hereby legalized, validated and given the same force and effect as if proper notice thereof had been given and such hearing or proceeding had been held at the proper time; provided that nothing herein contained shall be construed to apply to any action or proceeding heretofore brought or which shall be brought within one year from the passage of this act to test the validity of any such probate hearing or proceeding, or in which a defense alleging the invalidity thereof has been interposed; or to any action heretofore brought or which shall be brought within one year from the date of the passage of this act involving any right, title or estate in lands situate within this state derived under said will.⁴⁸

48. Notice of filing orders, judgments and decrees—Statute—Every probate judge, at the time of filing any appealable order, judgment, or decree, shall cause notice of such filing to be given, either personally or by mail, to all parties interested who have appeared of record on the hearing, or to their attorneys: Provided, that this section shall not apply in uncontested cases or where final decision was made at the time of hearing.⁴⁹ The notice provided for by this statute does not limit the time of appeal. The purpose of the statute is to give all the parties who took part in the hearing speedy notice of the decision, so that those prevailing may, by giving the defeated parties notice, limit their right of appeal to thirty days, instead of six months which they otherwise have.⁵⁰

49. Amendments—Extensions of time—G. S. 1913, §§ 7783, 7786, authorizing amendments, extensions of time and relief from mistakes, possibly apply to the probate courts.⁵⁰

50. Clerk may sign certain orders and citations in his own name—Statute—The judge of the probate court of any county in this state in which county there is a clerk of the probate court may by written authorization duly recorded in the office of the clerk of said probate court authorize said clerk to issue the following orders and citations and sign the same in the name of the clerk instead of having the same signed in the name of the judge to wit:

1. Citation for hearing of petition for letters of administration.

⁴⁸ G. S. 1913, § 7235. See also, Laws 1919, c. 241.

⁴⁹ G. S. 1913, § 7233.

⁴⁹ *Timm v. Brauch*, 133 Minn. 20, 157 N. W. 709.

⁵⁰ See § 52; *Davis v. Superior Court*, 35 Cal. App. 473, 170 Pac. 437.

2. Citations for hearing petition for the admission of a will to probate and the issuance of letters testamentary or of administration with will annexed.

3. Citation for hearing, petition for decree of descent.

4. Orders limiting the time to file claims and fixing the date of hearing of said claims.

5. Citations for hearing petition to sell, lease or mortgage land.

6. Citations for hearing petition for settlement and distribution in estates of deceased persons.⁵¹

51. Powers of probate courts—Witnesses—Citations—Contempt of court—Adjournments—Amendment of records—Statute—In addition to their general powers under the constitution, probate courts shall have the same power as district courts in the following matters:

1. To examine witnesses and parties on oath, to compel their attendance, to preserve order during any proceedings before it, and punish contempts;

2. To issue citations, subpoenas, and attachments, to make orders, judgments, and decrees, to issue all necessary executions, warrants, or processes to enforce them, and to issue commissions to take depositions;

3. To adjourn any hearing from time to time, provided that when objection is made the adjournment shall be only for cause, shown by affidavit or otherwise;

4. To correct, modify, or amend its records to conform to the facts, and to correct its final decrees so as to include therein property omitted from the same or from administration.⁵²

52. Vacation of orders, judgments and decrees—Opening defaults—Amendment of records—A probate court may vacate an order, judgment or decree procured by fraud, misrepresentation, or through surprise or excusable inadvertence or neglect.⁵³ Probate courts have the

⁵¹ Laws 1917, c. 216.

⁵² G. S. 1913, § 7211. See 117 Am. St. Rep. 954 (authority to punish for contempt).

⁵³ G. S. 1913, § 7490 (8); *In re Gragg's Estate*, 32 Minn. 142, 19 N. W. 651 (vacation of order allowing claims—collusion between administrator and claimants); *In re Hause*, 32 Minn. 155, 19 N. W. 973 (vacation of order allowing guardian's account—opening default—ignorance of proceedings—accident or other circumstance preventing party from appearing); *Fern v. Leuthold*, 39 Minn. 212, 215, 39 N. W. 399 (vacation of final decree procured by fraud or erroneously rendered by inadvertence); *In re Kilder's Estate*, 53 Minn. 529, 55 N. W. 738 (vacation of order allowing claim held

not justified by the facts—failure of applicant to appear and oppose claim inexcusable under the circumstances); *In re Thompson's Estate*, 57 Minn. 109, 58 N. W. 682 (an estate having been fully administered, the administration closed, and the administrator discharged, and the estate assigned to one as sole heir, a will devising the real estate to others was subsequently admitted to probate and an administrator with the will annexed appointed—held, there being nothing to administer, there could be no legitimate charges of administration under the second administrator for which real estate could be sold, that he had no interest in the real estate and could not apply for a revocation of the decree assigning it); *McNamara v. Casserly*, 61

same power as district courts to correct, modify, or amend their records to conform to the facts, and to correct their final decrees so as to include therein property omitted from the same or from administration.⁵⁴ They cannot modify or reverse their orders, judgments or decrees for mere error of law after the time to appeal therefrom has expired.⁵⁵ This limitation of time does not apply in case of "mistake, inadvertence, surprise, or excusable neglect."⁵⁶ They cannot vacate their orders, judgments or decrees after the subject-matter has passed beyond their jurisdiction.⁵⁷ The probate of a will cannot be vacated for failure to appoint a guardian for minors interested in the estate.⁵⁸

Minn. 335, 63 N. W. 880 (vacation of void decree of distribution); *Larson v. How*, 71 Minn. 250, 73 N. W. 966 (vacation of order admitting will to probate on application of party who failed to appear and oppose probate); *Levi v. Longini*, 82 Minn. 324, 84 N. W. 1017, 86 N. W. 333 (vacation of order allowing a guardian's account obtained by fraud); *State v. Bazille*, 89 Minn. 440, 95 N. W. 211 (vacation of final decree to permit creditor to present claim); *Bradley v. Bradley Estate Co.*, 97 Minn. 130, 106 N. W. 338 (vacation of order allowing final account of administrator); *St. Paul Gaslight Co. v. Kenny*, 97 Minn. 150, 106 N. W. 344 (vacation of final decree of distribution—when allowable as against purchaser from heir or distributee); *Southern Minnesota Investment & Loan Co. v. Livingston*, 117 Minn. 421, 136 N. W. 8 (opening default to allow a contest on a will—when an application to open a default is denied by the trial court its action will not be disturbed on appeal unless the record discloses an abuse of discretion in passing upon it, not only as to the excuse for the default, but also as to the good faith and merit of the claim sought to be asserted by the applicant); *Pierce v. Maetzold*, 126 Minn. 445, 148 N. W. 302 (a surety on a representative's bond may be heard on an application to correct an order settling the account of the representative or to

set it aside for fraud); *Savela v. Erickson*, 138 Minn. 93, 163 N. W. 1029 (amendment of final decree to let in afterborn children not provided for in decree); *Amundson v. Hanson* (Minn.) 185 N. W. 252 (changing the name of a purchaser at a private sale under a license in an order confirming the sale). See title "Vacation" in index.

⁵⁴ G. S. 1913, § 7211 (4); *State v. Probate Court*, 84 Minn. 289, 295, 87 N. W. 783; *Tomlinson v. Phelps*, 93 Minn. 350, 101 N. W. 496; *Savela v. Erickson*, 138 Minn. 93, 163 N. W. 1029. See *Kurtz v. St. Paul & Duluth R. Co.*, 65 Minn. 60, 67 N. W. 808; *Hanson v. Ingwaldson*, 77 Minn. 533, 80 N. W. 702; *Dunnell*, Minn. Digest and Supplements, §§ 5091-5107.

⁵⁵ *Thomlinson v. Phelps*, 93 Minn. 350, 101 N. W. 496; *Knutson v. Krook*, 111 Minn. 352, 358, 127 N. W. 11.

⁵⁶ *Savela v. Erickson*, 138 Minn. 93, 163 N. W. 1029.

⁵⁷ *State v. Probate Court*, 33 Minn. 94, 22 N. W. 10. See *Hurley v. Hamilton*, 37 Minn. 160, 33 N. W. 912; *Kurtz v. St. Paul & Duluth R. Co.*, 65 Minn. 60, 67 N. W. 808; *Hanson v. Ingwaldson*, 77 Minn. 533, 80 N. W. 702; *State v. Probate Court*, 84 Minn. 289, 87 N. W. 783; *Amundson v. Hanson* (Minn.) 185 N. W. 252; and cases under §§ 33, 996, 978, 1081, 1082.

⁵⁸ *In re Mousseau's Will*, 30 Minn. 202, 14 N. W. 887.

APPEAL TO DISTRICT COURT

53. What orders, judgments and decrees appealable—Statute—An appeal to the district court from a judgment, order, or decree of the probate court may be taken by any party aggrieved in the following cases:⁵⁹

1. An order admitting a will to probate and record or refusing the same.⁶⁰

2. An order appointing an executor, administrator, or guardian, or removing him, or refusing to make such appointment or removal.⁶¹

3. An order authorizing or refusing to authorize real property to be sold, mortgaged, or leased, or confirming or refusing to confirm such sale, mortgaging, or leasing.⁶²

4. An order allowing or disallowing the claim of a creditor against the estate, or disallowing a counterclaim, in whole or in part, to the amount in either case of twenty dollars or more.⁶³

⁵⁹ G. S. 1913, § 7490.

⁶⁰ *In re Penniman's Will*, 20 Minn. 245 (220); *In re Brown's Will*, 32 Minn. 443, 21 N. W. 474; *Graham v. Burch*, 47 Minn. 171, 177, 49 N. W. 697; *Foster v. Gordon*, 96 Minn. 142, 144, 104 N. W. 765. See §§ 68, 70.

⁶¹ *Mumford v. Hall*, 25 Minn. 347, 354; *Brown v. Huntsman*, 32 Minn. 466, 21 N. W. 555 (on appeal by a guardian from an order removing him, any person, upon showing his right to be heard, may, without being formally entered as a party, bring the appeal to a hearing); *State v. Probate Court*, 83 Minn. 58, 85 N. W. 917 (an order restoring an incompetent person to capacity is not appealable under this subdivision though it results in the removal of the guardian); *Chadwick v. Dunham*, 83 Minn. 366, 86 N. W. 351 (where, in proceedings instituted upon the petition of the testamentary guardian for his appointment to that trust, the next of kin appeared and objected to such appointment, and also filed a petition setting forth that such testamentary guardian was not a suitable person to discharge the trust, a determination by the probate court in such a case that the guardian was competent and suitable is reviewable, and, upon appeal being taken, is entitled to be heard upon its merits in the district court); *Foster v. Gordon*, 96 Minn. 142, 104 N. W. 765 (an appeal from

an order admitting a will to probate does not affect an order appointing an executor unless an appeal is also taken from such order—overruled by *Laws 1901, c. 147*); *Castigliano v. Great Northern Ry. Co.*, 129 Minn. 279, 152 N. W. 413 (no appeal lies from an order appointing a special administrator); *Hayden v. Keown*, 232 Mass. 259, 122 N. E. 264 (a representative who is removed cannot appeal from the order appointing his successor).

⁶² *State v. Probate Court*, 19 Minn. 117 (85); *Dee v. Wilson*, 91 Minn. 115, 97 N. W. 647 (an order of the probate court discharging an order upon a representative to show cause why the homestead devised by the will should not be sold to pay debts of the estate is an order refusing to direct the sale of real estate and appealable under this subdivision).

⁶³ *Capehart v. Logan*, 20 Minn. 442 (395); *State v. Probate Court*, 28 Minn. 381, 382, 10 N. W. 209; *State v. Probate Court*, 51 Minn. 241, 53 N. W. 463 (no appeal lies under this subdivision from an order directing or refusing to direct payment of a claim against an estate); *Smith v. Pence*, 62 Minn. 321, 64 N. W. 822 (a claim for attorney's fees held not a claim against the estate and an order disallowing it held not appealable under this subdivision); *State v. Probate Court*,

5. An order or decree by which a legacy or distributive share is allowed or payment thereof directed, or such allowance or direction refused, when the amount in controversy exceeds twenty dollars.⁶⁴

6. An order setting apart property, or making an allowance for the widow, the widow and children, or children, or refusing the same.⁶⁵

7. An order allowing the account of an executor, administrator, or guardian, or refusing to allow the same, when the amount allowed or disallowed exceeds twenty dollars.⁶⁶

8. An order vacating or refusing to vacate a previous order, judgment, or decree alleged to have been procured by fraud, misrepresentation, or through surprise or excusable inadvertence or neglect.⁶⁷

9. An order or decree directing or refusing a conveyance of real estate.⁶⁸

10. A final judgment or decree assigning the residue of the estate of a decedent.⁶⁹

11. An order denying an application for the restoration to capacity of any person under guardianship.⁷⁰

72 Minn. 434, 75 N. W. 700 (order allowing claim after an amendment); *State v. Probate Court*, 76 Minn. 132, 78 N. W. 1039 (order allowing compensation to representative and attorney's fees and ordering them paid as expenses of administration held not appealable); *Stellmacher v. Bruder*, 93 Minn. 98, 100 N. W. 473 (part of claim allowed and part disallowed); *First Unitarian Society v. Houliston*, 96 Minn. 342, 105 N. W. 66 (id.); *Knutsen v. Krook*, 111 Minn. 352, 127 N. W. 11 (what is a claim against the estate—a demand for the whole or a part of the estate is not a claim within this subdivision); *State v. Probate Court*, 142 Minn. 283, 171 N. W. 928 (an order on a claim of the state for reimbursement under Laws 1917, c. 409). See §§ 59, 68, 905.

⁶⁴ *Mintzer v. St. Paul Trust Co.*, 45 Minn. 323, 324, 47 N. W. 973 (appeal lies from an order fixing and determining the rights and estate of a surviving husband or wife in a homestead); *State v. Willrich*, 72 Minn. 165, 75 N. W. 123 (inapplicable to order affecting realty).

⁶⁵ *Tracy v. Tracy*, 79 Minn. 267, 271, 82 N. W. 635. See *Mintzer v. St. Paul Trust Co.*, 45 Minn. 323, 47 N. W. 973, and § 792.

⁶⁶ *Watson v. Watson*, 65 Minn. 335, 68 N. W. 44 (applicable only to statutory

accountings—does not allow an appeal from an order based on a finding that an alleged accounting and settlement between a guardian and his ward, made after the latter became of age, had never been had or made); *St. Paul Trust Co. v. Kittson*, 84 Minn. 493, 87 N. W. 1012 (appeal from part of a final order on accounting of executor); *Bradley v. Bradley Estate Co.*, 97 Minn. 130, 106 N. W. 338 (scope of review).

⁶⁷ *In re Mousseau's Will*, 30 Minn. 202, 204, 14 N. W. 887; *In re Gragg's Estate*, 32 Minn. 142, 19 N. W. 651; *In re Hause*, 32 Minn. 155, 157, 19 N. W. 973; *State v. Probate Court*, 33 Minn. 94, 95, 22 N. W. 10; *Larson v. How*, 71 Minn. 250, 73 N. W. 966; *Levi v. Longini*, 82 Minn. 324, 84 N. W. 1017, 86 N. W. 333; *Tomlinson v. Phelps*, 93 Minn. 350, 101 N. W. 496 (order vacating part of previous order).

⁶⁸ See *State v. Probate Court*, 33 Minn. 94, 22 N. W. 10.

⁶⁹ *State v. Willrich*, 72 Minn. 165, 75 N. W. 123 (overruled by Laws 1899, c. 27). See *Penstock v. Wentworth*, 75 Minn. 2, 77 N. W. 420; *Rong v. Haller*, 106 Minn. 454, 456, 119 N. W. 405.

⁷⁰ *State v. Probate Court*, 83 Minn. 58, 85 N. W. 917 (overruled by Laws 1901, c. 147).

54. Appeal from part of an order or judgment—An appeal may be taken from a part of a final order, judgment or decree, if the part where-by the appellant is aggrieved is so far distinct and independent that it may be adjudicated on appeal without bringing up for review the entire order, judgment or decree.⁷¹ Where the probate court allows a portion and disallows the balance of a claim of the same general character presented against an estate of a deceased person, and an appeal is taken from that portion only of such order which disallows the claim, the appeal is not effectual and does not confer jurisdiction on the district court.⁷²

55. Statutory—The right of appeal to the district court and a trial de novo there is statutory and not constitutional.⁷³

56. Favored—Appeals from the probate to the district court are favored and the proceedings are to be liberally construed.⁷⁴

57. Who may appeal—Statute—An appeal under § 7490, subd. 4 (53, supra) may be taken by the representative or by the creditor, and when the representative declines to appeal in such case any person interested in the estate as creditor, devisee, legatee, or heir may appeal in the name of such representative and by the same proceedings: Provided, that the person appealing in such case shall give a bond, conditioned to secure the estate from damages and costs, and also to secure the intervening damages and costs to the adverse party. In all other cases, the appeal can be taken only by a party aggrieved, who appeared and moved for or opposed the order or judgment appealed from, or who, being entitled to be heard thereon, did not appear and take part in the proceedings.⁷⁵

58. Same—Who may appeal as an aggrieved party—An aggrieved party within the meaning of the statute is one who, as heir, devisee, legatee, or creditor, has what may be called a legal interest in the assets of the estate and their due administration.⁷⁶ A mere debtor of the estate is not entitled to appeal as an aggrieved party.⁷⁷ The estate, as such, cannot appeal.⁷⁸ An executor propounding a will by which he is nominated may appeal as an aggrieved party from an order denying its

⁷¹ G. S. 1913, § 7492; *Capehart v. Logan*, 20 Minn. 442 (395); *St. Paul Trust Co. v. Kittson*, 84 Minn. 493, 87 N. W. 1012; *First Unitarian Society v. Houlliston*, 96 Minn. 342, 105 N. W. 66.

⁷² *Stellmacher v. Bruder*, 93 Minn. 98, 100 N. W. 473. See *First Unitarian Society v. Houlliston*, 96 Minn. 342, 105 N. W. 66.

⁷³ *Lipman v. Bechhoefer*, 141 Minn. 131, 169 N. W. 536.

⁷⁴ *Riley v. Mitchell*, 38 Minn. 9, 35 N.

W. 472; *First Unitarian Society v. Houlliston*, 96 Minn. 342, 105 N. W. 66.

⁷⁵ G. S. 1913, § 7491.

⁷⁶ *In re Hardy's Estate*, 35 Minn. 193, 28 N. W. 219; *Edgerly v. Alexander*, 82 Minn. 96, 84 N. W. 653; *Hayden v. Keown*, 232 Mass. 259, 122 N. E. 264. See 119 Am. St. Rep. 740.

⁷⁷ *In re Hardy's Estate*, 35 Minn. 193, 28 N. W. 29. See *State v. Probate Court*, 149 Minn. 464, 184 N. W. 43.

⁷⁸ *Estate of Columbus v. Monti*, 6 Minn. 568 (403).

probate.⁷⁹ An executor and trustee under the will may appeal from an order of the probate court directing them to pay out funds of the estate.⁸⁰ An executor may appeal from a judgment of the probate court construing the will and assigning the property to a devisee.⁸¹ A foreign consul may appeal from an order appointing an administrator of the estate of one of his nationals.⁸² Only a party aggrieved by it can question on appeal a specific provision of a decree of distribution.⁸³ An executrix of the estate of a husband of an incompetent person has been held not entitled to appeal from an order appointing a guardian for such incompetent.⁸⁴ A person liable under the statute for death by wrongful act has been held not entitled to appeal from an order appointing an administrator to prosecute an action against him.⁸⁵ Whether a surety on a bond of a representative may appeal from an order settling the account of the representative is an open question, though it has been strongly intimated that he may.⁸⁶ An administrator appointed in another state, on the estate of a person there resident and deceased, may appeal from an order of the probate court here appointing an ancillary administrator.⁸⁷ A surviving spouse may appeal from an order allowing a will though she has renounced the will.⁸⁸ A party entitled to appear and object to the probate of a will, but who does not so appear, may appeal from an order admitting the will to probate and contest its probate in the district court.⁸⁹ An heir may appeal though he did not appear and take part in the proceedings. If he dies after the entry of an order and before the expiration of the time allowed for an appeal a special administrator may perfect an appeal within such time.⁹⁰ Prior to Laws 1903, c. 27, the statute provided that an appeal could only be taken by a party aggrieved who appeared and moved for or opposed the order or judgment appealed from, or who, being entitled to be heard thereon, had not due notice or opportunity to be heard.⁹¹

59. Same—Who may appeal from an order allowing or disallowing a claim—One not "interested" in the estate cannot appeal.⁹² The right

⁷⁹ *Burmeister v. Gust*, 117 Minn. 247, 135 N. W. 980.

⁸⁰ *State v. Probate Court*, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234.

⁸¹ *Empeger v. Fairley*, 119 Minn. 186, 137 N. W. 1110.

⁸² *Austro-Hungarian Consul v. Westphal*, 120 Minn. 122, 139 N. W. 300.

⁸³ *Casey v. Brabeck*, 111 Minn. 43, 126 N. W. 401.

⁸⁴ *Edgerly v. Alexander*, 82 Minn. 96, 84 N. W. 653.

⁸⁵ *In re Hardy's Estate*, 35 Minn. 193, 28 N. W. 219.

⁸⁶ *Pierce v. Maetzold*, 126 Minn. 445, 148 N. W. 302.

⁸⁷ *Martin v. Gage*, 147 Mass. 204, 17 N. E. 310.

⁸⁸ *Dexter v. Codman*, 148 Mass. 421, 19 N. E. 517.

⁸⁹ *Schleiderer v. Gergen*, 129 Minn. 248, 152 N. W. 541.

⁹⁰ *Sheeran v. Sheeran*, 96 Minn. 484, 105 N. W. 677.

⁹¹ *In re Hause*, 32 Minn. 155, 19 N. W. 973; *In re Brown's Will*, 32 Minn. 443, 21 N. W. 474; *Sheeran v. Sheeran*, 96 Minn. 484, 105 N. W. 677. See *State v. Bazille*, 81 Minn. 370, 84 N. W. 120; *Rong v. Haller*, 106 Minn. 454, 119 N. W. 405.

⁹² *Semper v. Coates*, 93 Minn. 80, 100 N. W. 663.

to appeal under section 7490, subd. 4, G. S. 1913, by creditors, devisees, legatees, or heirs, is, by section 7491, subordinated to the general right of appeal given the representative of the estate. It is only when the representative declines to appeal that the right extends to the creditors and heirs. The legislative intent, in enacting section 7491, G. S. 1913, was to give the right to appeal from the allowance or disallowance of a claim against the estate of a decedent, first, to the representative or the interested creditor, but, in the event that the representative, after request, declines to appeal from the allowance or disallowance of a claim, then and in that event to extend the right to the creditors, heirs, etc., in general. The fact that appellants appeared in the probate court and opposed the allowance of the claim, does not entitle them to appeal; the representative not having declined to appeal.⁹³ A payee of a note given for the benefit of another has been held a creditor within the statute and entitled to appeal.⁹⁴ Proof of the fact of the refusal of the representative to appeal need not be made prior to appeal, but may be made at any time when the fact is called in question.⁹⁵ Objection that an appellant had no right to appeal to the district court cannot be made for the first time in the supreme court.⁹⁶

60. Dismissal of appeal—An appeal may be dismissed by the district court for want of jurisdiction.⁹⁷

61. Time of taking appeal—An appeal from an order, judgment or decree must be taken within thirty days after notice thereof; and in the absence of notice, within six months of its entry.⁹⁸ The thirty days begin to run from the time of written notice of the order, judgment or decree. When no such notice is given an appeal may be taken at any time within six months from the entry of the order, judgment or decree. The burden is on the party moving to dismiss an appeal, which it is claimed should have been taken within thirty days, to show the service of such notice of the order, judgment or decree.⁹⁹ The notice to limit the time of appeal, provided by G. S. 1913, § 7492, must be in writing and served on the aggrieved party by the adverse party. The notice given by the probate judge under G. S. 1913, § 7233, does not limit the time of appeal.¹

62. Mode of taking appeal—Time—Notice—Bond—Statute—No appeal shall be effectual for any purpose unless the following requisites

⁹³ O'Brien v. Murphy, 136 Minn. 327, 162 N. W. 356.

⁹⁴ Lake v. Albert, 37 Minn. 453, 35 N. W. 177.

⁹⁵ Schults v. Brown, 47 Minn. 255, 49 N. W. 982.

⁹⁶ McAlpine v. Kratka, 92 Minn. 411, 100 N. W. 233.

⁹⁷ Capehart v. Logan, 20 Minn. 442 (395, 401).

⁹⁸ G. S. 1913, § 7492. See, under former statutes, Auerbach v. Gloyd, 34 Minn. 500, 27 N. W. 193; In re Charles' Estate, 35 Minn. 438, 29 N. W. 170.

⁹⁹ Knutsen v. Krook, 111 Minn. 352, 127 N. W. 11; Timm v. Brauch, 133 Minn. 20, 157 N. W. 709.

¹ Timm v. Brauch, 133 Minn. 20, 157 N. W. 709.

are complied with by the appellant within thirty days after notice of the order, judgment, or decree appealed from:

1. The appellant shall serve a written notice upon the adverse party, his agent or attorney who appeared in court, and, when there has been no appearance, by delivering a copy of such notice to the probate judge for such party. Such notice shall specify the order, judgment, or decree, or such part thereof as is appealed from, be signed by the appellant or his attorney, and be served in the same manner as notices in civil actions, and, together with proof of service thereof, be filed in the probate court.

2. In case any person other than the representative appeals, he shall execute a bond, with sureties, to the judge, conditioned that he will prosecute his appeal with due diligence to a final determination, pay all costs and disbursements, and abide the order of court therein. But no appeal from an order, judgment, or decree shall be taken after six months from the entry thereof.²

63. Notice of appeal—The notice of appeal must be in writing and specify the order, judgment or decree, or such part thereof as may be appealed from.³ Where, upon the refusal of a representative to appeal, a creditor, devisee, legatee or heir appeals from the allowance of a claim against the estate, the notice of appeal should be to the effect that such creditor, devisee, legatee or heir appeals and be signed by him.⁴ A notice of appeal is to be liberally construed.⁵ A notice of appeal from an order admitting a will to probate may be served on the attorney of the proponent of the will.⁶ Service of notice of an appeal from a final decree of distribution on the attorney of an executor has been held sufficient.⁷ Formerly an amendment of a notice was expressly prohibited.⁸ Under a former statute a notice of appeal was held equivalent to an "application" for an appeal.⁹

64. Bond—In case any person other than the representative appeals he must execute a bond, with sureties, to the judge, conditioned that he will prosecute his appeal with due diligence to a final determination, pay all costs and disbursements, and abide the order of court therein.¹⁰ If the condition of a bond substantially covers the provisions of the statute, and secures to the respondent all that the law designed for him, it is sufficient, though not in the exact words of the statute. The fact that a bond is executed by only one surety does not go to the jurisdiction

² G. S. 1913, § 7492.

³ See § 62; *Foster v. Gordon*, 96 Minn. 142, 144, 104 N. W. 765.

⁴ *Schultz v. Brown*, 47 Minn. 255, 49 N. W. 982.

⁵ *First Unitarian Society v. Houliston*, 96 Minn. 342, 105 N. W. 66.

⁶ *In re Brown's Will*, 32 Minn. 443, 21 N. W. 474.

⁷ *Rong v. Haller*, 106 Minn. 454, 119 N. W. 405.

⁸ *McCloskey v. Plantz*, 76 Minn. 323, 79 N. W. 176.

⁹ *Lake v. Albert*, 37 Minn. 453, 35 N. W. 177.

¹⁰ See § 62.

of the district court over the subject-matter of the appeal, but is a mere irregularity, which the respondent may waive, or which the district court may allow to be remedied by amending the bond or filing a new one.¹¹ An undertaking is sufficient.¹²

65. Return to district court—Statute—Upon filing such notice of appeal and proof of service, the probate court shall forthwith make and return to the district court a certified transcript of all the papers and proceedings upon which the order, judgment, or decree appealed from is founded, together with copies of the order, judgment, or decree, the notice of appeal with proof of service thereof, and the bond. The district court, when necessary, may require a further or amended return.¹³ The district court acquires jurisdiction of the subject-matter of the appeal when the return is filed therein. Subsequent proceedings are not jurisdictional.¹⁴

66. Effect of appeal in suspending order, judgment or decree—Statute—Such appeal shall suspend the operation of the order, judgment, or decree appealed from until the appeal is determined or the district court shall otherwise order. The court shall have discretionary power, for cause shown, to require the appellant to give further security for the payment of damages which may be awarded against him in consequence of such suspension, in case he fails to obtain a reversal of the order, judgment, or decree so appealed from. But nothing herein contained shall prevent the probate court from appointing special administrators or special guardians, or to prevent special administrators or guardians appointed prior to such appeal from continuing to act as such.¹⁵ An appeal from an order admitting a will to probate does not affect an order appointing an executor unless an appeal is also taken from such order.¹⁶

67. Placing cause on calendar of district court—Notice of trial—Statute—Upon appeal the cause may be brought on for trial by either party on eight days' notice, which shall be served upon the attorney of the adverse party, or, if he have none, shall be deposited for him with the clerk of the district court. On or before the first day of the term for which the cause is noticed, the appellant shall cause it to be entered on the calendar; otherwise the appeal shall be dismissed. When placed on the calendar, the cause shall be tried and determined in the same manner as if originally commenced in such court.¹⁷ The district court

¹¹ *Riley v. Mitchell*, 38 Minn. 9, 35 N. W. 472.

¹² *In re Brown's Will*, 35 Minn. 307, 29 N. W. 131.

¹³ G. S. 1913, § 7493. See, under former statute, *In re Post's Estate*, 33 Minn. 478, 24 N. W. 184 (under former statute appeal on questions of law alone was tried in district court on the record and

not de novo as at present—nature of return under former practice).

¹⁴ *Hintermeister v. Brady*, 70 Minn. 437, 73 N. W. 145.

¹⁵ G. S. 1913, § 7494. See, prior to statute, *Dutcher v. Culver*, 23 Minn. 415.

¹⁶ *Foxter v. Gordon*, 96 Minn. 142, 104 N. W. 765.

¹⁷ G. S. 1913, § 7495.

may relieve an appellant from his default in not having the cause placed on the calendar, and the statutory requirement may be waived by the attorney of the respondent.¹⁸

68. Trial in district court *de novo*—Pleadings—Jury—Practice—Statute—The trial in the district court is *de novo*. The statute provides that “when placed on the calendar, the cause shall be tried and determined in the same manner as if originally commenced in such court.” The conclusions reached by the probate court are immaterial.¹⁹ The question in the district court is not whether the determination of the probate court was right upon the record made in that court, or upon the evidence then obtainable, but whether the same order or judgment would be proper upon the record made and the evidence received in the district court.²⁰ New facts developing after the hearing in the probate court may be received in evidence on the trial in the district court if relevant and material. A decree of the district court in another suit, involving issues over which the probate court had no jurisdiction, and entered during the pendency of the appeal, may be received in evidence, if pertinent to the issue.²¹ Formerly an appeal was allowed on questions of law alone and such an appeal was determined in the district court on the record of the probate court and not *de novo*.²² The statute provides that: “If the appeal be from the allowance or disallowance of a claim or counterclaim, the district court, on or before the second day of the term, shall direct pleadings to be made up as in civil actions, defining the issues to be tried. Such appeal shall then be heard and tried in the same manner as other issues of fact are heard and tried in such court. All other appeals shall be tried by the court without a jury, unless the court orders the whole issue or some specific question of fact involved therein to be tried by jury or referred.”²³ The complaint in the district court must be based on the same claim that was presented to the probate court, but a variance as to the particulars of the claim is not fatal. It is sufficient if the same matter or transaction is presented.²⁴ A claim on an express contract may be changed to one on an im-

¹⁸ *Hintermeister v. Brady*, 70 Minn. 437, 73 N. W. 145.

¹⁹ G. S. 1913, § 7495; *Washburn v. Van Steenwyk*, 32 Minn. 336, 355, 20 N. W. 324; *In re Mill's Estate*, 34 Minn. 296, 25 N. W. 631; *Strauch v. Uhler*, 95 Minn. 304, 104 N. W. 535; *Turner v. Fryberger*, 99 Minn. 236, 107 N. W. 1133, 109 N. W. 229; *Swick v. Sheridan*, 107 Minn. 130, 132, 119 N. W. 791; *First Nat. Bank v. Towle*, 118 Minn. 514, 521, 137 N. W. 291; *Benz v. Rogers*, 141 Minn. 93, 169 N. W. 477; *Lipman v. Bechoefer*, 141 Minn. 131, 169 N. W. 536.

²⁰ *Benz v. Rogers*, 141 Minn. 93, 169 N. W. 477.

²¹ *Benz v. Rogers*, 141 Minn. 93, 169 N. W. 477.

²² *In re Post's Estate*, 33 Minn. 478, 24 N. W. 184. See *McCloskey v. Plantz*, 76 Minn. 323, 79 N. W. 176.

²³ G. S. 1913, § 7496.

²⁴ *Stuart v. Stuart*, 70 Minn. 46, 72 N. W. 819; *Mason v. Savage*, 141 Minn. 346, 170 N. W. 585 (proposed complaint held properly stricken out on the ground of departure from the claim filed in the probate court). *Savage v. Minnesota*

plied contract.²⁵ The district court may properly allow an amendment of the complaint on the trial to conform to the proofs if the amendment does not substantially change the claim.²⁶ Pleadings are not required except on appeal from the allowance or disallowance of a claim or counterclaim.²⁷ A trial without pleadings is an irregularity merely.²⁸ On an appeal from an order allowing or disallowing a will there is no constitutional or statutory right to a jury trial. Whether the issues shall be submitted to a jury is within the discretion of the trial court. If issues are framed and submitted to a jury the court has discretionary power to withdraw them any time before verdict and itself make findings of fact.²⁹ When specific questions of fact are submitted to a jury its findings are conclusive on the court unless set aside for cause.³⁰ In all cases involving the trial of issues of fact the court must make findings of fact and conclusions of law as in an ordinary civil action.³¹ Certain findings held sufficient though the facts constituting the execution of the will were not set out or the testamentary capacity of the testator.³² Matters not properly before the court on an appeal may be litigated by consent of the parties and when this is done the determination of the court is as binding on the parties as though the matters were properly before the court.³³ Where a party answered a complaint in the district court and proceeded to trial without objection, it was held that the court had jurisdiction though the claim was *ex delicto* and hence not provable in the probate court.³⁴ If the appellant does not appear and prosecute his appeal the district court is not required to hear evidence and determine the case on its merits.³⁵ Where the court is called

Loan & Trust Co., 142 Minn. 187, 171 N. W. 778. See *Palmer v. Pollock*, 26 Minn. 433, 4 N. W. 1113; *Chadwick v. Dunham*, 83 Minn. 366, 86 N. W. 351.

²⁵ *White v. Deering*, 38 Cal. App. 516, 179 Pac. 401; *Kappa v. Levstik*, 123 Minn. 532, 144 N. W. 137. See *Dunnell*, Minn. Digest, 1916 Supplement, §§ 1904, 10377.

²⁶ *Savage v. Minnesota Loan & Trust Co.*, 142 Minn. 187, 171 N. W. 778.

²⁷ *Swick v. Sheridan*, 107 Minn. 130, 119 N. W. 791.

²⁸ *Lake v. Albert*, 37 Minn. 453, 35 N. W. 177. See *Palmer v. Pollock*, 26 Minn. 433, 4 N. W. 1113.

²⁹ *Schmidt v. Schmidt*, 47 Minn. 451, 50 N. W. 598; *Lewis v. Murray*, 131 Minn. 439, 155 N. W. 392.

³⁰ *Marvin v. Dutcher*, 26 Minn. 391, 407, 4 N. W. 685; *In re Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; *Buzalsky v. Buzalsky*, 108 Minn. 422, 122

N. W. 322; *Lewis v. Murray*, 131 Minn. 439, 155 N. W. 392. See *Dunnell*, Minn. Digest, § 9645.

³¹ *Turner v. Fryberger*, 99 Minn. 236, 107 N. W. 1133; *Swick v. Sheridan*, 107 Minn. 130, 119 N. W. 791; *First Nat. Bank v. Towle*, 118 Minn. 514, 137 N. W. 291. See *Palmer v. Pollock*, 26 Minn. 433, 4 N. W. 1113 (not necessary to find facts admitted by the pleadings); *Dunnell*, Minn. Digest and Supplements, § 9849.

³² *In re Storger's Will*, 28 Minn. 9, 8 N. W. 827.

³³ *Bradley v. Bradley Estate Co.*, 97 Minn. 130, 106 N. W. 338. See *First Nat. Bank v. Strait*, 65 Minn. 162, 167, 67 N. W. 987 (determination of claim in tort upon trial without objection).

³⁴ *First Nat. Bank v. Strait*, 65 Minn. 162, 167, 67 N. W. 987.

³⁵ *Blandin v. Brennin*, 106 Minn. 353, 119 N. W. 57.

upon to determine the probate of a will, it is acting upon the res of the estate, and, when an appeal is taken from the probate court by the executors to the district court, it removes the whole case to the district court, and all parties interested in the distribution are necessarily parties in the district court, and are entitled to be heard there. When the proponents take the case to the district court for the purpose of having that court probate the will, and determine that it was valid, they take it there with the burden upon them to prove its due execution and the capacity of the testator to make it at the time of such execution.³⁶

69. New trials—The district court may grant new trials of a part of the issues as in the case of actions originating in that court.³⁷ Evidence as to the genuineness of testator's signature to a will held to have been such as to have made it the duty of the trial court to grant a new trial.³⁸

70. Judgment in district court—Affirmance—Remand—Statute—Whenever the appellant fails to prosecute his appeal, or the order, judgment, or decree appealed from or brought up on certiorari is sustained by the district court on the merits, it shall enter judgment affirming the decision of the probate court, with costs. Upon filing in the probate court a certified transcript of the judgment of the district court, the same proceedings shall be had as if no appeal had been taken. But in case such order, judgment, or decree is reversed or modified, the district court shall make the order or decree which should have been made by the probate court, in case it can do so, and, if it cannot, it shall remand the case to the probate court, with direction to make such order or decree, or proceed as it may otherwise direct. Such final judgment shall be certified by the district court to the probate court, and upon filing the same in such court it shall proceed as directed by the district court if any direction is made. In case the judgment of the district court requires no action by the probate court, then such judgment shall be substituted in place of the original order, judgment, or decree, and like proceedings shall be had as when so ordered by the probate court. If the district court remands the case to the probate court with directions, the probate court shall comply with such directions in a summary manner, without notice.³⁹ The district court may render such judgment as the probate court ought to have rendered, but its jurisdiction is appellate, not original, and it exercises probate rather than common-law jurisdiction. It has no greater or different jurisdiction than the probate court had in the premises.⁴⁰ Whenever the order, judgment or decree appealed from is

³⁶ *In re Sweeney's Estate*, 94 Neb. 834, 144 N. W. 902.

³⁷ *Buck v. Buck*, 122 Minn. 463, 142 N. W. 729.

³⁸ *In re Murphy's Estate*, 148 Minn. 480, 181 N. W. 320.

³⁹ G. S. 1913, § 7497.

⁴⁰ *Berkey v. Judd*, 31 Minn. 271, 17 N. W. 618; *Huntsman v. Hooper*, 32 Minn. 163, 20 N. W. 127; *Graham v. Burch*, 47 Minn. 171, 49 N. W. 697; *Tracy v. Tracy*, 79 Minn. 267, 82 N. W. 635; *State v. Probate Court*, 83 Minn. 58, 85 N. W. 917; *Chadwick v. Dunham*, 83 Minn.

sustained by the district court on the merits, it shall enter judgment affirming the decision of the probate court, with costs.⁴¹ On an appeal from the probate court from an order involving the discretion of the probate court the district court should try the cause de novo and exercise its own discretion and not merely review the exercise of the discretion of the probate court upon the return made therefrom.⁴² Upon an appeal from an order allowing or refusing to allow the probate of a will the district court exercises probate jurisdiction to make such determination as the probate court ought to have made, but no other or greater. It cannot declare a trust under the will or determine the ultimate rights and interests of parties in the estate.⁴³ The validity of a claim to a whole or a part of an estate, formally allowed by the probate court, may be determined by the district court on appeal from a final decree, though no appeal was taken from the order allowing the claim.⁴⁴ On appeal from an order of the probate court allowing the final account of an administrator, the district court cannot determine the right of the administrator to compensation for services rendered or for disbursements made subsequent to the filing of his account in the probate court.⁴⁵ The district court may enter a judgment of affirmance where the appellant fails to appear and prosecute his appeal, or where the order, judgment or decree appealed from is sustained on the merits. Where the appellant does not appear and prosecute his appeal the district court is not required to hear evidence and determine the case on the merits. Whether both an affirmance and a dismissal of the appeal may be entered by the district court is doubtful. An application to be relieved from default in the prosecution of an appeal is addressed to the discretion of the district court.⁴⁶

71. Judgment against appellant and sureties on appeal bond—Statute—Whenever the order, judgment or decree appealed from is affirmed, judgment shall be rendered against the appellant and his sureties on the appeal bond, and execution may issue against him and his sureties.⁴⁷

366, 86 N. W. 351; *Wheaton v. Pope*, 91 Minn. 299, 305, 97 N. W. 1046; *Strauch v. Uhler*, 95 Minn. 304, 308, 104 N. W. 535; *Turner v. Fryberger*, 99 Minn. 236, 240, 107 N. W. 1133, 109 N. W. 229; *Fiske v. Lawton*, 124 Minn. 85, 92, 144 N. W. 455; *Hause v. O'Leary*, 136 Minn. 126, 161 N. W. 392; *Benz v. Rogers*, 141 Minn. 93, 169 N. W. 477. See *First Nat. Bank v. Strait*, 65 Minn. 162, 167, 67 N. W. 987 (Jurisdiction to determine claim in tort upon trial without objection).

⁴¹ *Tracy v. Tracy*, 79 Minn. 267, 272, 82 N. W. 635; *Hause v. O'Leary*, 136 Minn. 126, 161 N. W. 392.

⁴² *Washburn v. Van Steenwyk*, 32 Minn. 336, 355, 20 N. W. 324; *In re Mill's Estate*, 34 Minn. 296, 25 N. W. 631; *Strauch v. Uhler*, 95 Minn. 304, 104 N. W. 535; *Benz v. Rogers*, 141 Minn. 93, 169 N. W. 477.

⁴³ *Graham v. Burch*, 47 Minn. 171, 49 N. W. 697.

⁴⁴ *Knutsen v. Krook*, 111 Minn. 352, 127 N. W. 11.

⁴⁵ *Turner v. Fryberger*, 99 Minn. 236, 107 N. W. 1133, 109 N. W. 229.

⁴⁶ *Blandin v. Brennin*, 106 Minn. 353, 119 N. W. 57.

⁴⁷ G. S. 1913, § 7499.

72. Costs—Statute—The party prevailing on the appeal shall be entitled to costs and disbursements, to be taxed as in a civil action. If judgment be rendered against the estate, they shall be an adjudicated claim against it; and if the judgment be against a claimant against the estate, either for costs or on a counterclaim, execution may issue as in other cases.⁴⁸

73. Default in prosecuting appeal—An application to be relieved from default in the prosecution of an appeal is addressed to the discretion of the district court.⁴⁹

74. Certiorari—The district court has jurisdiction to issue a writ of certiorari to review any final order of the probate court from which no appeal is given by statute.⁵⁰

⁴⁸ G. S. 1913, § 7498; *Tracy v. Tracy*, 79 Minn. 267, 272, 82 N. W. 635; *Gilman v. Maxwell*, 79 Minn. 377, 380, 82 N. W. 669; *Casey v. Brabec*, 111 Minn. 43, 126 N. W. 401. See § 1139.

⁴⁹ *Blandin v. Brennan*, 106 Minn. 353, 119 N. W. 57.

⁵⁰ *State v. Probate Court*, 72 Minn. 165, 75 N. W. 123; *State v. Probate Court*, 142 Minn. 499, 172 N. W. 210. See § 905.



DESCENT AND DISTRIBUTION

IN GENERAL

75. Definitions—Descent is the devolution of the realty of an intestate to his heirs. Distribution is the devolution of the personalty of an intestate to his heirs.⁵¹

76. When right to inheritance accrues—The right to inherit property does not accrue until the death of the owner intestate and is governed by the law then in force. There are no heirs until the death of the owner.⁵² Until the ancestor dies there is no vested right in the heir and rules of descent may be changed by the legislature.⁵³ Presumptive heirs have no vested rights of inheritance of which they may not be deprived by the acts of their ancestor.⁵⁴

77. When title passes—The title to the real property of a decedent passes immediately upon his death to the heirs or devisees, subject to the claims of administration. The heirs or devisees have the right to the immediate possession, subject to the right of the representative to take possession under the statute for purposes of administration. No act or decree of court is necessary to vest them with title. It vests by operation of law.⁵⁵ If a representative is appointed the title to the personalty does not pass to the heir or legatee until it is duly assigned to him by a decree of distribution by the probate court.⁵⁶ The title to the personalty of a decedent, whether he dies testate or intestate, passes to his personal representative when appointed and relates back to the death of the decedent. It constitutes the primary fund for the payment of the claims of administration.⁵⁷ The rule that the title to personalty of

⁵¹ *State v. Willrich*, 72 Minn. 165, 75 N. W. 123. See, as to meaning of word "inherit," *Ann. Cas.* 1917C, 386.

⁵² *State v. Probate Court*, 102 Minn. 268, 287, 113 N. W. 888; *Sorenson v. Rasmussen*, 114 Minn. 324, 131 N. W. 325; *Moen v. Moen*, 16 S. D. 210, 92 N. W. 13.

⁵³ *Jefferson v. Fink*, 247 U. S. 288.

⁵⁴ *In re Reichel*, 148 Minn. 433, 182 N. W. 517.

⁵⁵ *Paine v. First Div., etc., Ry. Co.*, 14 Minn. 65 (49); *State v. Probate Court*, 25 Minn. 22, 25; *Greenwood v. Murray*, 26 Minn. 259, 261, 2 N. W. 945; *Noon v. Finnegan*, 29 Minn. 418, 420, 13 N. W. 197; *Farnham v. Thompson*, 34 Minn. 330, 336, 26 N. W. 9; *Sloggy v. Dilworth*, 38 Minn. 179, 183, 36 N. W. 451; *Hill v. Townley*, 45 Minn. 167, 47 N. W. 653; *Sparrow v. Pond*, 49 Minn. 412, 418, 52

N. W. 36; *Scott v. Wells*, 55 Minn. 274, 277, 56 N. W. 828; *Byrnes v. Sexton*, 62 Minn. 135, 138, 64 N. W. 155; *Fleming v. McCutcheon*, 85 Minn. 152, 156, 88 N. W. 433; *Kern v. Cooper*, 91 Minn. 121, 123, 97 N. W. 648; *Jenkins v. Jenkins*, 92 Minn. 310, 100 N. W. 7; *Lightbody v. Lammers*, 98 Minn. 203, 204, 108 N. W. 846; *Hanson v. Nygaard*, 105 Minn. 30, 38, 117 N. W. 235; *Wellner v. Eckstein*, 105 Minn. 444, 470, 117 N. W. 830; *Kolars v. Brown*, 108 Minn. 60, 121 N. W. 229; *Eyre v. Faribault*, 121 Minn. 233, 237, 141 N. W. 170; *Winters v. Ellefson*, 128 Minn. 3, 150 N. W. 171; *Glencoe Ditching Co. v. Martin*, 148 Minn. 176, 181 N. W. 108; 14 Cyc. 102; 18 C. J. 876. See §§ 1060, 1073, 1209.

⁵⁶ See §§ 1000, 1073.

⁵⁷ *State v. Probate Court*, 25 Minn. 22, 25; *Greenwood v. Murray*, 26 Minn. 259,

a decedent passes to his personal representative applies only to such property as constitutes assets for purposes of administration.⁵⁸ If no administrator is appointed the title to the personalty of an intestate passes directly to his heirs.⁵⁹ It is sometimes said that on the death of an intestate the title to his personalty remains in abeyance until the appointment of an administrator.⁶⁰ The distinction between real and personal property as to the mode of its succession is not founded in considerations of justice, practical convenience, or expediency, but is due wholly to the way in which the law of succession developed in England. It is an historical accident and is preserved by us merely as a matter of habit and mental inertia. In some states it has been wisely abolished.⁶¹

78. Right of inheritance statutory—Aliens—The descent and distribution of the property of a decedent is a matter within the exclusive control of the legislature, which may give or withhold the right as it sees fit.⁶² Inheritance is not an absolute or natural right, but the creature of statute.⁶³ At common law aliens are not entitled to inherit, but they are generally accorded the right by statute or treaty.⁶⁴

79. Governed by state law—The right to succeed to property of a decedent depends upon and is regulated by state rather than federal law.⁶⁵

80. Conflict of laws—The *lex rei sitæ* governs the descent of real property in case of intestacy.⁶⁶ The law of the domicile of the decedent at the time of his death governs the distribution of personal property in case of intestacy.⁶⁷

261, 2 N. W. 945; *Wellner v. Eckstein*, 105 Minn. 444, 470, 117 N. W. 830; 14 Cyc. 105; 18 C. J. 878. See §§ 735, 1060, 1073.

⁵⁸ See § 735.

⁵⁹ *Granger v. Harriman*, 89 Minn. 303, 94 N. W. 869; *Kern v. Cooper*, 91 Minn. 121, 123, 97 N. W. 648. See *Vail v. Anderson*, 61 Minn. 552, 554, 64 N. W. 47; *Cooper v. Hayward*, 71 Minn. 374, 74 N. W. 152; 112 Am. St. Rep. 727.

⁶⁰ *Parks v. Norris*, 101 Mich. 71, 59 N. W. 428.

⁶¹ See 27 A. & E. Ency. of Law (2 ed.) 295; 14 Cyc. 107; 15 Am. L. Rev. 512; 22 Id. 30, 57; *Woerner*, Am. Law of Adm., §§ 16, 337.

⁶² *Streeter v. Wilkinson*, 24 Minn. 288, 291; *Wellner v. Eckstein*, 105 Minn. 444, 448, 117 N. W. 830. See 18 C. J. 804; Ann. Cas. 1918A, 939.

⁶³ *Jones v. Jones*, 234 U. S. 615.

⁶⁴ See G. S. 1913, § 6696; 2 A. & E. Ency. of Law (2 ed.) 76; 2 C. J. 1057,

1061, 1065; 4 A. L. R. 1391; 11 A. L. R. 162 (right of alien enemy).

⁶⁵ *Uterhart v. United States*, 240 U. S. 598.

⁶⁶ *Prentiss v. Prentiss*, 14 Minn. 18 (5); *Washburn v. Van Steenwyk*, 32 Minn. 336, 20 N. W. 324; *Morin v. St. Paul, etc., Ry. Co.*, 33 Minn. 176, 179, 22 N. W. 251; *Boeing v. Owsley*, 122 Minn. 190, 142 N. W. 129; *Mechling v. McAllister*, 135 Minn. 357, 160 N. W. 1016; *Jones v. Jones*, 234 U. S. 615; 22 A. & E. Ency. of Law (2 ed.) 1359; 14 Cyc. 21; 18 C. J. 809.

⁶⁷ *Putnam v. Pitney*, 45 Minn. 242, 47 N. W. 790; *Harvey v. Great Northern Ry. Co.*, 50 Minn. 405, 407, 52 N. W. 905; *Fox v. Hicks*, 81 Minn. 197, 83 N. W. 538; *Gregory v. Lansing*, 115 Minn. 73, 131 N. W. 1010; *State v. Probate Court*, 128 Minn. 371, 150 N. W. 1094. See *Stromberg v. Stromberg*, 119 Minn. 325, 138 N. W. 428; *Ennis v. Smith*, 14 How.

81. Presumption of intestacy—In the absence of evidence to the contrary there is a presumption that a person died intestate and that land conveyed by his heirs descended to them.⁶⁸

82. Presumption of heirs—There is a presumption that a decedent left heirs and that his property descended to them.⁶⁹ Where a married child of an intestate dies first the law raises a presumption that the child left issue surviving the intestate.⁷⁰

83. Title of heir—An heir succeeds to the title of the decedent. He is not entitled to protection as a bona fide purchaser. If the decedent held the property subject to a trust his heir takes it subject to the trust.⁷¹

84. Heirs tenants in common—The heirs of an intestate take as tenants in common.⁷²

85. Domicil—Minors—The law of the domicil of a minor at the time of his death governs inheritance by his heirs. Where the absolute custody of a minor child is given to its mother upon her divorce from the father the domicil of the child follows that of the mother.⁷³

86. Meaning of "issue"—The word "issue" as used in our statutes of descent and distribution includes all the lawful lineal descendants of the ancestor and is not restricted to children.⁷⁴ It also probably includes adopted children and illegitimate children in certain cases.⁷⁵ It does not include stepchildren.⁷⁶

87. Stepfather and stepmother—A stepfather or stepmother is not a "father" or "mother" within the meaning of the statutes of descent and distribution.⁷⁷

88. Stepchildren—A stepchild is not entitled to inherit as a "child" or "issue" of its stepfather.⁷⁸

89. Inheritance by representation—Taking per stirpes or per capita—Next of kin standing in unequal degree to the intestate take per stirpes, but if they are all in equal degree they take per capita. The doctrine of

(U. S.) 400; 22 A. & E. Ency. of Law (2 ed.) 1355; 14 Cyc. 21; 18 C. J. 810.

⁶⁸ *Sherin v. Larson*, 28 Minn. 523, 525, 11 N. W. 70; *Barnes v. Gunter*, 111 Minn. 383, 394, 127 N. W. 398; *Richmond Cedar Woods v. Stringfellow*, 236 Fed. 264. See 14 Cyc. 20.

⁶⁹ *Barnes v. Gunter*, 111 Minn. 383, 394, 127 N. W. 398; *In re Friedman's Estate*, 178 Cal. 27, 172 Pac. 140; 22 A. & E. Ency. of Law (2 ed.) 1201; 14 Cyc. 99; 18 C. J. 873; *Ann. Cas.* 1913E, 383; *Ann. Cas.* 1915C, 1062.

⁷⁰ *Stennett v. Stennett*, 174 Iowa, 431, 156 N. W. 406.

⁷¹ *Wellendorf v. Wellendorf*, 120 Minn.

435, 139 N. W. 812; *Irvine v. Campbell*, 121 Minn. 192, 141 N. W. 108; *Colby v. Street*, 146 Minn. 290, 178 N. W. 599. See 14 Cyc. 104; 18 C. J. 876, 949.

⁷² *Sherin v. Larson*, 28 Minn. 523, 525, 11 N. W. 70; *Ziebarth v. Donaldson* (Minn.) 185 N. W. 377.

⁷³ *Fox v. Hicks*, 81 Minn. 197, 83 N. W. 538.

⁷⁴ G. S. 1913, § 9412 (8). See § 356.

⁷⁵ See §§ 92, 94.

⁷⁶ *Barrett v. Thielen*, 140 Minn. 266, 167 N. W. 1030.

⁷⁷ See § 343; 18 C. J. 830.

⁷⁸ *Barrett v. Thielen*, 140 Minn. 266, 167 N. W. 1030; 18 C. J. 830.

representation is one of necessity and is only resorted to when the next of kin are of unequal degree, to prevent the exclusion of those in the remoter degree. Prior to Revised Laws 1905 the statute made the change from the per stirpes rule to the per capita rule at the point where there were no living brothers or sisters and the first in the line of descent were nephews and nieces or kin of a more remote degree. The Revised Laws 1905 made the change from the per stirpes rule to the per capita rule where there were no living brothers or sisters, no living issue of any deceased brother or sister, and the first in the line of descent were kin of a more remote degree than a brother or sister. The amendment of 1917 repealed this change and re-established the former rule.⁷⁹

90. Degrees of kinship—How computed—Kindred of half blood—Statute—The degree of kindred shall be computed according to the rules of the civil law, and kindred of the half blood shall inherit equally with those of the whole blood in the same degree, unless the inheritance comes to the intestate by descent, devise, or gift from one of his ancestors, in which case all those who are not of the blood of such ancestors shall be excluded from such inheritance.⁸⁰ The statute applies to all cases falling within its terms and is not limited to cases in which the intestate does not leave issue or a widow, father, mother, brother or sister.⁸¹ The method of computing degrees of consanguinity by the civil law is to begin at either of the persons claiming relationship and count up to the common ancestor and then down to the other person, in the lineal course, calling it a degree for each person, both ascending and descending, and the degrees they stand from each other is the degree in which they are related.⁸² The method of computing degrees of kindred in the direct line is the same in the civil as in the common law. The difference arises only where the consanguinity is collateral.⁸³ This statute does not adopt the rules of the civil law for the determination of the kindred who are entitled to share in the estate of an intestate.⁸⁴ The statute abolishes the common-law distinction between kindred of the half blood and of the whole blood except as specified.⁸⁵ Kindred of the half blood in any degree inherit equally with those of the whole blood in the same degree. The right of kindred of the half blood is not limited to those only of one degree distant from the intestate.⁸⁶ The expression "kindred of the half blood" means the degree of relationship which exists between those who have only one parent in common. Two

⁷⁹ *Staubit v. Lambert*, 71 Minn. 11, 73 N. W. 511; *Swenson v. Lewison*, 135 Minn. 145, 160 N. W. 253. See §§ 110, 351; 18 C. J. 824.

⁸⁰ G. S. 1913, § 7242. See 27 A. & E. Ency. of Law (2 ed.) 310, 312; 14 Cyc. 35; 18 C. J. 823; *Woerner*, Am. Law of Adm. (2 ed.) §§ 64-70.

⁸¹ *Perkins v. Simonds*, 28 Wis. 90.

⁸² *Van Cleve v. Van Fossen*, 73 Mich. 342; 27 A. & E. Ency. of Law (2 ed.) 310; 14 Cyc. 34; 18 C. J. 823; *Woerner*, Am. Law of Adm. (2 ed.) § 72.

⁸³ *Brown v. Baraboo*, 90 Wis. 151, 62 N. W. 921.

⁸⁴ *Cooley v. Dewey*, 4 Pick. (Mass.) 93.

⁸⁵ *McCracken v. Rogers*, 6 Wis. 278.

⁸⁶ *Larrabee v. Tucker*, 116 Mass. 562.

brothers or sisters who have the same father but different mothers are kindred of the half blood. If they have the same father and mother they are kindred of the whole blood.⁸⁷ At common law collateral kindred of the half blood did not inherit from an intestate.⁸⁸ The limitation as to kindred of the half blood is not a general limitation on the right to inherit, but only applies in the particular case of the inheritance coming to the intestate as therein specified.⁸⁹ The exception in the statute does not establish a general rule of inheritance, but merely an exception to the right of kindred of the half blood. The person who is next of kin of the full blood of the intestate takes the inheritance, though not of the blood of the ancestor from whom it came to the intestate.⁹⁰ The exception in the statute "unless, etc." does not apply to a case where a surviving husband and half-sisters of the intestate are sole heirs, though such half sisters are not of the blood of the ancestor from whom the property was inherited.⁹¹ If there is only one next of kin he will inherit the whole estate without reference to his relationship to the ancestor from whom the inheritance to the intestate came. In other words the half blood are excluded only where there are more than one person in the same degree of kinship who are not all relatives of the blood of the ancestor from whom the inheritance came to the intestate. The half blood are excluded only where there are others in the same statutory class who are preferred by reason of being of the blood of the ancestor from whom the inheritance came to the intestate.⁹² The word "ancestors" in the statute means merely the persons from whom the inheritance comes directly, and not a progenitor, as in popular acceptance. A husband may be his wife's ancestor within the meaning of the statute.⁹³ In determining whether property is ancestral or non-ancestral courts follow the legal rather than the equitable title.⁹⁴ The exception in the statute possibly applies only to real estate.⁹⁵ The rights of a surviving spouse as statutory heir under R. L. 1905, § 3648 (G. S.

⁸⁷ 27 A. & E. Ency. of Law (2 ed.) 27; 14 Cyc. 35; 18 C. J. 825; Woerner, Am. Law of Adm. (2 ed.) § 70.

⁸⁸ 27 A. & E. Ency. of Law (2 ed.) 312; 14 Cyc. 45; 18 C. J. 825; Woerner, Am. Law of Adm. (2 ed.) § 70; 29 L. R. A. 541; 26 L. R. A. (N. S.) 603; L. R. A. 1916C, 902.

⁸⁹ In re Lynch's Estate, 132 Cal. 214, 64 Pac. 284. See 61 Am. Dec. 656; 29 L. R. A. 541; 26 L. R. A. (N. S.) 603; L. R. A. 1916C, 902; 9 R. C. L. 33; 27 A. & E. Ency. Law (2 ed.) 314; 14 Cyc. 35; 18 C. J. 825.

⁹⁰ In re Kirkendall's Estate, 43 Wis. 167.

⁹¹ In re Smith's Estate, 131 Cal. 433, 63 Pac. 729.

⁹² Ryan v. Andrews, 21 Mich. 235; Rowley v. Stray, 32 Mich. 70; Lyon v. Crego, 187 Mich. 625, 154 N. W. 65; In re Smith's Estate, 131 Cal. 433, 63 Pac. 729.

⁹³ Balley v. Balley, 25 Mich. 188; Cornett v. Hough, 136 Ind. 387, 35 N. E. 699; Buckingham v. Jacques, 37 Conn. 402, 404. See 14 Cyc. 34; L. R. A. 1916C, 905.

⁹⁴ Ann. Cas. 1914C, 407.

⁹⁵ Henderson v. Sherman, 47 Mich. 267, 273; In re Kirkendall's Estate, 43 Wis. 167. See Ross' Petition, 140 Wis. 330, 122 N. W. 809; Woerner, Am. Law of Adm. (2 ed.) § 73.

1913, § 7238), are not affected by this statute.⁹⁰ Where a widow who had married twice left surviving her a child by each marriage property given to her by her last husband descended to the two children as she was of the full blood as to both children.⁹⁷

91. Contracts—Renunciation—Religious orders—The statutes of descent and distribution may be superseded by contract.⁹⁸ Evidence held to justify a finding that a written instrument, purporting to be a relinquishment of a daughter's prospective right to inherit from her father's estate, was procured by the undue influence of the father, since deceased, and that another instrument of the same nature was not signed by the son of the deceased.⁹¹ A religious order may inherit by virtue of an agreement among its members to live in community and renounce for the benefit of the order individual rights of property, if liberty to withdraw from the order is retained and the community organization is authorized by statute.⁹⁹

92. Inheritance by and from adopted children—Statute—Upon adoption such child shall become the legal child of the persons adopting him, and they shall become his legal parents, with all the rights and duties between them of natural parents and legitimate child. By virtue of such adoption, he shall inherit from his adopting parents or their relatives the same as though he were the legitimate child of such parents, and shall not owe his natural parents or their relatives any legal duty; and, in case of his death intestate, the adopting parents and their relatives shall inherit his estate, as if they had been his parents and relatives in fact.¹ This statute applies to all adopted children whether adopted before or after its enactment.² The adopted child inherits from the adopting parents or their relatives in the same manner as if he were a natural born child of such parents.³ The adopted child is "issue" of the adopting parents within the statutes of descent and distribution.⁴ The word "relatives" in the statute undoubtedly includes collateral rel-

⁹⁰ *Boeing v. Owsley*, 122 Minn. 190, 142 N. W. 129.

⁹⁷ *In re McKenna's Estate*, 168 Cal. 339, 143 Pac. 605.

⁹⁸ *Appleby v. Appleby*, 100 Minn. 408, 419, 111 N. W. 305. See §§ 99, 105, 113.

⁹¹ *Bruski v. Bruski*, 148 Minn. 458, 182 N. W. 620.

⁹⁹ *Order of St. Benedict v. Steinhauer*, 234 U. S. 640.

¹ G. S. 1913, § 7156, Laws 1917, c. 222. See 27 A. & E. Ency. of Law (2 ed.) 333; 2 Ency. L. & P. 238; 1 Cyc. 931; 1 C. J. 1398; 1 R. C. L. 621; Woerner, Am. Law of Adm. (2 ed.) § 69; 9 Probate Reports Ann. 345; 32 Harv. L. Rev. 854.

² *Sorenson v. Rasmussen*, 114 Minn. 324, 131 N. W. 325.

³ *Odenbreit v. Uthelm*, 131 Minn. 56, 154 N. W. 741; *In re Reichel*, 148 Minn. 433, 182 N. W. 517; *Sewall v. Roberts*, 115 Mass. 262; *Buckley v. Frasier*, 153 Mass. 525, 27 N. E. 768; *In re Williams*, 102 Cal. 70, 36 Pac. 407; 27 A. & E. Ency. of Law (2 ed.) 333; 1 Cyc. 931; 1 C. J. 1398; Woerner, Am. Law of Adm. (2 ed.) § 69.

⁴ *Buckley v. Frasier*, 153 Mass. 525, 27 N. E. 768; *In re Newman's Estate*, 75 Cal. 213, 16 Pac. 887; *Riley v. Day*, 88 Kan. 503, 129 Pac. 524. See Ann. Cas. 1912A, 326; *In re Book's Will*, 89 N. J. Eq. 500, 105 Atl. 878.

atives so that an adopted child may inherit from the brothers and sisters of the adopting parents.⁵ An adopted child under our statute undoubtedly inherits from the ancestors of the adopting parents.⁶ An adopted child inherits from the natural children of the adopting parents.⁷ The natural parents and their relatives cannot inherit from the adopted child.⁸ The presumptive heirs of the adopting parents have no vested rights of inheritance of which they may not be deprived by the act of their parents in adopting a child who will have a right to inherit from them and their descendants.⁹ It is an open question in this state whether an adopted child may inherit from or through his natural parents. Our statute seems to transfer the child absolutely from one family to another for the purposes of inheritance. Under narrower statutes it is generally held that an adopted child may inherit from both natural and adopting parents.¹⁰ Where a child is adopted a second time he does not inherit from those who first adopted him. The first adoption is completely superseded by the second.¹¹ The statute provides that in case of the death of an adopted child intestate, the adopting parents and their relatives shall inherit his estate as if they had been his parents and relatives in fact.¹²

93. Same—Conflict of laws—For purposes of inheritance a foreign adoption will be recognized if not contrary to the public policy of the forum. An adoption legal where made will entitle the adopted child to inherit lands in another state as an "adopted child," though the adoption proceedings were not in accordance with the adoption laws of the latter state, provided they were not contrary to the public policy of such state or the inheritance is not forbidden by the local statute. The legality of the adoption is governed by the law of the place where it occurred. The status of the child as an "adopted child" is fixed by that law. What the adopted child shall inherit is determined by the law of the last domicile of the decedent in the case of personalty and by the *lex loci rei sitæ* in the case of realty.¹³ A state may, in its statutes of

⁵ *Anderson v. French*, 77 N. H. 509, 93 Atl. 1042. See *Wallace v. Noland*, 246 Ill. 535, 92 N. E. 956.

⁶ *Shick v. Howe*, 137 Iowa, 249, 114 N. W. 916.

⁷ *In re Reichel*, 148 Minn. 433, 182 N. W. 517; *Stearns v. Allen*, 183 Mass. 404, 67 N. E. 349; *In re Masterson's Estate*, 108 Wash. 307, 183 Pac. 93.

⁸ *In re Jobson's Estate*, 164 Cal. 312, 128 Pac. 938; 26 Harv. L. Rev. 546.

⁹ *In re Reichel*, 148 Minn. 433, 182 N. W. 517.

¹⁰ See *Boosey v. Darling*, 173 Cal. 221, 159 Pac. 606; *Klapp v. Pulsipher*, 197 Mich. 615, 164 N. W. 381; 27 A. & E.

Ency. of Law (2 ed.) 335; 2 Ency. L. & P. 241; 1 Cyc. 933, 1 C. J. 1400; 2 Minn. L. Rev. 301.

¹¹ *Klapp v. Pulsipher*, 197 Mich. 615, 164 N. W. 381. See 2 Minn. L. Rev. 301.

¹² See *Calhoun v. Bryant*, 28 S. D. 266, 133 N. W. 266; 27 A. & E. Ency. of Law (2 ed.) 334; 1 Cyc. 934; 1 C. J. 1401; 43 L. R. A. (N. S.) 1056; Ann. Cas. 1916C, 757; *Woerner*, Am. Law of Adm. (2 ed.) § 69.

¹³ *Calhoun v. Bryant*, 28 S. D. 266, 133 N. W. 266; *Anderson v. French*, 77 N. H. 509, 93 Atl. 1042; *Finley v. Brown*, 122 Tenn. 316, 123 S. W. 359; 22 A. & E. Ency. of Law (2 ed.) 1362; 14 Cyc. 21,

descent and distribution, exclude children adopted by proceedings in other states.¹⁴ A husband and wife living in Ohio and being childless adopted a child by an agreement which was valid in that state. They subsequently moved to this state bringing the child with them. The husband died leaving a will in which he made provision for the child. Thereafter the child died leaving an only child. After the death of the adopted child the wife died intestate. Held, that the child of the adopted child was entitled to share in the estate of the adopting wife as if the adopted child had been a daughter by blood; that, the estate having been reduced to personalty, the probate court had power to adjudge to whom the same should be apportioned, and, as an incident thereto, to determine the rights of the child of the adopted child under the contract, and, further, by its final decree, to award to appellant the share of the estate to which she was entitled under the contract whereby her parent was adopted; that the remedies for the enforcement of the contract were governed by the laws of this state.¹⁵

94. Inheritance by illegitimate children—Legitimation—Statute—An illegitimate child shall inherit from his mother the same as if born in lawful wedlock, and also from the person who, in writing and before a competent attesting witness, shall have declared himself to be his father; but such child shall not inherit from the kindred of either parent by right of representation, unless during his lifetime his parents intermarry, in which case he shall no longer be deemed illegitimate.¹⁶ The statute applies to children legitimated in the manner required by the statute before its enactment.¹⁷ The right of an illegitimate child to inherit as provided by the statute is not limited to cases where he is the only child, but he may share equally with legitimate children.¹⁸ An illegitimate child cannot inherit from his mother's ancestors or collateral kindred.¹⁹ He cannot inherit through his sister any part of

1 C. J. 1402; 1 R. C. L. 615; Woerner, Am. Law of Adm. (2 ed.) § 69; 21 L. R. A. (N. S.) 679; 25 Id. 1285; L. R. A. 1916A, 666; 16 Ann. Cas. 778; Ann. Cas. 1916B, 94; 118 Am. St. Rep. 672; 9 Probate Reports Ann. 351. See Brewer v. Browning, 115 Miss. 358, 76 So. 267.

¹⁴ Hood v. McGehee, 237 U. S. 611.

¹⁵ Fiske v. Lawton, 124 Minn. 85, 144 N. W. 455. See 21 L. R. A. (N. S.) 679; 25 Id. 1285; Ann. Cas. 1916B, 94; 30 Harv. L. Rev. 642; 32 Id. 854; Malaney v. Cameron, 99 Kan. 70, 161 Pac. 1180 (rights of child under an unexecuted contract of adoption).

¹⁶ G. S. 1913, § 7240. See 27 A. & E. Ency. of Law (2 ed.) 327; 5 Cyc. 641; 7

C. J. 960; 3 R. C. L. 775; Woerner, Am. Law of Adm. (2 ed.) § 75; Ann. Cas. 1917C, 826; Ann. Cas. 1914D, 577; 13 Prob. Rep. Ann. 375.

¹⁷ Alston v. Alston, 114 Iowa, 29, 86 N. W. 55; Moen v. Moen, 16 S. D. 210, 92 N. W. 13. See Sorenson v. Rasmussen, 114 Minn. 324, 131 N. W. 325.

¹⁸ Alexander v. Alexander, 31 Ala. 241; Earle v. Dawes, 3 Md. Cl. 230; Opdyke's Appeal, 49 Pa. St. 373; 27 A. & E. Ency. of Law (2 ed.) 328; 7 C. J. 961; Ann. Cas. 1917C, 828.

¹⁹ Pratt v. Atwood, 108 Mass. 40. See Woerner, Am. Law of Adm. (2 ed.) § 75; 7 C. J. 961; 13 Prob. Rep. Ann. 377; Ann. Cas. 1914D, 579; 23 L. R. A. 753.

her son's estate.²⁰ The statute is inapplicable to grandchildren. If an illegitimate child dies before his mother his children are not entitled to inherit her estate.²¹ The writing whereby a father acknowledges the paternity of an illegitimate child need not be in any particular form or made with any particular intent. It need not be made for the express purpose of acknowledging the paternity of the child. It may be sufficient though made in entire ignorance of the statute. The statute is remedial and should be construed liberally.²² The acknowledgment may be in the form of a letter written by the father and attested by a witness. If the letter is lost its contents may be proved by secondary evidence.²³ It is essential that the written acknowledgment of paternity should be signed by the attesting witness.²⁴ The statute impliedly requires that the person acknowledging the paternity should in fact be the real father.²⁵

95. Same—Conflict of laws—The law of the domicile of the person making the acknowledgment of paternity governs and not that of the domicile of the mother or child.²⁶ Where a bastard is legitimated according to the law of the domicile of the father and is thereby entitled to inherit as a legitimate child under such law the legitimation will be recognized in other states and he will be entitled to inherit both realty and personalty therein, unless such legitimation is contrary to the public policy or laws of the state where the property is situated. The legality of the legitimation is governed by the law of the domicile of the father. The status of the child is also governed by that law. What the child shall inherit is determined by the law of the last domicile of the decedent in the case of personalty and by the *lex rei sitæ* in the case of realty. The same principles govern as in the case of adoption. There are some cases which hold, contrary to the weight of authority, that the legitimation must be in accordance with the *lex rei sitæ* to entitle the child to inherit lands.²⁷ If the acts constituting the acknowledgment are in themselves such as the statute prescribes, they confer the

²⁰ *Haraden v. Larabee*, 113 Mass. 430.

²¹ *Curtis v. Hewins*, 11 Met. (Mass.) 294 (statute since changed). See contra, *In re Cameron*, 170 Mich. 578, 136 N. W. 451; *Foster v. Lee*, 172 Ala. 32, 55 So. 125; *Ann. Cas.* 1338.

²² *Pederson v. Christofferson*, 97 Minn. 491, 106 N. W. 958; *Richmond v. Taylor*, 151 Wis. 633, 139 N. W. 435.

²³ *Anderson v. Oleson*, 143 Minn. 328, 173 N. W. 665.

²⁴ *Williams v. Reid*, 130 Minn. 256, 153 N. W. 324, 593.

²⁵ *Williams v. Reid*, 130 Minn. 256, 153 N. W. 324, 593.

²⁶ *Blythe v. Ayres*, 96 Cal. 532, 31 Pac. 915; *Moen v. Moen*, 16 S. D. 210, 92 N. W. 13; *Richmond v. Taylor*, 151 Wis. 633, 139 N. W. 435; 22 A. & E. Ency. of Law (2 ed.) 1361; 7 C. J. 951.

²⁷ *Miller v. Miller*, 91 N. Y. 315; *Ross v. Ross*, 129 Mass. 243; *Moore v. Saxton*, 90 Conn. 164, 96 Atl. 960; 3 A. & E. Ency. of Law (2 ed.) 897; 22 Id. 1360; 7 C. J. 958; 5 R. C. L. 922; *Ann. Cas.* 1917C, 537; 56 Am. Dec. 261; 65 L. R. A. 181; 25 L. R. A. (N. S.) 1292. See *Moen v. Moen*, 16 S. D. 210, 92 N. W. 13; *Hall v. Gabbert*, 213 Ill. 208, 72 N. E. 806.

right to inherit in the state where real property is situated, without reference to the intent with which they were performed.²⁸

96. Inheritance from illegitimate children—Statute—If any illegitimate child dies intestate and without lawful issue, his estate shall descend to his mother, or, in case of her prior decease, to her heirs at law.²⁹ This statute abolishes the common-law rule against a mother inheriting from her illegitimate child.³⁰ By the common law a bastard is nullius filius. He can be the heir of no one, nor have heirs, excepting of his own body. He has no ancestors from whom any inheritable blood can be derived. The common law is in force here except as changed by statute.³¹ If an illegitimate child leaves no wife or issue and no relatives except a brother and sister of his mother and children of her deceased brothers, his estate goes to the uncle and aunt to the exclusion of cousins.³² The statute does not apply to the distribution of an estate of a person who is not an illegitimate child but one of the descendants of an illegitimate child.³³

97. Murderer cannot inherit from his victim—Statute—No person who feloniously takes or causes or procures another so to take the life of another shall inherit from such person or receive any interest in the estate of the decedent as surviving spouse, or take by devise or legacy from him any portion of his estate, and no beneficiary of any policy of insurance, or certificate of membership issued by any benevolent association or organization, payable upon the death or disability of any person, who in like manner takes or causes or procures to be taken the life upon which such policy or certificate is issued, or who causes or procures a disability of such person, shall take the proceeds of such policy or certificate; but in every instance mentioned in this act, all benefits that would accrue to any such person upon the death or disability of the person whose life is thus taken or who is thus disabled, shall become subject to distribution among the other heirs of such deceased person according to the law of descent and distribution in this state, in case of death, and in case of disability the benefits thereunder shall be paid to the disabled person. Provided, however, that an insurance company shall be discharged of all liability under a policy issued by it upon payment of the proceeds in accordance with the terms thereof, unless before such payment the company shall have knowledge that such beneficiary has taken or procured to be taken the life upon which such policy or certificate is issued, or that such beneficiary has caused or pro-

²⁸ *Moen v. Moen*, 16 S. D. 210, 92 N. W. 13.

²⁹ G. S. 1913, § 7241.

³⁰ *Cooley v. Dewey*, 4 Pick. (Mass.) 93; 27 A. & E. Ency. of Law (2 ed.) 332; 5 Cyc. 643; 7 C. J. 964.

³¹ *Sanford v. Marsh*, 180 Mass. 210, 62

N. E. 268; 27 A. & E. Ency. of Law (2 ed.) 327; 5 Cyc. 642; 7 C. J. 964; *Woerner Am. Law of Adm.* (2 ed.) § 75.

³² *Parkman v. McCarthy*, 149 Mass. 502, 21 N. E. 760.

³³ *Sanford v. Marsh*, 180 Mass. 210, 62 N. E. 268.

cured a disability of the person upon whose life such policy or certificate is issued.³⁴ A statute similar to ours has been held constitutional.³⁵

98. Real estate in general—Posthumous children—Statute—When any person dies seized of any lands, tenements, or hereditaments, or any right thereto, or entitled to any interest therein, in fee simple or for the life of another, not having lawfully devised the same, they shall descend as hereinafter provided. And for all the purposes of this chapter a posthumous child shall be considered as living at the death of its parent.³⁶ The statute merely lays down general rules of inheritance. It does not define how the status is to be created which gives the right to inherit. It does not define a husband, wife, parent or child.³⁷ The statutes of descent are not limited to legal titles. An equitable title to land descends in the same manner as a legal title.³⁸ Posthumous children inherit as if they had been living at the death of the parent.³⁹

DESCENT OF HOMESTEAD

99. Statute—The homestead of such decedent shall descend, free from any testamentary or other disposition thereof to which the surviving spouse, if there be one, shall not have consented in writing, and exempt from all debts which were not valid charges thereon at the time of such death, as follows:

1. If there be no surviving child, nor lawful issue of any deceased child, to the surviving spouse, if any.

2. If there be both a spouse and children, or issue of deceased children, surviving, then to such spouse for the term of his or her natural life, and remainder to such children and the issue of deceased children by right of representation.

3. In all other cases such homestead may be disposed of by decedent's last will. If not so disposed of, it shall descend the same as his other real estate, but exempt from his debts if inherited by his surviving children or the issue of children deceased.⁴⁰

100. Descent to surviving spouse—If there are no children, or lawful issue of a deceased child, the surviving spouse succeeds to the estate of the decedent in the homestead and takes an absolute estate in fee simple if such was the estate of the decedent.⁴¹ The estate of a sur-

³⁴ Laws 1917, c. 353. See *Wellner v. Eckstein*, 105 Minn. 444, 117 N. W. 830; *Gollnik v. Mengel*, 112 Minn. 349, 128 N. W. 292; 24 Harv. L. Rev. 227; 27 Id. 280; 28 Id. 426; 30 Id. 622; 15 Col. L. Rev. 260; 5 Minn. L. Rev. 76.

³⁵ *Hamblin v. Marchant*, 103 Kan. 508, 175 Pac. 678. See 6 A. L. R. 1408; 33 Harv. L. Rev. 475.

³⁶ G. S. 1913, § 7236.

³⁷ *Ross v. Ross*, 129 Mass. 243.

³⁸ *Doran v. Kennedy*, 122 Minn. 1, 141 N. W. 851.

³⁹ *Haydon v. Normandin*, 55 Mont. 539, 179 Pac. 460; 27 A. & E. Ency. of Law (2 ed.) 316; 14 Cyc. 39; *Woerner*, Am. Law of Adm. (2 ed.) § 74.

⁴⁰ G. S. 1913, § 7237.

⁴¹ *Wilson v. Proctor*, 28 Minn. 13, 8 N. W. 830; *Tracy v. Tracy*, 79 Minn. 267.

viving spouse in a homestead in case there are children or issue of deceased children is an absolute, unconditional estate for life.⁴² It is not qualified by or subject to a distinct or independent right of occupancy by the children. The surviving spouse has the sole right to the use, enjoyment and disposition of the homestead during life, without regard to the children.⁴³ The surviving spouse holds the homestead by the distinct tenure conferred by the statute.⁴⁴ It is a freehold estate.⁴⁵ The homestead rights of a widow are limited to the land which her husband had actually devoted to homestead purposes and was occupying as such at the time of his death.⁴⁶ The right of a surviving spouse and children to the homestead is no new right or estate. They have no general right of selection out of the whole body of the decedent's property. Their right is simply a transmission to them, or continuance in them, of the same right previously vested in the decedent and his family at the time of his death.⁴⁷ The rights of the surviving spouse do not depend on a formal selection of the homestead. These rights vest and become absolute at the death of the deceased spouse. The statutory provisions for setting it apart merely prescribe the procedure for segregating it from the remainder of the estate, and the representative is not entitled to the possession of it though it has not been so set apart.⁴⁸ The right of a surviving wife to a homestead is subject to a mortgage thereon for the purchase price though she did not join in the mortgage.⁴⁹ The right of a surviving spouse to a homestead may be controlled by an antenuptial agreement.⁵⁰ A surviving spouse cannot be allowed to waive a claim to the homestead fixed by law and take a part thereof to the injury of other parties interested in the distribution of the estate.⁵¹ The words "child" and "children" in the statute

82 N. W. 635; *Fraser v. Farmer's & Mechanic's Savings Bank*, 89 Minn. 482, 485, 95 N. W. 307. See *Rosbach v. Weldenbach*, 95 Minn. 343, 104 N. W. 137.

⁴² *Holbrook v. Wightman*, 31 Minn. 168, 17 N. W. 280; *McCarthy v. Van Der Mey*, 42 Minn. 189, 44 N. W. 53; *Gowan v. Fountain*, 50 Minn. 264, 52 N. W. 862; *Nordlund v. Dahlgren*, 130 Minn. 462, 153 N. W. 876; *Rux v. Adam*, 143 Minn. 35, 172 N. W. 912.

⁴³ *McCarthy v. Van Der Mey*, 42 Minn. 189, 44 N. W. 53. See *Lohiker v. Lohiker*, 112 Minn. 273, 127 N. W. 1122 (devise of homestead to wife with provision that certain children should have the right to occupy it with her "until they shall have homes of their own"—will construed—evidence held not to show any abandonment of their rights by the children).

⁴⁴ *Eaton v. Robbins*, 29 Minn. 327, 13 N. W. 143.

⁴⁵ *Hamilton v. Detroit*, 85 Minn. 83, 89, 88 N. W. 419.

⁴⁶ *King v. McCarthy*, 54 Minn. 190, 55 N. W. 960.

⁴⁷ *Wilson v. Proctor*, 28 Minn. 13, 8 N. W. 830.

⁴⁸ *Wilson v. Proctor*, 28 Minn. 13, 8 N. W. 830; *Nordlund v. Dahlgren*, 130 Minn. 462, 153 N. W. 876; *Rux v. Adam*, 143 Minn. 35, 172 N. W. 912. See § 808.

⁴⁹ G. S. 1913, § 6961; *Jones v. Tainter*, 15 Minn. 512 (423).

⁵⁰ *Appleby v. Appleby*, 100 Minn. 408, 429, 111 N. W. 305. See *Dunnell*, Minn. Digest and Supplements, § 4285.

⁵¹ *Mintzer v. St. Paul Trust Co.*, 45 Minn. 323, 47 N. W. 973. See *Nordlund v. Dahlgren*, 130 Minn. 462, 153 N. W. 876.

are not limited to those of the marriage existing at the time of the death of the decedent, but include children by a former marriage.⁵² They include adopted children but not stepchildren or illegitimate children of a male decedent. They include illegitimate children of a female decedent.⁵³ Where the surviving spouse is tenant for life of the homestead of the deceased spouse and also administrator of her estate, he cannot charge the estate with taxes paid by him upon the homestead nor with the value of improvements placed thereon by him.⁵⁴ The right of a surviving spouse and children to inherit a homestead may be cut off by an election of the surviving spouse to take under the will of the decedent.⁵⁵ If a homestead has been lost by removal and failure to file the statutory notice it does not descend to the surviving spouse as a homestead.⁵⁶

101. Assent of spouse to testamentary disposition—The interest of a surviving spouse in a homestead cannot be divested by the testamentary or other disposition thereof by the owner to which such survivor did not consent in writing.⁵⁷ The statutory consent in writing may be executed, at least if there are children, after the death of the testator.⁵⁸ The word "surviving" in the statute refers to the time of the death of the testator and not to the time of the execution of the will. The statute has no application where a spouse was living at the time of the execution of the will but died before the testator.⁵⁹ A will disposed of the homestead of the testator and made no provision for his wife. She never consented in writing to such disposition. She never elected to take under the will or otherwise and died after the testator and before the probate of the will. As there was no provision for her in the will she was not put to an election. Held, that the children had a right to insist that the homestead should descend under the statute unaffected by the will and that they were not estopped from attacking the validity of the will.⁶⁰

102. Descent to children—Children by a former marriage stand on the same footing as children of the marriage existing at the death of the decedent.⁶¹ The children have no independent right to occupy the homestead during the life of the surviving parent.⁶² The rights of the children may be cut off absolutely by an election of the surviving spouse

⁵² *Rosbach v. Weidenbach*, 95 Minn. 343, 346, 104 N. W. 137.

⁵³ See §§ 88, 92, 94.

⁵⁴ *Nordlund v. Dahlgren*, 130 Minn. 462, 153 N. W. 876. See § 729.

⁵⁵ See § 502.

⁵⁶ *Baillif v. Gerhard*, 40 Minn. 172, 41 N. W. 1059.

⁵⁷ G. S. 1913, § 7287; *Eaton v. Robbins*, 29 Minn. 327, 13 N. W. 143; *Holbrook v. Wightman*, 31 Minn. 168, 17 N.

W. 280; *Hawkinson v. Oleson*, 140 Minn. 298, 168 N. W. 13. See § 99.

⁵⁸ *Radl v. Radl*, 72 Minn. 81, 75 N. W. 111.

⁵⁹ *Penstock v. Wentworth*, 75 Minn. 2, 77 N. W. 420.

⁶⁰ *Hawkinson v. Oleson*, 140 Minn. 298, 168 N. W. 13.

⁶¹ *Rosbach v. Weidenbach*, 95 Minn. 343, 104 N. W. 137.

⁶² *McCarthy v. Van Der Mey*, 42 Minn. 189, 44 N. W. 53.

to take under a will.⁶³ The fee of the homestead vests in the children subject only to the life estate of the surviving spouse, and the title of the children to such remainder in fee cannot be waived, impaired or burdened by the surviving spouse either as life tenant or as administrator.⁶⁴ All the children share equally in the remainder after the life estate of the surviving spouse.⁶⁵

103. Exemption from debts of decedent and charges of administration—Disposition by will—A homestead descends to a surviving spouse and children exempt from all debts of the decedent which were not a valid charge thereon at the time of his death.⁶⁶ This exemption is absolute and does not depend upon the occupancy of the homestead as a home by the surviving spouse or children, but it is not exempt from the individual debts of the surviving spouse unless it is so occupied.⁶⁷ The homestead is not ordinarily an asset of the estate of the decedent for purposes of administration and neither the land itself nor the rents and profits thereof can be used to pay the debts of the decedent or the charges of administration.⁶⁸ A testator by his will directed that all his just debts be paid out of his estate, and bequeathed and devised all the rest, residue and remainder of his estate to his sister. This estate included the homestead of the testator, and he left no wife, or child, or issue of a deceased child. Held, that by the residuary devise the testator disposed of the homestead by his last will within the meaning of the third subdivision of the statute. In such a case the devisee takes the homestead free from claims of creditors of the decedent, unless the latter clearly indicates a contrary intention in his will.⁶⁹ Prior to Laws 1889, c. 46, the exemption of the homestead from the debts of the decedent was less extensive than under the present statute.⁷⁰ A testamentary disposition of a homestead assented to by the surviving spouse does not render it liable for the debts of the testator.⁷¹ Collateral heirs take subject to the debts of the decedent.⁷²

⁶³ See § 502.

⁶⁴ *Nordlund v. Dahlgren*, 130 Minn. 462, 153 N. W. 876.

⁶⁵ *Hawkinson v. Oleson*, 140 Minn. 298, 168 N. W. 13.

⁶⁶ G. S. 1913, § 7237; *Eaton v. Robins*, 29 Minn. 327, 13 N. W. 143; *Tracy v. Tracy*, 79 Minn. 267, 82 N. W. 635.

⁶⁷ *Holbrook v. Wightman*, 31 Minn. 168, 17 N. W. 280; *Gowan v. Fountain*, 50 Minn. 264, 52 N. W. 862; *Clark v. Dewey*, 71 Minn. 108, 73 N. W. 639; *Fraser v. Farmers & Mechanics Savings Bank*, 89 Minn. 482, 95 N. W. 307; *Larson v. Curran*, 121 Minn. 104, 140 N. W. 337.

⁶⁸ *Nordlund v. Dahlgren*, 130 Minn.

462, 153 N. W. 876. See §§ 782, 816, 821, 933, 953.

⁶⁹ *Larson v. Curran*, 121 Minn. 104, 140 N. W. 337.

⁷⁰ *McCarthy v. Van Der Mey*, 42 Minn. 180, 44 N. W. 53; *McGowan v. Baldwin*, 46 Minn. 477, 49 N. W. 251; *Dunn v. Stevens*, 62 Minn. 380, 64 N. W. 924, 65 N. W. 348.

⁷¹ *Eckstein v. Radl*, 72 Minn. 95, 75 N. W. 112; *Larson v. Curran*, 121 Minn. 104, 140 N. W. 337.

⁷² G. S. 1913, § 7237 (3); *Dunn v. Stevens*, 62 Minn. 380, 64 N. W. 924, 65 N. W. 348 (note on page 381). See *Larson v. Curran*, 121 Minn. 104, 140 N. W. 337.

DESCENT OF REAL PROPERTY OTHER THAN HOMESTEAD

104. Statute—The surviving spouse shall also inherit an undivided one-third of all other lands of which decedent at any time during coverture was seized or possessed, to the disposition whereof, by will or otherwise, such survivor shall not have consented in writing, except such as have been transferred or sold by judicial partition proceeding or appropriated to the payment of decedent's debts by either execution or judicial sale, by general assignment for the benefit of creditors, or by insolvency or bankruptcy proceedings, and subject to all judgment liens. But the lands so inherited shall be subject in their just proportion to such debts of the decedent as are not paid out of his personal estate. The residue of such other lands, or, if there be no surviving spouse, then the whole thereof, shall descend, subject to the debts of the intestate, in the manner following:

1. In equal shares to his surviving children, and to the lawful issue of his deceased children, by right of representation.

2. If there is no surviving child and no lawful issue of any deceased child, and the intestate leaves a surviving spouse, then the whole estate shall descend to such spouse.

3. If the intestate leaves no issue nor spouse, his estate shall descend to his father and mother in equal shares, or, if but one survives, then to such survivor.

4. If there be no surviving issue nor spouse, nor father nor mother, his estate shall descend in equal shares to his brothers and sisters, and to the lawful issue of any deceased brother or sister, by right of representation.

5. If the intestate leaves neither issue, spouse, father, mother, brother nor sister, his estate shall descend to his next kin in equal degree, except that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor more remote.

6. If any person dies leaving several children, or leaving one child and the issue of one or more other children, and any such surviving child dies under age and not having been married, all the estate that came to the deceased child by inheritance from such deceased parent shall descend in equal share to the other children of the same parent, and to the issue of any such other children who have died, by right of representation.

7. If, at the death of such child, who dies under age and not having been married, all the other children of his said parent being also dead, and any of them having left issue, the estate that came to such child

by inheritance from his said parent shall descend to all the issue of the other children of the same parent, according to the right of representation.

8. If the intestate leaves no spouse nor kindred, his estate shall escheat to the state.⁷³

105. To surviving spouse—A surviving spouse is entitled to an undivided one-third of all lands other than the homestead of which the decedent at any time during coverture was seized or possessed, to the disposition whereof, by will or otherwise, such survivor shall not have consented in writing, except such as have been transferred or sold by judicial partition proceeding or appropriated to the payment of decedent's debts by either execution or judicial sale, by general assignment for the benefit of creditors, or by insolvency or bankruptcy proceedings, and subject to all judgment liens.⁷⁴ The courts cannot read any exceptions into the statute.⁷⁵ A wife is probably entitled to her statutory third, though she abandons her husband, with or without cause, in the absence of a decree of divorce.⁷⁶ If there are no surviving children, or issue of deceased children, a surviving spouse takes the entire estate, unless there is a will, in which event, a surviving spouse, electing to take under the statute, is entitled to only one-third of the estate.⁷⁷ In determining whether there are surviving children or issue of deceased children within the foregoing rule children by a former marriage stand on the same footing as children of the marriage existing at the death of the decedent.⁷⁸ The interest of a surviving spouse under the statute is not the same thing as common-law dower or curtesy and nothing but confusion and error result from construing it with reference thereto. We are far from common-law dower in this state.⁷⁹ Some of our cases

⁷³ G. S. 1913, § 7238, as amended by Laws 1917, c. 272. As to descent of cemetery lots, see G. S. 1913, § 6288, as amended by Laws 1915, c. 233, § 1.

⁷⁴ G. S. 1913, § 7238; *Lake Phalen Land & Imp. Co.*, 66 Minn. 209, 212, 68 N. W. 974; *Hulett v. Carey*, 66 Minn. 327, 339, 69 N. W. 31; *Merrill v. Security Trust Co.*, 71 Minn. 61, 73 N. W. 640; *Kelly v. Slack*, 93 Minn. 489, 101 N. W. 797; *Griswold v. McGee*, 102 Minn. 114, 127, 112 N. W. 1020, 113 N. W. 382; *Wellner v. Eckstein*, 105 Minn. 444, 448, 117 N. W. 830; *Stromme v. Rieck*, 107 Minn. 177, 181, 119 N. W. 948; *Boeing v. Owsley*, 122 Minn. 190, 194, 142 N. W. 129; *State v. Probate Court*, 129 Minn. 442, 445, 152 N. W. 845. See, for the history of legislation on the subject in this state, *Desnoyer v. Jordan*, 27 Minn. 295, 298, 7 N. W. 140; *Washburn v. Van Steenwyk*,

32 Minn. 336, 20 N. W. 324; *In re Gotzian's Estate*, 34 Minn. 159, 24 N. W. 920; *Morrison v. Rice*, 35 Minn. 436, 29 N. W. 168; *Roach v. Dion*, 39 Minn. 449, 40 N. W. 512; *Lindley v. Groff*, 42 Minn. 346, 44 N. W. 196; *Griswold v. McGee*, 102 Minn. 114, 126, 112 N. W. 1020; *In re Evans' Estate*, 145 Minn. 252, 177 N. W. 126.

⁷⁵ *Wellner v. Eckstein*, 105 Minn. 444, 117 N. W. 830.

⁷⁶ *Sammons v. Higbie's Estate*, 103 Minn. 448, 453, 115 N. W. 265.

⁷⁷ *Kelly v. Slack*, 93 Minn. 489, 101 N. W. 797; *Johrden v. Pond*, 126 Minn. 247, 250, 148 N. W. 112.

⁷⁸ *Rosbach v. Weldenbach*, 95 Minn. 343, 346, 104 N. W. 137.

⁷⁹ *Scott v. Wells*, 55 Minn. 274, 56 N. W. 868; *Lake Phalen Land & Imp. Co. v. Lindeke*, 66 Minn. 209, 212, 68 N. W.

inaccurately speak of the statutory interest of a widow as a mere enlargement of dower, or otherwise assimilate it to dower.⁸⁰ Under the statute a surviving spouse is an "heir" of the deceased spouse.⁸¹ The statutory interest of a surviving spouse partakes of the nature of a distributive share of a next of kin, except that it cannot be defeated by transfer during coverture without the consent of the other spouse.⁸² It vests immediately on the death of the decedent by operation of law.⁸³ It is a freehold estate in fee simple if such was the estate of the decedent.⁸⁴ It may be devised or sold and conveyed and is subject to the lien of a judgment against the surviving spouse and to sale on execution like any other beneficial estate. A purchaser, whether at a voluntary or compulsory sale acquires the title of the surviving spouse, subject to the rights of the creditors of such spouse and also subject to the debts of the decedent and the charges of administration.⁸⁵ The statute is not limited to legal titles. An equitable title to land descends in the same manner as a legal title.⁸⁶ The rights of a surviving spouse as statutory heir under this statute are unaffected by the statute relating to the computation of degrees of kindred and excluding those of the half blood from an ancestral inheritance.⁸⁷ The interest of a surviving wife is subject to a mortgage executed by her husband alone before they were married.⁸⁸ The statutory interest of a surviving spouse is subject to all judgment liens attaching to the estate of the decedent before his death.⁸⁹ It is subject to all special liens existing at the death of

974; *Merrill v. Security Trust Co.*, 71 Minn. 61, 73 N. W. 640; *Johnson v. Minnesota Loan & Trust Co.*, 75 Minn. 4, 77 N. W. 421; *State v. Probate Court*, 137 Minn. 238, 163 N. W. 285; *In re Evans' Estate*, 145 Minn. 252, 177 N. W. 252.

⁸⁰ *In re Gotzian's Estate*, 34 Minn. 159, 24 N. W. 920; *In re Rausch's Will*, 35 Minn. 291, 28 N. W. 920; *Gowan v. Baldwin*, 46 Minn. 477, 479, 49 N. W. 251; *Dayton v. Corser*, 51 Minn. 406, 53 N. W. 717; *Holmes v. Holmes*, 54 Minn. 352, 56 N. W. 46; *Crowley v. C. N. Nelson Lumber Co.*, 66 Minn. 400, 69 N. W. 321; *Griswold v. McGee*, 102 Minn. 114, 128, 112 N. W. 1020; *Stromme v. Rteck*, 107 Minn. 177, 119 N. W. 948.

⁸¹ *Lake Phalen Land & Imp. Co. v. Lindeke*, 66 Minn. 209, 68 N. W. 974; *State v. Probate Court*, 137 Minn. 238, 163 N. W. 285; *In re Anderson's Estate*, 148 Minn. 44, 180 N. W. 1019; *Dana v. Dana*, 226 Mass. 297, 115 N. E. 418. See *L. R. A.* 1918A, 1108.

⁸² *Guerin v. Moore*, 25 Minn. 462; *Lake*

Phalen Land & Imp. Co. v. Lindeke, 66 Minn. 209, 212, 68 N. W. 974.

⁸³ *Scott v. Wells*, 55 Minn. 274, 277, 56 N. W. 828; *Byrnes v. Sexton*, 62 Minn. 135, 138, 64 N. W. 155; *Minneapolis & St. Louis R. Co.*, 91 Minn. 45, 48, 97 N. W. 452; *Griswold v. McGee*, 102 Minn. 114, 112 N. W. 1020, 113 N. W. 382; *Howe Lumber Co. v. Parker*, 105 Minn. 310, 117 N. W. 518. See §§ 77, 1060, 1073, 1209.

⁸⁴ *Crowley v. C. N. Nelson Lumber Co.*, 66 Minn. 400, 407, 69 N. W. 321; *Hamilton v. Detroit*, 85 Minn. 83, 89, 88 N. W. 419; *Griswold v. McGee*, 102 Minn. 114, 127, 112 N. W. 1020, 113 N. W. 382.

⁸⁵ *Byrnes v. Sexton*, 62 Minn. 135, 139, 64 N. W. 155.

⁸⁶ *Doran v. Kennedy*, 122 Minn. 1, 141 N. W. 851.

⁸⁷ *Boeing v. Owsley*, 122 Minn. 190, 142 N. W. 129.

⁸⁸ *Roach v. Dion*, 39 Minn. 449, 40 N. W. 512.

⁸⁹ *G. S.* 1913, § 7238; *Byrnes v. Sexton*, 62 Minn. 135, 64 N. W. 155 (not sub-

the decedent.⁹⁰ It is subject to a purchase-money mortgage or vendor's lien.⁹¹ It is subject to the debts of the decedent and the charges of administration. In other words it is an asset of the estate of the decedent for the purposes of administration.⁹² This liability to the charges of administration is enforceable only in the probate court.⁹³ The interest of a surviving spouse is liable to exonerate other real estate from a mortgage thereon.⁹⁴ It is subject to the inheritance tax.⁹⁵ It may be waived by an antenuptial agreement.⁹⁶ The surviving spouse does not take lands which have been transferred or sold by judicial partition proceeding or appropriated to the payment of decedent's debts by either execution or judicial sale, by general assignment for the benefit of creditors, or by insolvency or bankruptcy proceedings.⁹⁷ The interest of a wife of a partner in firm realty is conditional on the winding up of the firm affairs.⁹⁸ Under a former statute the statutory interest of a surviving wife was subject to a mortgage executed by her husband during coverture without her joining.⁹⁹ Under a former statute a surviving wife was only entitled to one-third of the real estate of which her husband died seized and her interest was cut off by his sole deed during coverture.¹ Where there is a will a surviving spouse may elect to take either under the will or the statute.²

106. Inchoate interest of one spouse in the realty of another—By virtue of G. S. 1913, § 7238, a husband and wife have a certain inchoate interest in the real property of each other while they are both living. In some of our cases this interest has been inaccurately characterized as a

ject to judgment recovered against decedent before his death but not docketed until thereafter). See *Dewing v. Dewing*, 112 Minn. 316, 127 N. W. 1051 (fraudulent judgments to defeat wife's interest).

⁹⁰ *Byrnes v. Sexton*, 62 Minn. 135, 139, 64 N. W. 155.

⁹¹ See *Jones v. Tainter*, 15 Minn. 512 (423); *Northwestern Trust Co. v. Ryan*, 115 Minn. 143, 132 N. W. 202; 52 L. R. A. (N. S.) 540.

⁹² *Scott v. Wells*, 55 Minn. 274, 56 N. W. 828; *Byrnes v. Sexton*, 62 Minn. 135, 64 N. W. 155; *Lake Phalen Land & Imp. Co. v. Lindeke*, 66 Minn. 209, 212, 68 N. W. 974; *Merrill v. Security Trust Co.*, 71 Minn. 61, 73 N. W. 640; *Johnson v. Minnesota Loan & Trust Co.*, 75 Minn. 4, 77 N. W. 421; *Keith v. Mellenthin*, 92 Minn. 527, 529, 100 N. W. 366; *Kelly v. Slack*, 93 Minn. 489, 101 N. W. 797. In *Goodwin v. Kumm*, 43 Minn. 403, 45 N. W. 853, it was held that only the lands of which the decedent died seized or pos-

sessed were subject to the payment of his debts. This case was overruled by *Johnson v. Minnesota Loan & Trust Co.*, 75 Minn. 4, 77 N. W. 421.

⁹³ *Goodwin v. Kumm*, 43 Minn. 403, 45 N. W. 853; *Luse v. Reed*, 63 Minn. 5, 65 N. W. 91; *Johnson v. Minnesota Loan & Trust Co.*, 75 Minn. 4, 77 N. W. 421.

⁹⁴ *Staigg v. Atkinson*, 144 Mass. 564, 12 N. E. 354.

⁹⁵ *State v. Probate Court*, 137 Minn. 238, 163 N. W. 285. See *Dana v. Dana*, 226 Mass. 297, 115 N. W. 418.

⁹⁶ *Desnoyer v. Jordan*, 27 Minn. 295, 7 N. W. 140; *In re Malchow's Estate*, 143 Minn. 53, 172 N. W. 915. See *Dunnell*, Minn. Digest and Supplements, § 4285.

⁹⁷ See § 104.

⁹⁸ *Woodward-Holmes Co. v. Nudd*, 58 Minn. 236, 59 N. W. 1010.

⁹⁹ *Roach v. Dion*, 39 Minn. 449, 40 N. W. 512.

¹ *Morrison v. Rice*, 35 Minn. 436, 29 N. W. 168.

² See §§ 495-523.

mere enlargement of common-law dower and curtesy and to be construed accordingly, but in fact the interest is purely statutory and essentially different from dower or curtesy. It is *sui generis* and should be construed without reference to common-law rules regarding dower or curtesy.³ During the life of the parties this interest is inchoate and contingent. It is not an estate or vested interest. It is a mere expectancy or possibility, incident to the marriage relation.⁴ Upon the death of a spouse the interest becomes vested at once and becomes such an estate in the land as the decedent had.⁵ Until it becomes vested at the death of the owner this interest is subject to the unrestricted control of the legislature. It may be enlarged, or diminished, or entirely taken away.⁶ While the interest is a mere expectancy prior to the death of the owner it is an interest which the law recognizes and which the husband or wife may protect.⁷ It is an incumbrance within a covenant against incumbrances.⁸ It is not within the recording act.⁹ It is cut off by an execution sale against the decedent prior to his death.¹⁰ It is cut off by insolvency or bankruptcy proceedings or an assignment for

³ See § 105.

⁴ *Guerin v. Moore*, 25 Minn. 462; *In re Rausch's Will*, 35 Minn. 291, 28 N. W. 920; *Madson v. Madson*, 69 Minn. 37, 40, 71 N. W. 824; *Hamilton v. Detroit*, 85 Minn. 83, 88, 88 N. W. 419; *Griswold v. McGee*, 102 Minn. 114, 112 N. W. 1020, 113 N. W. 382; *Stitt v. Smith*, 102 Minn. 253, 113 N. W. 652; *State v. Hart*, 104 Minn. 88, 111, 116 N. W. 212.

⁵ See § 105.

⁶ *Guerin v. Moore*, 25 Minn. 462; *Desnoyer v. Jordan*, 27 Minn. 295, 299, 7 N. W. 140; *Morrison v. Rice*, 35 Minn. 436, 29 N. W. 168; *Wistar v. Foster*, 46 Minn. 484, 49 N. W. 247; *Griswold v. McGee*, 102 Minn. 114, 112 N. W. 1020, 113 N. W. 382.

⁷ *Williams v. Stewart*, 25 Minn. 516 (right to redeem from foreclosure); *Martin v. Sprague*, 29 Minn. 53, 11 N. W. 143 (id.); *Roberts v. Meighen*, 74 Minn. 273, 77 N. W. 139 (id.); *Tracy v. Tracy*, 79 Minn. 267, 271, 82 N. W. 635 (appeal from probate of will); *Minneapolis & St. Louis R. Co. v. Lund*, 91 Minn. 45, 97 N. W. 452 (wife may defend an action against herself and husband to quiet title to land, though perhaps she could not maintain an affirmative action to recover her interest prior to the death of her husband); *Kopp v. Thele*, 104 Minn. 267,

116 N. W. 472 (redemption from foreclosure); *Slingerland v. Slingerland*, 109 Minn. 407, 124 N. W. 19 (wife may maintain action while husband is still alive to set aside an antenuptial agreement); *Dewing v. Dewing*, 112 Minn. 316, 127 N. W. 1051 (action by wife to set aside judgments and to restrain enforcement thereof—conspiracy to defraud wife of her statutory interest); *Northwestern Trust Co. v. Ryan*, 115 Minn. 143, 132 N. W. 202 (redemption from foreclosure of a purchase-money mortgage); *Souther v. Northwestern Telephone Exchange Co.*, 118 Minn. 102, 136 N. W. 571 (wife resisting trespass on husband's land).

⁸ *Crowley v. C. N. Nelson Lumber Co.*, 66 Minn. 400, 69 N. W. 321.

⁹ *Snell v. Snell*, 54 Minn. 285, 55 N. W. 1131.

¹⁰ *Aretz v. Kloos*, 89 Minn. 432, 440, 95 N. W. 216, 769; *Griswold v. McGee*, 102 Minn. 114, 112 N. W. 1020, 113 N. W. 382. Prior to Laws 1901, c. 33, the rule was otherwise. *Dayton v. Corser*, 51 Minn. 406, 53 N. W. 717; *Merrill v. Security Trust Co.*, 71 Minn. 61, 65, 73 N. W. 640; *Roberts v. Meighen*, 74 Minn. 273, 277, 77 N. W. 139; *Johnson v. Minnesota Loan & Trust Co.*, 75 Minn. 4, 7, 77 N. W. 421; *Aretz v. Kloos*, 89 Minn. 432, 440, 95 N. W. 216, 769. See § 105.

the benefit of creditors.¹¹ A wife loses her interest by a judgment against her husband that he is not the owner of land though she is not a party to the action in which the judgment is rendered.¹² The inchoate interest of a wife of a partner in firm realty is conditional on the winding up of the firm affairs.¹³ The interest may be lost by estoppel.¹⁴ It cannot be released by agreement between husband and wife during coverture.¹⁵ A husband and wife occupy a fiduciary relation toward each other as respects this statutory interest in each other's property.¹⁶ The statutes of this state relating to the reciprocal rights of husband and wife in each other's property show an intention to secure equality between them and protection of each from the acts of the other.¹⁷ Prior to Laws 1905, c. 255, the inchoate interest of a husband in the realty of his wife was greater than her interest in his.¹⁸ The inchoate interest of a wife in her husband's realty does not make her a necessary party to an action against him involving the title, but if she is made a party she may assert and defend her interest.¹⁹ A wife may lose her expectancy by the cancelation of an executory contract for the sale of realty.²⁰ Under a contract for the sale of lands by the terms of which the vendee pays part of the purchase price, and covenants to pay the deferred payments and taxes and assessments, and has the right of possession, and enters and makes improvements, the vendee has an equitable title to which the wife's statutory marital right attaches; and this is so though the contract provides that the vendor could convey to the vendee's assignees, upon the surrender of the contract, regardless of any agreement or relation between the vendor and others taking from or through him. The plaintiff, the wife of the vendee in such a contract, sued the defendant, the vendor, upon the death of her husband, claiming that her husband and the defendant had conspired to defraud her of her marital right by canceling the contract in which the vendee was in default and conveying directly to a purchaser whom the vendee had se-

¹¹ G. S. 1913, § 7238; *Merrill v. Security Trust Co.*, 71 Minn. 61, 73 N. W. 640. See *Kinney v. Sharvey*, 48 Minn. 93, 50 N. W. 1025; *Williamson v. Selden*, 53 Minn. 73, 77, 54 N. W. 1055.

¹² *Stitt v. Smith*, 102 Minn. 253, 113 N. W. 632.

¹³ *Woodward-Holmes Co. v. Nudd*, 58 Minn. 236, 59 N. W. 1010.

¹⁴ *Holcomb v. Independent School District*, 67 Minn. 321, 69 N. W. 1067. See *Madson v. Madson*, 69 Minn. 37, 71 N. W. 824.

¹⁵ *In re Rausch's Will*, 35 Minn. 291, 28 N. W. 920; *Erickson v. Robertson*, 116 Minn. 90, 133 N. W. 164.

¹⁶ *State v. Probate Court*, 129 Minn. 442, 152 N. W. 845.* See *Dewing v. Dew-*

ing, 112 Minn. 316, 127 N. W. 1051; *Boeing v. Owsley*, 122 Minn. 190, 202, 142 N. W. 129; *Smith v. Wold*, 125 Minn. 190, 145 N. W. 1067. See *In re Malchow's Estate*, 143 Minn. 53, 172 N. W. 915.

¹⁷ *Boeing v. Owsley*, 122 Minn. 190, 202, 142 N. W. 129.

¹⁸ *Lowe v. Lowe*, 83 Minn. 206, 209, 86 N. W. 11.

¹⁹ *Minneapolis & St. Louis R. Co. v. Lund*, 91 Minn. 45, 97 N. W. 452; *Stitt v. Smith*, 102 Minn. 253, 113 N. W. 632. See *Herberger v. Zion*, 129 Minn. 217, 152 N. W. 268; *Dunnell*, Minn. Pl. (2 ed.) § 111.

²⁰ *Wellington v. St. Paul, etc., Ry. Co.*, 123 Minn. 483, 144 N. W. 222.

cured. Held, that if the plaintiff could maintain an action at law to recover damages she must show that the lands had passed to innocent purchasers.²¹

107. Consent in writing to other disposition—The signature of a wife as a witness to an executory contract for the sale of realty, she being in no way referred to in the body of the contract as a party thereto, does not constitute a written consent to the sale on her part within the meaning of the statute.²² A quitclaim deed signed by husband and wife will bar the interest of the wife.²³ A wife loses her interest if she joins in the deed of her husband though she does not join in the covenants thereof.²⁴ A power of attorney signed by husband and wife has been held to authorize a conveyance that cut off the inchoate interest of the wife.²⁵ A written consent to other disposition does not require a consideration to support it. Such a consent is valid though given in furtherance of a void written agreement between husband and wife, by which each, in terms, released all interest in each other's real property, the wife having performed her part of the agreement.²⁶

108. To father and mother—If an intestate leaves no issue or spouse his estate descends to his father and mother in equal shares, or, if but one survives, then to such survivor.²⁷ The word "issue" as here used includes all lawful lineal descendants without limit, and is not restricted to children.²⁸ Prior to the revision of 1905 the father took the entire estate to the exclusion of the mother.²⁹ A stepfather or stepmother is not a father or mother within the meaning of this statute.³⁰

109. To brothers and sisters and children of deceased brothers and sisters—If an intestate leaves no issue, or spouse, or father or mother, his estate descends in equal shares to his brothers and sisters, and to the lawful issue of any deceased brother or sister, by right of representation.³¹ A stepfather or stepmother is not a father or mother within the meaning of this subdivision of the statute.³² The word "issue" as here used includes all lawful lineal descendants without limit, and is not restricted to children.³³ Under similar statutes where the word "children" is used in place of "issue" grandchildren are not included.³⁴ The

²¹ *Wellington v. St. Paul, etc., Ry. Co.*, 123 Minn. 483, 144 N. W. 222.

²² *Stromme v. Bieck*, 107 Minn. 177, 119 N. W. 948.

²³ *Ortman v. Chute*, 57 Minn. 452, 59 N. W. 533.

²⁴ *Sandwich Mfg. Co. v. Zellmer*, 48 Minn. 408, 51 N. W. 379.

²⁵ *Snell v. Weyerhauser*, 71 Minn. 57, 73 N. W. 633.

²⁶ *Erickson v. Robertson*, 116 Minn. 90, 133 N. W. 164.

²⁷ § 104; 18 C. J. 828.

²⁸ G. S. 1913, § 9412 (8).

²⁹ *Fox v. Hicks*, 81 Minn. 197, 206, 83 N. W. 538.

³⁰ See § 87.

³¹ § 104. As to brothers and sisters of the half blood, see § 90.

³² See § 87.

³³ G. S. 1913, § 9412 (8).

³⁴ *In re Chapoton's Estate*, 104 Mich. 11, 16 N. W. 892; *Noteware v. Colton*, 95 Neb. 541, 145 N. W. 993.

word "issue" as here used probably includes adopted children.³⁵ It includes an illegitimate child of a female intestate but not an illegitimate child of a male intestate unless the child has been legitimated.³⁶ Children of a deceased brother or sister take directly from the decedent and not through their parents and are not affected by acts of their parents in relation to the property.³⁷ There is great conflict of authority as to whether they take free of claims of the estate against their immediate ancestor. The question is an open one in this state.³⁸ They take subject to any advancements made by the decedent to their immediate ancestor.³⁹

110. To next of kin—Nephews and nieces—Cousins—If an intestate leaves neither issue, spouse, father, mother, brother or sister, his estate descends to his next of kin in equal degree, except that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor are preferred to those claiming through an ancestor more remote.⁴⁰ Under this subdivision nephews and nieces take per capita and not by representation. In other words they take in equal shares though they are children of different deceased brothers and sisters. The rule was otherwise under Revised Laws 1905. The amendment of 1917 repealed the change made by Revised Laws 1905.⁴¹ First cousins take to the exclusion of second cousins.⁴² Next of kin of equal degree, however remote, are entitled to inherit, and they take per capita.⁴³

111. Surviving child dying under age and unmarried—If an intestate leaves several children, or one child and the issue of one or more other children, and any such surviving child dies under age and not having been married, all the estate that came to such child by inheritance from the intestate descends in equal share to the other children of the intestate, and to the issue of any such other children who have died, by right of representation.⁴⁴

³⁵ See § 92; *Buckley v. Frasier*, 153 Mass. 525, 27 N. E. 768.

³⁶ See § 94.

³⁷ *Barnard v. Bilby* (Okla.) 171 Pac. 444.

³⁸ See 1 A. L. R. 1037.

³⁹ See § 118.

⁴⁰ § 104; *Yates v. Shern*, 84 Minn. 161, 86 N. W. 1004; *Hemenway v. Draper*, 91 Minn. 235, 97 N. W. 874; *Swenson v. Lewison*, 135 Minn. 145, 160 N. W. 253.

⁴¹ *Staubitz v. Lambert*, 71 Minn. 11, 73 N. W. 511; *Swenson v. Lewison*, 135

Minn. 145, 160 N. W. 253. See 18 C. J. 824.

⁴² *In re Klein's Estate*, 152 Mich. 420, 116 N. E. 394; *Conklin v. Conklin*, 165 Mich. 571, 131 N. W. 154. See 18 C. J. 837.

⁴³ *In re Nigro's Estate*, 172 Cal. 474, 156 Pac. 1019. See 18 C. J. 824.

⁴⁴ § 104; *St. Paul Gaslight Co. v. Kenny*, 97 Minn. 150, 106 N. W. 344; *Nash v. Cutler*, 16 Pick. (Mass.) 491; *Burke v. Burke*, 34 Mich. 451; *Ingersoll v. Vinton*, 94 Neb. 98, 142 N. W. 686. See 18 C. J. 820.

DISTRIBUTION OF PERSONAL PROPERTY

112. Statute—When any person dies owning personal property, or any interest therein, the same shall be disposed of and distributed as follows:

1. The widow shall be allowed the wearing apparel of her deceased husband, his household furniture not exceeding five hundred dollars in value, and other personal property not exceeding the same amount, both to be selected by her; and she shall receive such allowances when she takes the provisions made for her by her husband's will as well as when he dies intestate.

2. In case there is no surviving spouse, then the minor children, if any, shall receive the same allowances, to be selected by their guardian.

3. The widow or children, or both, constituting the family of the decedent, shall have such reasonable allowance out of his personal estate as the probate court deems necessary for their maintenance during the settlement of the estate, according to their circumstances, which in case of an insolvent estate shall not be longer than one year after administration is granted, nor, in any case, after the distributive share of the widow in the residue of the personal estate has been assigned to her; and such reasonable allowance may be made by the court when the husband or father has left a will, as well as when he dies intestate, except when the testator makes provision in his will specifically in lieu of all other allowances.

4. If from the inventory of an intestate estate it appears that the value of the whole estate does not exceed the sum of one hundred and fifty dollars in addition to the allowances made for the widow and children, the court, after the payment of the funeral charges and expenses of administration, shall assign for the use and support of the widow or the children, or both, constituting the family of the decedent, the whole of said estate.

5. If the personal estate amounts to more than the allowances mentioned in this section, the excess thereof, after the payment of the funeral charges and expenses of administration, shall be applied to the payment of the decedent's debts.

6. The residue, if any, of the personal estate shall be distributed as follows: one-third thereof to the surviving spouse, if any, free from any testamentary disposition thereof to which such survivor shall not have consented in writing; the remainder of such residue, or, if there be no surviving spouse, then the whole thereof, except as otherwise disposed of by will, shall be distributed in the same proportions to the same persons and for the same purposes as prescribed for descent of real estate by § 7238 (104 *supra*) subds. 1-7; provided, however, that if the intes-

tate leaves no spouse nor kindred, his personal property, if any, shall escheat to the state.

7. All the provisions of this section shall apply as well to a surviving husband as to a surviving wife.⁴⁵

113. Wearing apparel—Furniture, etc.—The right to this allowance is absolute and vests immediately upon the death of the husband and without any selection by the widow. A selection is necessary only as a designation of the particular property she elects to claim. The abandonment of a husband by a wife, whether with or without cause, does not, in the absence of a divorce, forfeit her right to the allowance. She may waive her rights by declining or refusing to make a selection, or be estopped from asserting them by standing by and without protest permitting the property to be disposed of in administration proceedings.⁴⁶ The statute expressly provides that the right to the allowance shall not be lost by an election to take under a will. The statute applies whether the decedent died testate or intestate.⁴⁷ The allowance does not rest in the discretion of the probate court in any sense but is a matter of absolute right. No order of court is necessary.⁴⁸ All that the probate court is called upon to do with reference to the property is to segregate it from the rest of the estate and order the executor or administrator to deliver it to the widow.⁴⁹ A selection by a widow of such property as she was entitled to under this provision and a sale thereof by her, without any prior allowance by the probate court, has been sustained.⁵⁰ If the widow dies before the property "allowed" to her by the statute has been set apart by order of the probate court, or before she has selected it, the right of selection survives to her personal representative.⁵¹ The widow of a non-resident decedent is entitled to the statutory allowance out of the property of her husband found in this state.⁵² The right to the allowance may be cut off by an antenuptial agreement.⁵³

⁴⁵ G. S. 1913, § 7243, as amended by Laws 1915, cc. 331, 350; Laws 1921, c. 173.

⁴⁶ *Sammons v. Higble's Estate*, 103 Minn. 448, 115 N. W. 265; *Rickert v. Wardell*, 142 Minn. 96, 170 N. W. 915.

⁴⁷ *Horbach v. Horbach*, 127 Minn. 223, 149 N. W. 303; *Blakeman v. Blakeman*, 64 Minn. 315, 317, 67 N. W. 69; *In re O'Shea's Estate*, 85 Neb. 156, 122 N. W. 881; *In re Leavitt's Estate*, 85 Neb. 521, 124 N. W. 114.

⁴⁸ *Redford v. Redford*, 45 Minn. 48, 47 N. W. 308; *Rickert v. Wardell*, 142 Minn. 96, 170 N. W. 915; *Barrett v. Helm* (Minn.) 188 N. W. 207.

⁴⁹ *Stromberg v. Stromberg*, 119 Minn. 325, 138 N. W. 428.

⁵⁰ *Benjamin v. Laroche*, 39 Minn. 334, 40 N. W. 156.

⁵¹ *Sammons v. Higble's Estate*, 103 Minn. 448, 115 N. W. 265; *Nordlund v. Dahlgren*, 130 Minn. 462, 153 N. W. 876; *Pourpore v. Stone-Ordean-Wells Co.*, 132 Minn. 409, 157 N. W. 648. See *Benjamin v. Laroche*, 39 Minn. 334, 40 N. W. 156.

⁵² *Stromberg v. Stromberg*, 119 Minn. 325, 138 N. W. 428; *Barrett v. Helm* (Minn.) 188 N. W. 207. See *Bigelow v. Booth*, 38 S. D. 107, 160 N. W. 525.

⁵³ *In re Malchow's Estate*, 143 Minn. 53, 172 N. W. 915; *In re Deller's Estate*, 141 Wis. 255, 124 N. W. 278. See *Dunnell*, Minn. Digest and Supplements, § 4285.

It may be waived by a family settlement.⁵⁴ The right of a surviving husband to select personal property to the value of five hundred dollars, if not exercised in his lifetime, may be exercised by his administrator.⁵⁵ The allowance is confined to the articles specified. The widow cannot select other property or money in lieu thereof.⁵⁶ The property to which a widow is entitled under this subdivision is not an asset of the estate or subject to administration and is no part of the residue to be distributed. It is not liable for the payment of claims against the estate or the charges or expenses of administration.⁵⁷ It is not liable for the expenses of the last sickness or funeral of the decedent.⁵⁸ It is not subject to the inheritance tax.⁵⁹ An action will not lie in the district court by a widow against a representative to obtain her statutory allowance. Her remedy is by petition in the probate court.⁶⁰

114. Residue to surviving spouse—Consent to other disposition—Prior to Laws 1903, c. 334, one spouse might disinherit the other as regards personal property.⁶¹ The omission from this paragraph of the statute of a reference to a disposition other than testamentary is obviously due to the fact that at the time of its adoption there was no limitation on the right of a spouse to dispose of personal property without the consent of the other spouse.⁶² Laws 1903, c. 334, made it unlawful for a childless spouse to dispose of all his or her personal property by will to another to the entire exclusion of the husband or wife of such testator, and entitled the surviving spouse to the same interest in both real and personal property of the deceased, unaffected by contrary testamentary disposition.⁶³

115. Property escheated—Refundment to heirs—Statute—Persons without known heirs—When any person who has died within the last past fifteen years in the state of Minnesota, or shall hereafter die being a resident of the state of Minnesota at the time of his death or owning property in said state, and his estate having been duly administered upon in the probate court of the county having jurisdiction thereof, and leaving no known spouse or kindred, and said estate having been

⁵⁴ Rickert v. Wardell, 142 Minn. 96, 170 N. W. 915.

⁵⁵ Nordlund v. Dahlgren, 130 Minn. 462, 153 N. W. 876.

⁵⁶ Stromberg v. Stromberg, 119 Minn. 325, 138 N. W. 428.

⁵⁷ Stromberg v. Stromberg, 119 Minn. 325, 138 N. W. 428; State v. Probate Court, 137 Minn. 238, 163 N. W. 285; Barrett v. Helm (Minn.) 188 N. W. 207; In re Manning's Estate, 85 Neb. 60, 122 N. W. 711.

⁵⁸ Barrett v. Helm (Minn.) 188 N. W. 207; Brown v. Keen (Mo.) 201 S. W. 621.

⁵⁹ State v. Probate Court, 137 Minn. 238, 163 N. W. 285.

⁶⁰ Fischer v. Hintz, 145 Minn. 161, 176 N. W. 177.

⁶¹ Johnson v. Johnson, 32 Minn. 513, 515, 21 N. W. 725; In re Rausch, 35 Minn. 291, 28 N. W. 920; State v. Hunt, 88 Minn. 404, 93 N. W. 314; Hayden v. Lamberton, 100 Minn. 384, 111 N. W. 278; State v. Probate Court, 129 Minn. 442, 445, 152 N. W. 845.

⁶² State v. Probate Court, 129 Minn. 442, 445, 152 N. W. 845.

⁶³ Hayden v. Lamberton, 100 Minn. 384, 111 N. W. 278.

fully administered upon, and the balance in the hands of the representative of said estate having by order of said court escheated to, and been paid to the state of Minnesota, and if it shall be made to appear that said deceased person, in fact, left heir or heirs to his estate, then, upon the proper presentation of proofs of such heirship and amount so escheated to the district court of the county wherein such probate proceedings were had, either in term time or vacation, upon notice of at least twenty days to the attorney general in said state of the time and place of hearing such proofs, and if upon such hearing the said district court shall find that such deceased person left heir or heirs, said court shall determine who such heir or heirs are and the amount so escheated, and file its decision to that effect and a certified copy of said decision shall be forthwith filed with the state auditor. When the said court has filed its decision in an escheated estate as aforesaid, and it was determined in said decision that certain heir or heirs are entitled to money or property heretofore escheated to the state of Minnesota, it shall be the duty of the state auditor of the state to recommend an appropriation, in writing, by the state legislature, if in session, or, if not in session, then to the next legislature for the repayment or the reimbursement of said money, or the transfer of said property to such heir or heirs, or to his or their attorney in fact, upon the recording of his power of attorney in the office of the state auditor, and the state auditor shall draw his warrant on the state treasurer of said state for the payment of the amount so escheated, if in money; and if in property the state auditor under his seal shall duly execute a proper transfer thereof.⁶⁴

ADVANCEMENTS

116. What constitutes—Effect—Statute—Any estate, real or personal, given by an intestate in his lifetime, to a child or other lineal descendant, when expressed in the gift or grant as an advancement or charged in writing by the intestate as such, or so acknowledged by the child or other descendant, shall be deemed an advancement to such heir, and treated as part of the estate of such intestate in the distribution of the same, and shall be taken by such heir toward his share of the estate. When the amount advanced exceeds the share of such heir he shall receive nothing in the distribution, but shall not be required to refund any part of such advancement. When the amount so received is less than his share, he shall be entitled to enough more to make up his full share.⁶⁵ Every advancement is a gift. Even in case of intestacy it re-

⁶⁴ Laws 1917, c. 72; *Clifford v. Colbert*, 141 Minn. 151, 169 N. W. 529.

⁶⁵ G. S. 1913, § 7404. See *Woerner*, *Am. Law of Adm.* (2 ed.) §§ 552-559; 1 *A. & E. Ency. of Law* (2 ed.) 760; 14 *Cyc.*

163; 18 C. J. 911; 2 *Ency. L. & P.* 305; 1 *R. C. L.* 652; 12 *L. R. A.* 566; 65 *Id.* 581; 26 *L. R. A.* (N. S.) 1053; 80 *Am. Dec.* 559; 27 *Am. St. Rep.* 748; 56 *Id.* 54.

mains a gift. An advancement is never to be returned. In case of intestacy, the gift reduces by so much the share of the heir receiving it, while in case of testacy the gift becomes absolute. Where a father makes an advancement to his daughter and then dies testate, the advancement becomes a mere gift. A promise to repay it to other heirs and a mortgage to secure the performance of such promise are without consideration.⁶⁶ An advancement does not involve an indebtedness.⁶⁷ A debt is not necessarily to be treated as an advancement because a will orders it to be deducted from a child's share.⁶⁸ Where a note is given by a child for money furnished by a parent the transaction will be deemed a loan and not an advancement, in the absence of a writing clearly showing that it was intended as an advancement.⁶⁹ A debt from an heir to a parent may be converted by the parent, with the consent of the heir, into an advancement, but when it is evidenced by a note there is a presumption that the transaction is a loan and not an advancement.⁷⁰

117. Value—How estimated—Statute—When such advancement is made in real estate the value thereof shall, for the purpose of distribution, be considered a part of the real estate to be divided, and when it is in personal estate as a part of the personal estate; and when in either case it exceeds the share of real or personal estate, respectively, that would have come to such heir, he shall not refund any part of it, but shall receive so much less out of the other part of the estate as will make his whole share equal to that of other heirs entitled to a like amount with him. When the value of the estate so advanced is expressed in the conveyance, or in the charge thereof made by the intestate, or in the acknowledgment of the heir receiving it, that shall be its value in the distribution; otherwise, it shall be estimated according to its value when given, as nearly as can be ascertained.⁷¹

118. Effect of heir dying before intestate—Statute—When a child or other lineal descendant, to whom an advancement has been made, dies before the intestate, leaving issue, such advancement shall be taken into consideration in the distribution of the estate, and the amount thereof shall be allowed by the representatives of such heir, the same as though such advancement had been made directly to them.⁷²

119. Determination in final decree—Appraisal—Statute—All questions as to advancements made or alleged to have been made by the intestate to any heir shall be heard and determined by the court at the time of final settlement, and every such advancement shall be specified in the decree distributing and assigning the estate. For the purpose of

⁶⁶ *Kuhne v. Gau*, 138 Minn. 34, 163 N. W. 982.

⁶⁷ *Stenson v. H. S. Halvorson Co.*, 28 N. D. 151, 147 N. W. 800.

⁶⁸ *Cummings v. Bramhall*, 120 Mass. 560.

⁶⁹ *Olney v. Brown*, 163 Mich. 125, 128 N. W. 241.

⁷⁰ *Lodge v. Fitch*, 72 Neb. 652, 101 N. W. 338.

⁷¹ G. S. 1913, § 7405. See 18 C. J. 929.

⁷² G. S. 1913, § 7406.

determining what proportion any one who has received an advancement is entitled to, the court shall ascertain the value of the entire residue of such estate, by ordering an appraisal, or in such other manner as it may deem best.⁷³ All questions concerning advancements are to be determined on the hearing for a final decree of distribution. It is the duty of the court to determine the amount of any advancement to a distributee, to deduct it from his share, and to specify the advancement in the decree.⁷⁴ The function of the court is to decide, from an examination of the whole record and upon weighing all competent evidence, the exact amounts which each distributee ought to receive in order to make the distribution of the whole estate, including all prior advancements, conform to the provisions of law and be just to all parties in interest. The result can be reached only by a consideration of all pertinent facts which have occurred during the settlement of the estate. Advancements made on account of distributive shares are proper items for an administrator's account. Such advancements may not have been made in the proportions required for the ultimate just distribution of the estate. In order that a decree be a plain and complete guide to the administrator it must state the exact amounts each distributee is entitled to in order to adjust the inequalities which have theretofore arisen.⁷⁵ The finding of the court as to advancements is like the allowance of a claim; it is one of the acts to be done by the court in the administration and settlement of the estate. It is not an original proceeding for which notice is to be given, in addition to that for the final settlement and distribution. It is binding on a creditor of the heir to whom the advancement was made.⁷⁶ In an action to set aside a final decree of distribution making no mention of advancements, held, that the supreme court would not presume that certain gifts to children were advancements.⁷⁷ A finding as to certain advances held justified by the evidence.⁷⁷

120. No consideration necessary—No consideration is essential to the validity of an advancement.⁷⁸

121. Intent of donee immaterial—The question of an advancement is not determined by the intent of the donee.⁷⁹

122. Applies only to intestate estates—Testamentary provisions—The doctrine of advancements, as embodied in the statute, applies only to intestate estates. The foundation of the doctrine is the purpose to carry

⁷³ G. S. 1913, § 7407.

⁷⁴ *Greenwood v. Murray*, 26 Minn. 259, 261, 2 N. W. 945; *Bruski v. Bruski*, 148 Minn. 458, 182 N. W. 620; *McClave v. McClave*, 60 Neb. 464, 83 N. W. 668; *Case v. Clark*, 220 Mass. 344, 107 N. E. 936.

⁷⁵ *Case v. Clark*, 220 Mass. 344, 107 N. E. 936.

⁷⁶ *Liginger v. Field*, 78 Wis. 367, 47 N. W. 613.

⁷⁷ *Bruski v. Bruski*, 148 Minn. 458, 182 N. W. 620.

⁷⁷ *Gillman v. Maxwell*, 79 Minn. 377, 82 N. W. 669.

⁷⁸ *In re Barnes' Estate*, 177 Iowa, 122, 158 N. W. 754. See 18 C. J. 920.

⁷⁹ *Fitts v. Morse*, 103 Mass. 164.

out the presumed intention of the parent that his children should share equally in his estate. When he makes a will the law conclusively presumes that he expresses his full and final wishes in the matter and the will excludes all consideration of gifts to children during the life of the testator unless they are expressly directed to be deducted.⁸⁰ The controlling element in determining whether a given transaction between a parent and his child will be considered an advancement, a gift, a loan, or a transfer for valuable consideration, is the intention of the donor at the time of the transaction; evidence establishing which must be drawn largely from the circumstances surrounding the persons interested. The circumstances surrounding a transaction, or the mere gift by a parent to his child, may be such as to create a presumption of advancement on account of the presumption that a parent desires to distribute his estate equally among all his children.⁸¹ The doctrine of advancements does not apply where there is a will even though the will directs that the estate shall be distributed as in case of intestacy.⁸² The doctrine of advancements does not apply to cases of partial intestacy.⁸³ While the law of "advancements" is applicable only to cases of intestacy a testator may make it applicable to a will by express provision, or he may provide that certain sums advanced to beneficiaries shall be deducted from their shares. Such provisions are controlling and cannot be contradicted.⁸⁴ An heir of full age may accept from his ancestor presently as an advancement his full share of the estate of the ancestor, and the probate court may give effect to a receipt given by an heir to his ancestor acknowledging the receipt of a specified sum under an agreement that the same shall be in full for his distributive share out of the estate whatever it may be, and adjudge that the heir is not entitled to any interest in the estate.⁸⁵ Where a will recites that the testator has made advancements to a certain sum to a child and gives an equal sum to other children to equalize the shares of all, the recital is conclusive, and the court cannot consider evidence to show that the property advanced was not worth the sum at which it was valued by the testator.⁸⁶

⁸⁰ *Kragnes v. Kragnes*, 125 Minn. 115, 145 N. W. 785; *Kuhne v. Gau*, 138 Minn. 34, 163 N. W. 982. See *In re Barnes' Estate*, 177 Iowa, 122, 158 N. W. 754; 18 C. J. 918.

⁸¹ *In re Barnes' Estate*, 177 Iowa, 122, 158 N. W. 754. See 18 C. J. 917.

⁸² *De Caumont v. Bogert*, 36 Hun (N. Y.) 382.

⁸³ *Gillmore v. Jenkins*, 129 Iowa, 686, 106 N. W. 193; 1 A. & E. Ency. of Law (2 ed.) 763; 18 C. J. 918; 1 R. C. L. 657; 6 Ann. Cas. 1011.

⁸⁴ *In re Bresler's Estate*, 155 Mich. 567, 119 N. W. 1104; *In re Hayne's Es-*

tate, 165 Cal. 568, 133 Pac. 277; *Nalle v. Safe Deposit & Trust Co.*, 120 Md. 187, 87 Atl. 770; *Buchanan v. Hunter*, 166 Iowa, 663, 148 N. W. 881; *Knight's Estate*, 253 Pa. St. 290, 98 Atl. 558; *Woerner*, Am. Law of Adm. (2 ed.) § 553; 1 A. & E. Ency. of Law (2 ed.) 777; 40 Cyc. 1922. See *Simpson v. Cook*, 24 Minn. 180; Ann. Cas. 1918E, 212 (interest on advancements).

⁸⁵ *Simon v. Simon's Estate*, 158 Mich. 256, 122 N. W. 544.

⁸⁶ *Buchanan c. Hunter*, 166 Iowa, 663, 148 N. W. 881.

123. Effect of receiving full share—An heir who has received advancements to the full amount of his share of the estate has no interest in the balance.⁸⁷

124. Writing must be contemporaneous with gift—An advancement can be proved only in the manner prescribed by the statute. A writing by the donor charging a gift as an advancement must be contemporaneous with the gift, or substantially so.⁸⁸

125. Evidence—Admissibility—Not provable by oral evidence—An advancement must be expressed in writing. It cannot be proved by oral evidence or inferred from the circumstances of the parties or the subsequent declarations of the parent.⁸⁹ A certificate, made by a father on the same day of a deed whereby he conveyed valuable property to his son, to the effect that he had made the deed as a portion of his son's patrimony, held admissible to show that the deed was an advancement.⁹⁰

126. Deduction from share—Advancements of personal property are to be deducted from the distributive share of the donee.⁹¹

127. Hotchpot—Election—Our statute has abolished the common-law rule that one who has received an advancement must bring it into hotchpot if he wishes to claim a portion of the estate of an intestate as an heir. He is not required to make any election in order to share in the estate as his rights are fixed by the statute.⁹²

128. Interest—Interest is not chargeable on moneys advanced, unless a will so directs.⁹³ It has been held that interest should be charged on all advancements after, but not before, the grantor's death.⁹⁴

⁸⁷ *Liginger v. Field*, 78 Wis. 387, 47 N. W. 613; *Courter v. Courter*, 283 Ill. 127, 119 N. E. 63.

⁸⁸ *Arthur v. Arthur*, 143 Wis. 126, 126 N. W. 550; *Ludington v. Patton*, 121 Wis. 649, 99 N. W. 614. See 18 C. J. 919.

⁸⁹ G. S. 1913, § 7404; *Kragnes v. Kragnes*, 125 Minn. 115, 145 N. W. 785; *Barton v. Rice*, 22 Pick. (Mass.) 508; *Olney v. Brown*, 163 Mich. 125, 128 N. W. 241; *Boden v. Mier*, 71 Neb. 191, 98 N. W. 701; *Lodge v. Fitch*, 72 Neb. 652, 101 N. W. 338; *Pomeroy v. Pomeroy*, 93 Wis. 262, 87 N. W. 430; *Schmidt v. Schmidt's Estate*, 123 Wis. 295, 101 N. W. 678; *Arthur v. Arthur*, 143 Wis. 126, 126 N. W. 550; *Elliott v. Western Coal &*

Mining Co., 243 Ill. 614, 90 N. E. 1104. See 18 C. J. 936.

⁹⁰ *Power v. Power's Estate*, 91 Mich. 587, 52 N. W. 60.

⁹¹ *Bemis v. Stearns*, 16 Mass. 200; *McClave v. McClave*, 60 Neb. 464, 83 N. W. 668.

⁹² *Burns v. Burns*, 87 Kan. 19, 123 Pac. 720; *Courter v. Courter*, 283 Ill. 127, 119 N. E. 63.

⁹³ *Osgood v. Breed's Heirs*, 17 Mass. 356; *Cummings v. Bramhall*, 120 Mass. 552; *In re Knight's Estate*, 253 Pa. St. 290, 98 Atl. 558. See Ann. Cas. 1912A, 955; Ann. Cas. 1918E, 212; 18 C. J. 931.

⁹⁴ *Sprague v. Moore*, 130 Mich. 92, 89 N. W. 712. See Ann. Cas. 1912A, 957; 18 C. J. 931.

DETERMINATION OF DESCENT WITHOUT ADMINISTRATION

129. When authorized—Whenever any person dies leaving real estate, or some interest therein, and no will has been proved nor any administration granted thereon in this state within five years after his death, or real property has been omitted in the administration or in the final decree, any person claiming an interest in such real estate may petition the probate court of the county wherein the same or any part thereof is situated to determine its descent and assign it to the persons entitled thereto.⁹⁵ The statute has been sustained against the objection that it was not authorized by the constitutional grant of jurisdiction to the probate courts over the estates of deceased persons, and held applicable to the estate of a person dying before, as well as after, its enactment.⁹⁶ The probate court of any county wherein lies any part of the lands of a decedent in which a proper petition is first filed has jurisdiction to determine the descent of all lands of the decedent in this state and to decree distribution thereof, though a part of them may lie in other counties.⁹⁷

130. Petition—Statute—Such petition, which shall be verified, shall state that more than five years have passed since decedent's death, that no will has been probated nor any administration granted in this state, or if administration was had, that real property was omitted in the administration or final decree, and shall give the name of the decedent, the time and place of his death, the contents of his will, if he left one, and the names and residences of his heirs, and of his devisees, if any, according to the best information of said petitioner; and it shall contain a description of such real estate, and disclose the interest of the decedent and of the petitioner therein.⁹⁸

131. Notice of hearing—Parties—Statute—Upon the filing of said petition the court, by its order, shall require all persons interested to show cause, at a time and place therein fixed, why the same should not be granted, and notice of such hearing shall be given in the manner prescribed by law upon an application for a final decree. All parties interested may appear and be heard thereon, and the court, in its discretion, may require that issues be framed and may confine the proofs to such issues.⁹⁹ It is not necessary that the land should be described in the order fixing the time and place of hearing the petition.¹

⁹⁵ G. S. 1913, § 7245.

⁹⁶ G. S. 1913, § 7246.

⁹⁷ *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 104, 90 N. W. 378.

⁹⁸ G. S. 1913, § 7247.

⁹⁹ *Chadbourne v. Alden*, 98 Minn. 118, 107 N. W. 148.

¹ *Chadbourne v. Alden*, 98 Minn. 118, 107 N. W. 148.

132. Decree of distribution—Statute—If, upon such hearing, it transpires that such decedent died testate, his will shall be admitted to probate upon the proofs required by law in other cases. And in all cases the court shall hear and determine the facts, and enter its decree, assigning and distributing all such real estate to the persons entitled thereto, which decree shall have the force and effect of a final decree of the probate court, and may be appealed from in like manner. A certified copy of any such decree may be filed for record with the register of deeds, who shall record the same, and enter in his reception book the name of the decedent as grantor, and the names of the persons to whom said real estate is assigned, as grantees.²

133. Government lands patented to heirs—Decree of distribution—Statute—Whenever any person holding a homestead or tree claim under the laws of the United States shall have died before a patent therefor has issued, and, by reason of such death, a patent shall afterward be granted to "the heirs" of such person, the probate court of the county in which the lands so patented are situated, upon petition, notice, and hearing substantially in the form and manner provided for in §§ 7245–7248 (§§ 129–132, *supra*), may determine who are such heirs, and may assign to them their respective shares in said homestead or tree claim; and a copy of the decree of assignment may be filed, recorded, and entered in like manner and with like effect.³

134. Decree of heirship under Laws 1885, c. 50—Laws 1885, c. 50, merely established a rule of evidence by which a "decree of heirship" was made *prima facie* evidence of certain facts and cast the burden of disproving them on the opposite party. After the repeal of that statute by the probate code, such "decrees" ceased to have any probative force whatever, though admitted without objection.⁴

² G. S. 1913, § 7248.

³ G. S. 1913, § 7249.

⁴ *Irwin v. Pierro*, 44 Minn. 490, 47 N. W. 154.

WILLS

IN GENERAL

135. Definition—A will is a legal declaration of the intention of a person as to what he would have done after his death in respect to the distribution of his property, the administration of his estate, or the guardianship of his children.⁵ In its usual form a will is a disposition of one's property to take effect after death.⁶ In English law the word "will" was originally used only of a disposition of real property to take effect at death, the word "testament" being then used, as in the Roman and civil law, of a like disposition of personal property. Hence the use of the redundant phrase "last will and testament." In our practice the word "will" includes a testament.⁷ An instrument may be a will and entitled to probate though it does not dispose of property but merely provides for the appointment of an executor or guardian, or revokes a prior will.⁸ In the construction of statutes the word "will" is to be construed as including codicils.⁹

136. What constitutes—Deeds deliverable after death—Gifts causa mortis—A written instrument of a testamentary character is a will regardless of its form, and if it is not executed as required by the statute, it is void.¹⁰ The test of a gift, as distinguished from a will, is that in case of a gift some interest vests at once in right.¹¹ It has been questioned whether a contract to make a will, executed and attested as provided in the case of wills, may be probated.¹² A deed delivered by the grantor to a third person, to be delivered by him to the grantee after the death of the grantor, the latter reserving no right to control or recall the deed, is valid and vests title in the grantee upon its delivery after the death of the grantor. It is immaterial that the enjoyment of the estate granted is postponed until the death of the grantor, or that the deed expressly reserves a life estate in the grantor, or that the deed is subject to the contingency that the grantee survives the grantor, or to

⁵ See Century Dict.; 30 A. & E. Ency. of Law (2 ed.) 550; *Smith v. Bell*, 6 Pet. (U. S.) 68; *Hardenberg v. Ray*, 151 U. S. 112; 89 Am. St. Rep. 486; 28 R. C. L. 58.

⁶ *Tobin v. Haack*, 79 Minn. 101, 107, 81 N. W. 758. See 30 A. & E. Ency. of Law (2 ed.) 550; 40 Cyc. 995; 89 Am. St. Rep. 486; 41 L. R. A. (N. S.) 39; 28 R. C. L. 58.

⁷ Century Dict.; 30 A. & E. Ency. of Law (2 ed.) 550.

⁸ *Lowery v. Hawker*, 22 N. D. 318, 133 N. W. 918; *Sullivan v. Murphy*, 92 Or. 52, 179 Pac. 680; 30 A. & E. Ency. of

Law (2 ed.) 573; 40 Cyc. 1078; 1 Ann. Cas. 368.

⁹ G. S. 1913, § 7412(23).

¹⁰ *Conrad v. Douglas*, 59 Minn. 498, 61 N. W. 673; *Fitzgerald v. English*, 73 Minn. 266, 76 N. W. 27; *Thomas v. Williams*, 105 Minn. 88, 117 N. W. 155. See *German v. McKay*, 136 Minn. 433, 162 N. W. 527; 30 A. & E. Ency. of Law (2 ed.) 572; 40 Cyc. 1084; *Woerner*, Am. Law of Adm. (2 ed.) § 38; 41 L. R. A. (N. S.) 39; 89 Am. St. Rep. 486.

¹¹ *Innes v. Potter*, 130 Minn. 320, 153 N. W. 604.

¹² *Kleeberg v. Schrader*, 69 Minn. 136, 138, 72 N. W. 59.

any other contingency, so long as it is one over which the grantor has no control. The grantor in such a deed cannot recall it. It is not testamentary in character. It cannot be invalidated by declarations of the grantor, while in possession after the delivery of the deed to the third person, to the effect that he retains the right to recall the deed.¹³ The fact that the grantor has the right to have the contract canceled and the deed returned if the grantee fails to perform the conditions of the contract, is not such a reservation by the grantor of the right to recall or control the deed as to affect the validity of the agreement or the title of the grantee.¹⁴ The test whether an instrument is a deed or will is the intention of the maker, which is primarily to be determined from its language. If it cannot be given effect as a will but may be as a deed it will be construed as a deed in doubtful cases. The fact that an instrument, in form a deed, postpones the enjoyment of the subject-matter of the grant until the death of the grantor, and is contingent upon the grantee surviving him, is not necessarily conclusive that the deed is testamentary in character. The test in such a case is whether the grantor intended the instrument to be ambulatory, serving no purpose until after his death, or whether he intended to convey thereby some vested right or interest, absolute or contingent, in the subject-matter of the grant, with the enjoyment thereof postponed until after his death.¹⁵ Similar principles apply to a gift of personal property. A gift of stock deposited with a third person with instructions to deliver it to the donee only in case of the death of the donor has been held not of a testamentary capacity.¹⁶ A trust deed, made by the grantor some years prior to his death, provided that the trustee should take possession of personal property, transferred to him as trustee, consisting of secured notes; that he should pay the accruing interest to the grantor, reinvest the principal in real estate securities, and on the death of the grantor pay the principal to the children of the latter. Held, that the deed was not

¹³ *Haeg v. Haeg*, 53 Minn. 33, 55 N. W. 1114; *Logenfield v. Richter*, 60 Minn. 49, 53, 61 N. W. 826; *Wicklund v. Lindquist*, 102 Minn. 321, 113 N. W. 631; *Thomas v. Williams*, 105 Minn. 88, 117 N. W. 155; *Exblaw v. Nelson*, 124 Minn. 335, 144 N. W. 1094; *Dickson v. Miller*, 124 Minn. 346, 145 N. W. 112; *Wortz v. Wortz*, 128 Minn. 251, 150 N. W. 809; *Innes v. Potter*, 130 Minn. 320, 153 N. W. 604; *Shaughnessy v. Shaughnessy*, 135 Minn. 262, 160 N. W. 769; *Pettis v. McLarne*, 135 Minn. 269, 160 N. W. 691; *Hagen v. Hagen*, 136 Minn. 121, 161 N. W. 380. See *German v. McKay*, 136 Minn. 433, 162 N. W. 527; 30 A. & E. Ency. of Law (2 ed.) 576; 40 Cyc. 1084; 28 R. C. L. 63; 11 A. L. R. 23; 14 Col. L. Rev. 403, 452;

89 Am. St. Rep. 486; 54 L. R. A. 869; 9 L. R. A. (N. S.) 224; 38 Id. 942; 18 Mich. L. Rev. 470.

¹⁴ *Malley v. Quinn*, 132 Minn. 254, 156 N. W. 263.

¹⁵ *Thomas v. Williams*, 105 Minn. 88, 117 N. W. 155; *Smith v. Wold*, 125 Minn. 190, 145 N. W. 1067; *Innes v. Potter*, 130 Minn. 320, 153 N. W. 604; *Hagen v. Hagen*, 136 Minn. 121, 161 N. W. 380; *Trumbauer v. Rust*, 36 S. D. 301, 154 N. W. 801; *Smith v. Thayer*, 234 Mass. 214, 125 N. E. 171. See 1 L. R. A. (N. S.) 315; 30 A. & E. Ency. of Law (2 ed.) 576; 40 Cyc. 1085; 28 R. C. L. 63.

¹⁶ *Innes v. Potter*, 130 Minn. 320, 153 N. W. 604.

testamentary in character.¹⁷ An oral contract that, in consideration of support and maintenance of another for life, the person furnishing the consideration should, after the death of the person supported, take his estate, hold the same in trust until a certain minor reached his majority and then deliver it all to the cestui que trust, is void as a testamentary disposition of property. If under such a contract title and possession to the property were delivered during the life of the owner it would be a valid transaction.¹⁸ A deed of property executed by a person in expectation of death, who adopts that mode of distributing his property rather than by will, his intention being that the deed shall take effect on its execution, there being no unlawful purpose contemplated, is to be treated as a disposition by deed and not by will.¹⁹ A warranty deed, containing the provision that the grantor shall remain in full possession and ownership of the premises conveyed during his lifetime, and that the deed shall not be recorded until after his death passes the title to the grantee subject to an estate for life in the grantor.²⁰ A direction to a trustee to deliver the subject of a gift to the donee only in case of the death of the donor is not decisive of testamentary character. Nor is a statement of a donor that he wants to "leave" the property to the donee.²¹ A gift causa mortis is distinguished from a will, in that a gift causa mortis may be made by parol, and must be made under apprehension of impending death, and be accompanied by a delivery, while writing is ordinarily required for a will, which, though commonly made in view of the fact of death, is not generally made because of its immediate proximity, and no delivery of property is had pursuant to a will until after the testator's death, the legatee deriving his title from the executor while, in the case of a gift causa mortis, the gift is claimed in spite of the executor.²²

137. Right statutory—The right to dispose of property by will is purely statutory. It may be enlarged, abridged or abolished at the will of the legislature.²³ Statutes of wills are enabling acts and prior to the statute of 32 Hen. VIII there was no general power at common law to devise lands. The power was opposed to the feudal policy of holding lands inalienable without the consent of the lord.²⁴ The control of the

¹⁷ *Smith v. Wold*, 125 Minn. 190, 145 N. W. 1067.

¹⁸ *Larson v. Lund*, 109 Minn. 372, 123 N. W. 1070.

¹⁹ *Brown v. Atwater*, 25 Minn. 520.

²⁰ *Ekblaw v. Nelson*, 124 Minn. 335, 144 N. W. 1094.

²¹ *Innes v. Potter*, 130 Minn. 320, 153 N. W. 604.

²² *Vosburg v. Mallory*, 155 Iowa 165, 135 N. W. 577; 30 A. & E. Ency. of Law (2 ed.) 576; 20 Cyc. 1230; 28 R. C. L. 63.

²³ *Tobin v. Haack*, 79 Minn. 101, 108, 81 N. W. 758; *Tyner v. Varlen*, 97 Minn. 181, 106 N. W. 898; *Pederson v. Christoffersen*, 97 Minn. 491, 500, 106 N. W. 958; *Minnesota Loan & Trust Co. v. Douglas*, 135 Minn. 413, 426, 161 N. W. 158; *State v. Probate Court*, 137 Minn. 238, 244, 163 N. W. 285; *Peace v. Edwards*, 170 N. C. 64, 86 S. E. 807; *In re Brown's Estate*, 101 Wash. 314, 172 Pac. 247.

²⁴ *United States v. Fox*, 94 U. S. 315.

legislature over wills, estates of decedents, succession and administration, is absolute, within constitutional limitations.²⁵ The right of testamentary disposition of property is carefully guarded and protected by statute and judicial construction.²⁶ Subject to slight statutory restrictions the power of testamentary disposition is absolute.²⁷ The right to dispose of property by will is not a natural or inalienable right and is not guaranteed by the state or federal constitution.²⁸

138. Must be in writing—Oral instructions—The statute expressly provides that a will shall be in writing. It cannot be partly written and partly oral. Property cannot be given by will to be disposed of as the beneficiary has been orally instructed by the testator.²⁹ The total failure to designate the beneficiaries of a trust in a will makes it to that extent an unwritten will, ineffectual for any purpose.³⁰

139. When takes effect—Ambulatory—A will takes effect only on the death of the testator. Until then it is ambulatory, that is, changeable, not fixed.³¹

140. Testator's knowledge of contents—A person does not execute an instrument as and for his last will according to law unless he knows its contents.³² A will may be valid though the testator is unacquainted with the English language in which it is written, if he has a full and accurate knowledge of its contents. Where a will has been drawn in the English language, but all the directions as to its preparation have been given by the testator in another tongue, it may nevertheless be found to be his last will and testament, if, prior to its execution, a substantially accurate translation or explanation of its provisions is given the testator, so that he understands their meaning. It is not necessary that he should correctly appreciate their legal effect. If a testator comprehends and approves the instrument as written it should not be refused probate because it fails to carry out the intention of the testator as to part of his property.³³

²⁵ *In re Mousseau's Will*, 30 Minn. 202, 14 N. W. 887; *Minnesota Loan & Trust Co. v. Douglas*, 135 Minn. 413, 426, 161 N. W. 158.

²⁶ *In re Penniman's Will*, 20 Minn. 245 (220, 226); *Tyner v. Varlen*, 97 Minn. 181, 106 N. W. 898.

²⁷ *Tyner v. Varlen*, 97 Minn. 181, 106 N. W. 898.

²⁸ *Moody v. Hagen*, 36 N. D. 471, 162 N. W. 704.

²⁹ *Moore v. O'Leary*, 180 Mich. 261, 146 N. W. 661; *Reynolds v. Reynolds*, 224 N. Y. 429, 121 N. E. 61; *Wilcox v. Attorney General*, 207 Mass. 198, 93 N. E. 599. See *Ann. Cas.* 1912A, 833; *Lar-*

son v. Lund, 109 Minn. 372, 123 N. W. 1070.

³⁰ *Reynolds v. Reynolds*, 224 N. Y. 429, 121 N. E. 61.

³¹ *Penstock v. Wentworth*, 75 Minn. 2, 4, 77 N. W. 420; *Thomas v. Williams*, 105 Minn. 88, 90, 117 N. W. 155; *Moultrie v. Hunt*, 23 N. Y. 394; 40 Cyc. 1073; 28 R. C. L. 60; 89 Am. St. Rep. 488. See *In re Tibbetts' Estate* (Minn.) 189 N. W. —.

³² *Richardson v. Richards*, 226 Mass. 240, 115 N. E. 307; 30 A. & E. Ency. of Law (2 ed.) 572; 40 Cyc. 1100; L. R. A. 1918D, 747. See § 268.

³³ *Benrud v. Anderson*, 144 Minn. 111,

141. Testator's knowledge of effect of will—It is sufficient if the testator understood the effect of the will as a whole; he need not have grasped the meaning of technical legal terms or endeavored to anticipate what legal construction might be placed on it by the courts.³⁴ A misunderstanding of the legal effect of the provisions of a will by the testator, whether resulting from erroneous legal advice or otherwise, will not, in the absence of fraud or undue influence, defeat probate.³⁵

142. Mistake—In the absence of fraud or undue influence, mistake, except in identity of the instrument executed, will not defeat probate.³⁶

143. Holographic wills—Our statutes make no exceptions in favor of holographic wills. To be valid they must be executed and attested in the same manner as other wills.³⁷

144. Nuncupative wills—A nuncupative will is a will of personal property orally declared in the presence of witnesses. It must be reduced to writing within thirty days and cannot be probated except upon the evidence of at least two credible and disinterested witnesses.³⁸ It is provided by statute that "nuncupative wills shall not be valid unless made by a soldier in actual service or by a mariner at sea, and then only as to personal estate."³⁹ At common law a nuncupative will is effective only as to personal property.⁴⁰ Nuncupative wills are not favored.⁴¹

145. Conditional wills—A will may be made conditional so that if the contingency occurs or fails the will is or is not entitled to probate, as the case may be. Courts do not incline to regard a will as conditional where it can reasonably be held that the testator was merely expressing his inducement to make it.⁴²

174 N. W. 617; *In re Watter's Will*, 64 Wis. 487, 25 N. W. 538; *In re Arneson's Will*, 128 Wis. 112, 107 N. W. 21. See § 268.

³⁴ *Dunham v. Holmes*, 225 Mass. 68, 113 N. E. 845; *Conrades v. Heller*, 119 Md. 448, 87 Atl. 28; 40 Cyc. 1100.

³⁵ *Benrud v. Anderson*, 144 Minn. 111, 174 N. W. 617; *In re Gluckman's Will*, 87 N. J. Eq. 638, 101 Atl. 295.

³⁶ *In re Gluckman's Will*, 87 N. J. Eq. 638, 101 Atl. 295; *Riley v. Casey*, 185 Iowa 461, 170 N. W. 742.

³⁷ *In re Brown's Estate*, 101 Wash. 314, 172 Pac. 247; *In re Turell*, 166 N. Y. 330, 59 N. E. 910. See 30 A. & E. Ency. of Law (2 ed.) 552; 40 Cyc. 1129; 28 R. C. L. 161; *Woerner, Am. Law of Adm.* (2 ed.) §§ 43, 223; 11 Prob. Rep. Ann. 458; 104 Am. St. Rep. 22; *Ann. Cas.* 1913B, 1305.

³⁸ G. S. 1913, §§ 7252, 7282. See 30 A. & E. Ency. of Law (2 ed.) 560; 40 Cyc. 1300; 28 R. C. L. 154; *Woerner, Am. Law of Adm.* (2 ed.) §§ 44, 45; 11 Prob. Rep. Ann. 14; 67 Am. St. Rep. 572; *Ann. Cas.* 1916A, 483.

³⁹ G. S. 1913, § 7252. See 31 Harv. L. Rev. 1022; 2 Minn. L. Rev. 261.

⁴⁰ *Maurer v. Relfschneider*, 89 Neb. 673, 132 N. W. 197. See *Ann. Cas.* 1912C, 646.

⁴¹ *Maurer v. Relfschneider*, 89 Neb. 673, 132 N. W. 197; *Brown v. State*, 87 Wash. 44, 151 Pac. 81; 40 Cyc. 1300.

⁴² *Eaton v. Brown*, 193 U. S. 411; *In re Cook's Estate*, 173 Cal. 465, 160 Pac. 553; *In re Tinsley's Will*, 187 Iowa 23, 174 N. W. 4; 30 A. & E. Ency. of Law (2 ed.) 553; 40 Cyc. 1082; 28 R. C. L. 166; 11 A. L. R. 846; *Woerner, Am. Law of Adm.* (2 ed.) § 36; 8 *Ann. Cas.* 1150.

146. Joint and mutual wills—A joint will is one executed as a single instrument by two or more persons as their will. Mutual wills are separate wills executed by two or more persons with reciprocal provisions. These distinctions, however, are not closely observed in the cases. On the death of one of such testators the will may be probated as his will unless the provisions are such that it cannot be executed until the death of the other testator. The law upon the subject of joint and mutual wills is still in a formative period, especially where there is a contractual element. Extrinsic evidence is admissible to prove the contractual nature of the transaction, but the contract must be specific and clearly proved. Direct evidence is unnecessary.⁴³ A mutual and reciprocal joint will, made by a husband and his wife, in which they give a life estate in their property to the survivor and the remainder to their children, is not opposed to public policy. Where the surviving husband accepts the benefits of such a will it cannot be revoked by his subsequent marriage.⁴⁴ Where husband and wife make mutual wills pursuant to an agreement, evidenced by the wills, that after their death any remaining property should go to their children, the survivor cannot defeat the rights of the children by a new will.⁴⁵ Whether such wills contain contractual provisions is not a question within the jurisdiction of the probate court when they are sought to be probated.⁴⁶ Joint or mutual wills may be revoked by either party as freely as ordinary wills. If they are of a contractual nature the revocation does not affect the right to specific performance of the contract, but merely defeats the right to probate.⁴⁷ Either of the parties to joint or mutual wills for the benefit of the survivor may recede therefrom by revocation made with notice in the lifetime of the other.⁴⁸ Joint or mutual wills by two per-

⁴³ *Rosteller v. Hoenninger*, 214 N. Y. 66, 108 N. E. 210; *Baker v. Syfritt*, 147 Iowa 49, 125 N. W. 998; *Campbell v. Dunkelberger*, 172 Iowa 385, 153 N. W. 56; *Anderson v. Anderson*, 181 Iowa 578, 164 N. W. 1042; *Gerbrich v. Freitag*, 213 Ill. 552, 73 N. E. 338; *Frazier v. Patterson*, 243 Ill. 80, 90 N. E. 216; *Bright v. Cox*, 147 Ga. 474, 94 S. E. 572; *Ginn v. Edmundson*, 173 N. C. 85, 91 S. E. 696; *Williams v. Williams*, 123 Va. 643, 96 S. E. 749; *Lewis v. Lewis*, 104 Kan. 269, 178 Pac. 421; *Tooker v. Vreeland* (N. J.) 112 Atl. 665; *Moore v. Samuelson* (Kan.) 193 Pac. 369; *Stevens v. Myers*, 91 Or. 114, 177 Pac. 37; 30 A. & E. Ency. of Law (2 ed.) 556; 40 Cyc. 2110; 28 R. C. L. 166; *Woerner*, Am. Law of Adm. (2 ed.) § 37; 20 Harv. L. Rev. 315; 28 Id. 246; 32 Id. 296; 33 Id. 557; 17 Ann. Cas. 1003; Ann. Cas. 1915A, 364; 27 L. R. A.

(N. S.) 508; 136 Am. St. Rep. 592; 12 Probate Reports Ann. 63; 17 Mich. L. Rev. 677.

⁴⁴ *Lewis v. Lewis*, 104 Kan. 269, 178 Pac. 421.

⁴⁵ *Stevens v. Myers*, 91 Or. 114, 177 Pac. 37.

⁴⁶ *Lansing v. Haynes*, 95 Mich. 16, 54 N. W. 699.

⁴⁷ *Rastetter v. Hoenninger*, 214 N. Y. 66, 108 N. E. 210; *Morgan v. Sanborn*, 225 N. Y. 454, 122 N. E. 696; 30 A. & E. Ency. of Law (2 ed.) 621; 40 Cyc. 2115; 28 R. C. L. 172; 27 L. R. A. (N. S.) 508; 37 Id. 1196; 12 Probate Reports Ann. 71; 32 Harv. L. Rev. 296; 3 A. L. R. 172.

⁴⁸ *Anderson v. Anderson*, 181 Iowa, 578, 164 N. W. 1042; *Brown v. Webster*, 90 Neb. 491, 134 N. W. 185; *Rastetter v. Hoenninger*, 214 N. Y. 66, 108 N. E. 210. See 20 Harv. L. Rev. 315.

sons for the benefit of the survivor constitute but a single will, and are in all essential respects the will of the first to die, and when such death occurs and the will is thereby made effective and established by probate, the joint or mutual will has served its full purpose, and it has no further existence as the will of the survivor in the absence of any bequest or devise to third persons.⁴⁹ If a husband and wife join in an instrument in the form of a joint will, which disposes only of property of which the husband is the sole owner, it will be sustained as the will of the husband.⁵⁰ Where one of the parties to a joint and mutual will of a contractual nature breaks the contract by executing another will disposing of his property contrary to the contract, and dies, the survivor, if not in default, may have specific performance of the contract, as against the heirs, devisees, legatees and executors of the decedent.⁵¹ A third party who is a beneficiary of a joint or mutual will may have specific performance of the provisions in his favor. It is not essential to the validity of such a will that the benefits thereof should accrue directly to the surviving testator.⁵²

147. Pretermitted children—Statute—If a testator omits to provide in his will for any of his children or the issue of a deceased child, they shall take the same share of his estate which they would have taken if he had died intestate, unless it appears that such omission was intentional, and not occasioned by accident or mistake.⁵³ The statute applies to wills of women.⁵⁴ It does not apply to an estate in which the testator had only a power of appointment.⁵⁵ It is not to be extended by implication.⁵⁶ A parent may entirely disinherit a child except one to whom he is bound by contract to give property.⁵⁷ A parent may disinherit an illegitimate child though he has acknowledged the child as provided by statute.⁵⁸ As against their heirs testators may dispose of all their property for charitable purposes, subject only to the statutory rights of the husband or wife.⁵⁹ An adopted child is within the protection

⁴⁹ *Anderson v. Anderson*, 181 Iowa, 578, 164 N. W. 1042.

⁵⁰ *Juel v. Hansen*, 87 Neb. 567, 127 N. W. 879.

⁵¹ *Brown v. Webster*, 90 Neb. 591, 134 N. W. 185; *Stewart v. Todd* (Iowa) 173 N. W. 619.

⁵² *Williams v. Williams*, 123 Va. 643, 96 S. E. 749; *Morgan v. Sanborn*, 225 N. Y. 454, 122 N. E. 696. See *Rastetter v. Hoenninger*, 214 N. Y. 66, 108 N. E. 210; 32 Harv. L. Rev. 296.

⁵³ G. S. 1913, § 7260. See 30 A. & E. Ency. of Law (2 ed.) 614; 14 Cyc. 55; 40 Id. 1498; 18 C. J. 838; 28 R. C. L. 81; *Woerner*, Am. Law of Adm. (2 ed.) § 55; 9 Probate Reports Ann. 3; 39 Am. Dec. 740; 115 Am. St. Rep. 579.

⁵⁴ See *Walker v. Hyland*, 70 N. J. L. 69, 56 Atl. 268; *Owens v. Haines*, 199 Pa. St. 137, 48 Atl. 859; 9 Probate Reports Ann. 11; 18 C. J. 839.

⁵⁵ *Sewall v. Wilmer*, 132 Mass. 131.

⁵⁶ *Mansfield v. Neff*, 43 Utah 258, 134 Pac. 1160.

⁵⁷ *Odenbreit v. Uthelm*, 131 Minn. 56, 154 N. W. 741. Prior to Laws 1915, c. 343, a parent could not disinherit a posthumous child.

⁵⁸ *Lepper v. Knox*, 179 Iowa 419, 161 N. W. 454. See L. R. A. 1918A, 45; 115 Am. St. Rep. 579.

⁵⁹ *Hubbard v. Worcester Art Museum*, 194 Mass. 280, 80 N. E. 490.

of the statute.⁶⁰ An illegitimate child omitted from its mother's will is within the statute.⁶¹ An illegitimate child omitted from its father's will is not within the protection of the statute unless the parents were married or his father acknowledged the child as provided by statute.⁶² The statute does not apply to illegitimate grandchildren who are the issue of a deceased son of the testator.⁶³ Children by a former wife or husband are within the statute.⁶⁴ Stepchildren are not within the protection of the statute.⁶⁵ Whether the omission was intentional is a question of fact.⁶⁶ Evidence of an intention to disinherit a child must be clear and satisfactory.⁶⁷ Extrinsic evidence, oral or written, is admissible to show that the omission was intentional. In other words, the declarations of the testator are admissible to prove the intention whether made at the time of executing the will or subsequently. Former wills of the testator are admissible.⁶⁸ If a child is mentioned in a will the statute probably affords him no protection though no provision is made for him, at least if the intention to disinherit him is clear.⁶⁹ Any provision in a will, however small or inadequate, takes the case out of the statute. It is immaterial that all the property is consumed in satisfying other gifts in the will and nothing is in fact left for the claimant.⁷⁰ A failure of an apparent provision for a child in a will, by reason of the fact that the testator did not have title to the property given, is not an omission to provide within the meaning of the statute.⁷¹ Whether a provision for the testator's heirs covers the children and satisfies the

⁶⁰ *Odenbreit v. Uthelm*, 131 Minn. 56, 154 N. W. 741; *Sandon v. Sandon*, 123 Wis. 603, 101 N. W. 1089. See *In re Barlow's Estate* (Minn.) 188 N. W. 282; *L. R. A.* 1916D, 424; 115 Am. St. Rep. 579; 28 R. C. L. 84; 33 Harv. L. Rev. 724; 18 C. J. 839.

⁶¹ *In re Wardell*, 57 Cal. 484. See *Ann. Cas.* 1918B, 253.

⁶² *Loring v. Thorndike*, 5 Allen (Mass.) 257; *Monson v. Palmer*, 8 Allen (Mass.) 551; *Kent v. Barker*, 2 Gray (Mass.) 535; *King v. Thissell*, 222 Mass. 140, 109 N. E. 880. See 9 Probate Reports Ann. 10.

⁶³ *King v. Thissell*, 222 Mass. 140, 109 N. E. 880.

⁶⁴ *Thomas v. Black*, 113 Mo. 66, 20 S. W. 657; *In re Brown*, 22 Okl. 216, 97 Pac. 613.

⁶⁵ See *Gazlay v. Cornwell*, 2 Recf. Surr. (N. Y.) 139.

⁶⁶ *Woodvine v. Dean*, 194 Mass. 40, 79 N. E. 882; *Carpenter v. Snow*, 117 Mich. 489, 76 N. W. 78.

⁶⁷ *Moon v. Estate of Evans*, 69 Wis. 667, 35 N. W. 20. See *In re Parrott's Estate* (Nev.) 203 Pac. 258.

⁶⁸ *Whitby v. Motz*, 125 Minn. 40, 145 N. W. 623; *Converse v. Wales*, 4 Allen (Mass.) 512; *Wilson v. Fosket*, 6 Met. (Mass.) 400; *Goff v. Britton*, 182 Mass. 293, 65 N. E. 379; *Newman v. Waterman*, 63 Wis. 612, 23 N. W. 696; *In re Peterson's Estate*, 49 Mont. 96, 140 Pac. 237; 40 Cyc. 1437; 18 C. J. 841; *Ann. Cas.* 1916A, 718; 115 Am. St. Rep. 588; 51 L. R. A. (N. S.) 646, 9 Probate Reports Ann. 29.

⁶⁹ *In re Callaghan's Estate*, 119 Cal. 571, 51 Pac. 860. See 9 Probate Reports Ann. 12, 18; 115 Am. St. Rep. 584; 18 C. J. 840.

⁷⁰ *Case v. Young*, 3 Minn. 209 (140); 30 A. & E. Ency. of Law (2 ed.) 614; 14 Cyc. 57; 18 C. J. 840; 28 R. C. L. 82; 9 Probate Reports Ann. 12; 15 Am. St. Rep. 592.

⁷¹ *In re Callaghan's Estate*, 119 Cal. 571, 51 Pac. 860.

statute depends upon the provisions of the particular will.⁷³ A bequest to a parent (son-in-law) of a grandchild has been held not a provision for a pretermitted grandchild.⁷⁴ So far as the omitted child is concerned the testator dies intestate and such child takes under the law and not under the will.⁷⁵ Under the statute the testator dies intestate so far as the omitted child is concerned and a sale by the executor of realty of the testator under a power in the will does not divest the child of his interest.⁷⁶ The rights of an omitted child should be asserted in the probate court by motion after the probate of the will. An omitted child cannot oppose the probate of a will solely on the ground that it makes no provision for him. He should make his application at, or at least not later than the time of the hearing for a final decree for distribution and if he fails to do so he will be barred by such a decree.⁷⁷ When omitted children claim their share under the statute the burden of proving that the omission was intentional is on those who oppose their claim.⁷⁸ A child was provided for in a will. Subsequently the testator made a codicil to the will in which no reference was made to the provision and no new provision made. The child died before the testator leaving a son. Held, that the gift to the child of the testator was void because of his death before the will took effect and that the republication of the will through the codicil was not in effect the making of a legacy to the son so as to preclude him from claiming as a pretermitted heir under the statute.⁷⁹

148. Same—Conflict of laws—A child of a non-resident testator is entitled to the protection of the statute so far as realty in this state is concerned.⁸⁰ Whether it was the intention of a non-resident testator to disinherit a child is to be determined by the law of this state so far as realty in this state is concerned.⁸⁰

⁷³ *Neal v. Davis*, 53 Or. 423, 99 Pac. 69, 100 Pac. 212.

⁷⁴ *Meyers v. Watson*, 234 Mo. 236, 136 S. W. 236.

⁷⁵ *In re Loyd's Estate*, 175 Cal. 699, 167 Pac. 157.

⁷⁶ *Smith v. Steen*, 20 N. M. 436, 150 Pac. 927; *Smith v. Robertson*, 89 N. Y. 555; *Smith v. Olmstead*, 88 Cal. 582, 585, 26 Pac. 521; *Worley v. Taylor*, 21 Or. 589, 28 Pac. 903.

⁷⁷ *Odenbreit v. Uthelm*, 131 Minn. 56, 154 N. W. 741; *In re Barlow's Estate* (Minn.) 188 N. W. 282; *Lowery v. Hawker*, 22 N. D. 318, 133 N. W. 918; *In re Barker's Estate*, 5 Wash. 390, 31 Pac. 976; *Newman v. Waterman*, 63 Wis. 612, 23 N. W. 696. See L. R. A. 1916D, 426;

9 Probate Reports Ann. 33; 28 R. O. L. 84.

⁷⁸ *Whitby v. Motz*, 125 Minn. 40, 145 N. W. 623; *Ramsdill v. Wentworth*, 106 Mass. 320; *Goff v. Britton*, 182 Mass. 293, 65 N. E. 379. See 9 Probate Reports Ann. 28.

⁷⁹ *In re Matthews' Estate*, 176 Cal. 576, 169 Pac. 233. For a criticism of this case see 31 Harv. L. Rev. 901.

⁸⁰ *Peet v. Peet*, 229 Ill. 341, 82 N. E. 376; *Crossett Lumber Co. v. Files*, 104 Ark. 600, 149 S. W. 908. See *Prentiss v. Prentiss*, 14 Minn. 18 (5); 2 L. R. A. (N. S.) 459; 9 Probate Reports Ann. 7.

⁸¹ *Peet v. Peet*, 229 Ill. 341, 82 N. E. 376. See § 158.

149. Posthumous children—Statute—If any child of a testator, born after the death of such testator, has no provision made for him by his father in his will or otherwise, he shall take the same share of his father's estate that he would have taken if the father had died intestate, unless it appears that such omission was intentional.⁸¹ Since the amendment of 1915 a parent may entirely disinherit a posthumous child, if he clearly expresses his intention to do so in his will.⁸² A child born after the death of a testator unprovided for in the will takes by inheritance as heir at law. As to his share the will is annulled and the testator dies intestate. The child takes subject to the statutory interest of the surviving spouse.⁸³ Any provision, great or small, equal or unequal, vested or contingent, present or future, is sufficient.⁸⁴ A vested remainder is a sufficient provision.⁸⁵ A contingent remainder is a sufficient provision.⁸⁶ A will making a bequest to a wife and giving all the rest of the property to a trustee to pay the whole income to the wife during life, and the reversion to those who at her death might be his heirs at law by blood, held to make a sufficient provision.⁸⁷ A devise by a testator to his wife of all his real estate to have and to hold until the youngest child, if any be born, attained the age of twenty-one years, and in case no children were living at his death, to his wife, unless she remarried, held to make a sufficient provision.⁸⁸ Where a testator gave all the residue of his estate to his wife, expressing confidence that she would provide for their children, they then having three, another child, born after the death of the testator, was held entitled to the benefit of the statute.⁸⁹

150. Same—Conflict of laws—The child of a non-resident is within the protection of the statute so far as realty is concerned, but not as to personality.⁹⁰

151. Same—From what estate share taken—Statute—If an after-born child, or a child or the issue of a child omitted in the will, takes a portion of a testator's estate under the provisions of §§ 7259, 7260 (147, 149 supra), such portion shall first be taken from the estate not disposed of by will, if any; if that be insufficient, so much as is necessary shall be

⁸¹ G. S. 1913, § 7259, as amended by Laws 1915, c. 343. See 27 A. & E. Ency. of Law (2 ed.) 316; 14 Cyc. 56; 18 C. J. 827; 115 Am. St. Rep. 586; 18 A. L. R. 8 (posthumous illegitimate children).

⁸² See *Prentiss v. Prentiss*, 14 Minn. 18 (5).

⁸³ *Young v. Blake*, 148 N. Y. S. 557.

⁸⁴ *In re Newlin's Estate*, 209 Pa. 456, 58 Atl. 846. See 43 L. R. A. (N. S.) 1195; 14 Cyc. 57.

⁸⁵ *Allison v. Allison's Executors*, 101 Va. 537, 48 S. E. 904.

⁸⁶ *Verrinder v. Winter*, 98 Wis. 287, 73

N. W. 1007; *McLean v. McLean*, 207 N. Y. 365, 101 N. E. 178; *In re Newlin's Estate*, 209 Pa. 456, 58 Atl. 846; *Osborn v. Jefferson Nat. Bank*, 116 Ill. 130.

⁸⁷ *Minot's Appeal*, 164 Mass. 38, 41 N. E. 63.

⁸⁸ *In re Donges' Estate*, 103 Wis. 497, 79 N. W. 786.

⁸⁹ *Crocker v. Mulligan*, 139 N. Y. S. 381.

⁹⁰ *Eyre v. Storer*, 37 N. H. 114; *Bloomer v. Bloomer*, 2 Bradf. (N. Y.) 339; *Van Wickle v. Van Wickle*, 59 N. J. Eq. 317, 44 Atl. 877.

taken from all the devisees and legatees in proportion to the value of what they respectively receive under such will. But if the obvious intention of the testator in relation to some specific devise, bequest, or other provision of the will would thereby be defeated, then such specific devise, legacy, or provision may be exempted from such apportionment, and a different apportionment be adopted, in the discretion of the court.⁹¹

152. Contracts to devise or bequeath property—A person may obligate himself by contract to make his will in a particular way, or to give certain specific property to a particular person, so as to bind his estate. But courts will be strict in looking into the nature and circumstances of such contracts and require satisfactory evidence of their fairness and justice. The remedy for a breach of such a contract depends upon the facts of the particular case, and may be either at law for damages or in equity for specific performance, or in presenting a claim to the probate court. If the contract is an oral one to devise land, and is reasonably certain as to its subject-matter and stipulations, equity will decree specific performance if there has been a part performance sufficient to take the case out of the statute of frauds. If the consideration for the contract is labor and services which may be estimated, and their value liquidated in money, so as reasonably to make the promisee whole, specific performance will not be decreed. But if the consideration for the contract is that the promisee shall assume a peculiar and domestic relation to the promisor, and render him service of such a peculiar character that it is practically impossible to estimate their value by any pecuniary standard, specific performance will be decreed. Specific performance must be sought in the district court and not in the probate court.⁹² The contract cannot be enforced by the probate court in making a final decree of distribution.⁹³ It may be enforced by the heirs of the prom-

⁹¹ G. S. 1913, § 7261. See *In re Smith's Estate*, 145 Cal. 118, 78 Pac. 369; 18 C. J. 842.

⁹² *Schwab v. Pierro*, 43 Minn. 520, 46 N. W. 71; *Newton v. Newton*, 46 Minn. 33, 48 N. W. 450; *Kleeberg v. Schrader*, 69 Minn. 136, 72 N. W. 59; *Svanburg v. Fosseen*, 75 Minn. 350, 78 N. W. 4; *Stellmacher v. Bruder*, 89 Minn. 507, 95 N. W. 324; *Laird v. Villa*, 93 Minn. 45, 100 N. W. 656; *Richardson v. Richardson*, 114 Minn. 12, 130 N. W. 4; *Haubrich v. Haubrich*, 118 Minn. 394, 136 N. W. 1025; *Fiske v. Lawton*, 124 Minn. 85, 144 N. W. 455; *Brasch v. Reeves*, 124 Minn. 114, 144 N. W. 744; *Robertson v. Corcoran*, 125 Minn. 118, 145 N. W. 812; *Odenbreit v. Uthelm*, 131 Minn. 56, 154 N. W. 741; *Kins v. Glinzky*, 135 Minn. 327, 160 N. W.

868; *Lindell v. Lindell*, 135 Minn. 368, 160 N. W. 1031; *Wold v. Wold*, 138 Minn. 409, 165 N. W. 229; *Greenfield v. Peterson*, 141 Minn. 475, 170 N. W. 696; *Colby v. Street*, 146 Minn. 290, 178 N. W. 599; 26 A. & E. Ency. of Law (2 ed.) 91; 40 Cyc. 1063; 28 R. C. L. 64; *Woerner*, Am. Law of Adm. (2 ed.) § 37; 15 L. R. A. (N. S.) 466; 44 L. R. A. (N. S.) 733, 756; Ann. Cas. 1914A, 399; Ann. Cas. 1915A, 463; Ann. Cas. 1916D, 1160 (contract not to change will); 25 Harv. L. Rev. 571; 28 Id. 241; 30 Id. 192; 33 Id. 933; 3 Mich. L. Rev. 84; 2 A. L. R. 1155, 1193 (right of beneficiary to enforce contract between third parties to provide for him by will).

⁹³ See § 1071.

isee.⁹⁴ Where a contract is made to devise specific property in consideration for services to be performed, the measure of damages for a breach of the contract, is the full value of the promised devise, regardless of the value of the services.⁹⁵ Where a person performs services for another under an agreement for compensation by will and no such compensation is made, he may recover the reasonable value of his services against the estate of the latter.⁹⁶ A will executed in pursuance of such a contract will be recognized in equity as a part performance of the contract, and becomes itself in its contractual features an enforceable contract binding on the testator, and his heirs, and cannot be revoked to the prejudice of the other party.⁹⁷ It has been held in North Dakota that the probate of a second will revoking a prior will made in pursuance of such an agreement might be enjoined, but this is doubtful.⁹⁸ An action at law, triable by jury, will lie for the breach of a contract to bequeath personalty.⁹⁹ In an action on a quantum meruit the measure of damages for breach of a promise to give one a legacy for services performed prior to the promise is the reasonable value of the services and not the amount of the legacy promised.¹ An agreement to devise cannot be specifically enforced until the death of the party agreeing to make the will, but if he repudiates the agreement a cause of action accrues for analogous relief by way of rescission or recovery of damages.² The statute of limitations does not begin to run against an action at law for a breach of the contract until the death of the testator, unless the latter unequivocally repudiates the contract in his lifetime.³ A contract whereby one agrees to adopt another and make him his heir at law is continuing in character, and an attempted renunciation thereof by the promisor does not set in motion the statute of limitations. The promisee in such a case may act upon such repudiation and sue at once to protect his rights, or he may delay action until the death of the promisor.⁴

⁹⁴ *Lindell v. Lindell*, 135 Minn. 368, 160 N. W. 1031.

⁹⁵ *Gordon v. Spellman*, 145 Ga. 682, 89 S. E. 749; *Jefferson v. Simpson* (W. Va.) 98 S. E. 212. See 40 Cyc. 1073; Ann. Cas. 1918A, 854.

⁹⁶ *Schwab v. Pierro*, 43 Minn. 520, 46 N. W. 71; 40 Cyc. 1069; Ann. Cas. 1918A, 855. See § 928.

⁹⁷ *Torgerson v. Hauge*, 34 N. D. 646, 159 N. W. 6; *Baker v. Syfritt*, 147 Iowa 49, 125 N. W. 998. See 3 A. L. R. 172.

⁹⁸ *Torgerson v. Hauge*, 34 N. D. 646, 159 N. W. 6. See *Sumner v. Crane*, 155 Mass. 483, 29 N. E. 1151; *Morgan v. Sanborn*, 225 N. Y. 454, 122 N. E. 696; 30 Harv. L. Rev. 192.

⁹⁹ *Dilger v. McQuade's Estate*, 158 Wis. 328, 148 N. W. 1085; *In re Simons*,

247 U. S. 231; *Jefferson v. Simpson* (W. Va.) 98 S. E. 212. See *Wold v. Wold*, 138 Minn. 409, 165 N. W. 229; 40 Cyc. 1070.

¹ *Murtha v. Donohoo*, 149 Wis. 481, 136 N. W. 158. See Ann. Cas. 1918A, 856.

² *Chantland v. Sherman*, 148 Iowa 352, 125 N. W. 871. See *Wold v. Wold*, 138 Minn. 409, 165 N. W. 229; 40 Cyc. 1067; 44 L. R. A. (N. S.) 752.

³ *In re Hess' Estate*, 57 Minn. 282, 59 N. W. 193; 40 Cyc. 1071; 8 Ann. Cas. 112; Ann. Cas. 1918A, 912. See *In re Wagner*, 138 Minn. 37, 163 N. W. 975; *Savage v. Minnesota Loan & Trust Co.*, 142 Minn. 187, 171 N. W. 778; *Welsh v. Welsh's Estate*, 148 Minn. 235, 181 N. W. 356.

⁴ *Wold v. Wold*, 138 Minn. 409, 165 N. W. 229.

153. Preventing execution of will—Constructive trust—If a person by his promises, or by any fraudulent conduct, with a view to his own profit, prevents a will from being made in favor of a third person, and the property intended for such third person afterwards comes to him who prevented the execution of the will, he will be held to be the trustee of the person defrauded to the extent of the interest intended for him.⁵

154. Deposit of wills in probate court for safe keeping—Statute—A will in writing inclosed in a sealed wrapper, indorsed upon which is the name of the testator, his place of residence, the day when, and the person by whom, it is delivered, may be deposited with the probate judge of the county where the testator lives, by the testator or by any person for him, and such judge shall receive and safely keep the same, and give a certificate of its deposit. During the testator's lifetime such will shall be delivered only to him or upon his written order, witnessed by at least two subscribing witnesses and duly acknowledged. After the testator's death, and at the first session of the probate court after notice thereof, it shall be publicly opened and retained by the probate judge. He shall give notice thereof to the executor therein named, if any there be, otherwise to the persons interested in its provisions, or, if the jurisdiction of the case belongs to any other court, he shall deliver the same to the executor named therein, or to some trusty person interested in its provisions, to be presented to such other court. These provisions shall apply to all wills heretofore deposited with probate judges.⁶

CONFLICT OF LAWS

155. General rule as to realty—The *lex loci rei sitæ* governs the testamentary disposition of real property, but this general rule is subject to the statutory rule in this state that a will made out of the state and valid according to the laws of the state or country in which it was made, or of the testator's domicil, if in writing and signed by the testator, may be proved and allowed in this state, and shall thereupon have the same effect as if it had been executed according to the laws of this state. This statutory rule applies only to the validity of the execution of the will and does not affect the validity of the provisions thereof. The validity and effect of the provisions of a foreign will disposing of real property in this state must be determined by the laws of this state.⁷ The general rule that the *lex loci rei sitæ* governs the testamentary disposition of

⁵ *Rollins v. Mitchell*, 52 Minn. 41, 53 N. W. 1020; *Barrett v. Thielen*, 140 Minn. 266, 167 N. W. 1030. See 33 L. R. A. (N. S.) 995; 21 Ann. Cas. 1375; 106 Am. St. Rep. 94; 28 Harv. L. Rev. 460.

⁶ G. S. 1913, § 7265.

⁷ G. S. 1913, § 7253; *Washburn v. Van Steenwyk*, 32 Minn. 336, 20 N. W. 324; *Putnam v. Pitney*, 45 Minn. 242, 47 N.

W. 790; *Boeing v. Owsley*, 122 Minn. 190, 142 N. W. 129; *Jacobs v. Whitney*, 205 Mass. 477, 91 N. E. 1009; *Jackman v. Herrick*, 178 Iowa 1374, 161 N. W. 97; *Ford v. Ford*, 70 Wis. 19, 33 N. W. 188; *White v. Howard*, 46 N. Y. 144; *Larned v. Larned*, 98 Kan. 328, 158 Pac. 3; *Blaine v. Dow*, 111 Me. 480, 89 Atl. 1126; 22 A. & E. Ency. of Law (2 ed.) 1367;

real property is also limited in this state by the statute authorizing the probate of foreign wills already proved and allowed in another state.⁸

156. General rule as to personality—The law of the domicil of the testator at the time of his death governs the testamentary disposition of personal property.⁹ This general common-law rule is modified somewhat by the statutes of this state.¹⁰ Leasehold interests are personal property within this rule.¹¹ Where the decedent was in fact domiciled at the time of his death is to be determined by the law of the place where the personal property is situated.¹²

157. Capacity of testator—At common law the capacity of a testator to make a will is governed by the law of his last domicil as respects personality and by the *lex loci rei sitæ* as respects realty.¹³ This common-law rule is modified by statute in this state.¹⁴

158. Construction—Where the construction of a will merely involves the ascertainment of the intention of the testator and not the validity or effect of a gift the law of the domicil of the testator at the time of the execution of the will governs, regardless of whether the will disposes of real or personal property, unless it is obvious that the testator had the law of another place in view.¹⁵ It has been held, however, that whether a testator intended a provision for his wife should be in addition to or in exclusion of her statutory one-third should be determined by the law of the place where the land was situated rather than the law of the last domicil.¹⁶ Where, after making his will, a testator changed his domicil, it was held that the law of the place where he made his will governed in determining whether he intended to put his wife to an election between

40 Cyc. 1074, 1384; Woerner, *Am. Law of Adm.* (2 ed.) § 168; 2 L. R. A. (N. S.) 408; 11 Ann. Cas. 498. See § 293.

⁸ See § 299.

⁹ *Putnam v. Pitney*, 45 Minn. 242, 47 N. W. 790; *Harvey v. Great Northern Ry. Co.*, 50 Minn. 405, 407, 52 N. W. 905; *Babcock v. Collins*, 60 Minn. 73, 77, 61 N. W. 1020; *Fox v. Hicks*, 81 Minn. 197, 83 N. W. 538; *Gregory v. Lansing*, 115 Minn. 73, 131 N. W. 1010; *State v. Probate Court*, 128 Minn. 371, 150 N. W. 1094; *Rackemann v. Taylor*, 204 Mass. 394, 90 N. E. 552; 22 A. & E. Ency. of Law (2 ed.) 1366; 40 Cyc. 1074, 1384; 2 L. R. A. (N. S.) 408.

¹⁰ See §§ 293, 299.

¹¹ *Despard v. Churchill*, 53 N. Y. 192.

¹² *Harral v. Harral*, 39 N. J. Eq. 279. See 20 Harv. L. Rev. 226.

¹³ *Carpenter v. Bell*, 96 Tenn. 294, 34 S. W. 209; *Dickey v. Vann*, 81 Ala. 425,

8 So. 195; 22 A. & E. Ency. of Law (2 ed.) 1362; 40 Cyc. 997; 2 L. R. A. (N. S.) 415.

¹⁴ See §§ 293, 299; *Higgins v. Eaton*, 202 Fed. 75.

¹⁵ *Ford v. Ford*, 80 Mich. 42, 44 N. W. 1057; *Ford v. Ford*, 70 Wis. 19, 33 N. W. 188; *Keith v. Eaton*, 58 Kan. 732, 51 Pac. 271; *Larned v. Larned*, 98 Kan. 328, 158 Pac. 3; *Jacobs v. Whitney*, 205 Mass. 477, 91 N. E. 1009; *Johnson v. Johnson*, 215 Mass. 276, 102 N. E. 465; *Purl v. Purl* (Kan.) 197 Pac. 185; 22 A. & E. Ency. of Law (2 ed.) 1367; 40 Cyc. 1382; 12 C. J. 483; 2 L. R. A. (N. S.) 443; 11 Ann. Cas. 499; 50 Am. L. Reg. (O. S.) 623, 718.

¹⁶ *Jackman v. Herrick*, 178 Iowa 1374, 161 N. W. 97; *Perry v. Wilson*, 183 Ky. 155, 208 S. W. 776. See *Larned v. Larned*, 98 Kan. 328, 158 Pac. 3.

her dower rights and a provision made her in the will.¹⁷ And it has also been held that whether it was the intention of a testator to disinherit a child is to be determined by the *lex loci rei sitæ*.¹⁸ A construction of a will by a court of one state may be *res judicata* and binding on the same parties in an action in another state under the full faith and credit clause of the federal constitution.¹⁹ A testator owning real property in Wisconsin and in Minnesota died in the former state, that being his domicile as well as that of his widow. The widow was insane. Administration was had upon the will in Wisconsin, and also in this state in respect to property here. An action was commenced in Wisconsin, in which all persons interested in the will were made parties, for the purpose of obtaining a judicial construction of the will, and, if it should be considered to present a case for election on the part of the widow as between certain bequests made by the will in her behalf and her legal rights in the property of the testator, that an election might be made in her behalf. In that action it was finally determined that the will expressed the intention of the testator that the bequest made in favor of the widow should be in lieu of her legal right to the testator's property, and not in addition thereto; that it presented a case for an election; and the court, acting in behalf of its insane ward, elected in her behalf to take under the will. Held, that such determination as to the construction of the will was conclusive between the same parties in administration proceedings in this state.²⁰

159. Same—Gift to a class—What persons take under a gift to a class, without naming them, is to be determined by the law of the domicile of the testator at the time of the execution of the will, regardless of where the beneficiaries are domiciled, unless a contrary intention is clearly manifested by the will.²¹

160. Testamentary trusts—As a general rule the validity and construction of a testamentary trust involving personalty is governed by the law of the last domicile of the testator. If valid there it will be enforced elsewhere, though not valid under the local law, if its enforcement would not be contrary to the public policy of the local jurisdiction. If such a trust is valid where it is to be administered it will be sustained though it is

¹⁷ *Stalgg v. Atkinson*, 144 Mass. 564, 12 N. E. 354. See *Jackman v. Herrick*, 178 Iowa 1374, 161 N. W. 97.

¹⁸ See § 148.

¹⁹ *Washburn v. Van Steenywyk*, 32 Minn. 336, 20 N. W. 324. See *Clarke's Appeal*, 70 Conn. 195, 39 Atl. 155; 22 A. & E. Ency. of Law (2 ed.) 1377.

²⁰ *Washburn v. Van Steenywyk*, 32 Minn. 336, 20 N. W. 324.

²¹ *Lincoln v. Perry*, 149 Mass. 368, 21 N. E. 671; *Proctor v. Clark*, 154 Mass.

45, 27 N. E. 673; *Brandels v. Atkins*, 204 Mass. 471, 90 N. E. 861; *In re Ferguson's Will*, 1 Ch. 483; *Keith v. Eaton*, 58 Kan. 732, 51 Pac. 271; *In re Riesenbergs Estate*, 116 Mo. App. 308, 90 S. W. 1170; *Harris v. Ingalls*, 74 N. H. 339, 68 Atl. 34; *New York Life Ins. Co. v. Viele*, 161 N. Y. 11, 55 N. E. 311; *Rose v. Rambo* (Miss.) 82 So. 140; 22 A. & E. Ency. of Law (2 ed.) 1368; 2 L. R. A. (N. S.) 447; 11 Ann. Cas. 499.

invalid under the law of the last domicil of the testator.²² The validity and construction of a testamentary trust involving realty is governed by the *lex rei sitæ*.²³

TESTAMENTARY CAPACITY

161. What constitutes—Test—A testator has testamentary capacity if, at the time of making the will, he comprehends his relation to those who would naturally have claims on his bounty, the extent and situation of his property, and the effect of the will in disposing of it, and is able to hold these things in his mind long enough to form a rational judgment concerning them.²⁴ It is not an uncommon impression that a will must be set aside whenever the existence of any mental disorder at the time of its execution is established. That this is not the law is apparent from the fact that the testamentary dispositions of monomaniacs are often sustained in spite of the mental disorder. When the monomania is conceded, it is only necessary to inquire further whether the provisions of the will are or are not affected by it, and the will stands or falls by that test. The test is not whether the testator did the best or the wisest or the theoretically just thing in his will; but, did he have sufficient active memory to collect in his mind and comprehend, without prompting, the condition of his property, his relations to his children and other persons who might properly be his beneficiaries, and the scope and bearing of his will, and to hold these things in his mind a sufficient length of time to perceive their obvious relations to each other, and be able to form some rational judgment in relation to them. A person who has mental power to understand and transact ordinary business has capacity to make a valid will. The truth of this cannot be doubted, but it must not be understood to mean that that degree of mental power and vigor is requisite to testamentary capacity. Mental perception and power to think and reason of a lesser degree may be all that is requisite to the full understanding of everything involved in the execution of a will. The real question is, did he, at the time of making the instrument purporting to be

²² *Cross v. United States Trust Co.*, 131 N. Y. 330, 30 N. E. 125; *Hope v. Brewer*, 136 N. Y. 126, 32 N. E. 558; *Dammert v. Osborn*, 140 N. Y. 30, 35 N. E. 407; *Peabody v. Kent*, 138 N. Y. S. 32; *Pottstown v. New York Life Ins. & Trust Co.*, 208 Fed. 196; 22 A. & E. Ency. of Law (2 ed.) 1369; 39 Cyc. 89; *Woerner*, Am. Law of Adm. (2 ed.) § 565; 19 Harv. L. Rev. 457; 20 Ann. Cas. 866.

²³ *Acker v. Priest*, 92 Iowa 610, 61 N. W. 235. See 22 A. & E. Ency. of Law (2 ed.) 1369; 39 Cyc. 89; 19 Harv. L. Rev. 457; 20 Ann. Cas. 867.

²⁴ *Hammond v. Dike*, 42 Minn. 273, 44 N. W. 61; *Young v. Otto*, 57 Minn. 307, 311, 59 N. W. 199; *Schmidt v. Schmidt*, 47 Minn. 451, 457, 50 N. W. 598; *Buck v. Buck*, 126 Minn. 275, 148 N. W. 117; *Schleiderer v. Gergen*, 129 Minn. 248, 152 N. W. 541; *Woodville v. Morrill*, 130 Minn. 92, 153 N. W. 131; *Lewis v. Murray*, 131 Minn. 439, 155 N. W. 392; *Rasmussen v. Evans* (Minn.) 185 N. W. 297; 28 A. & E. Ency. of Law (2 ed.) 70; 40 Cyc. 1004; 28 R. C. L. 86; *Woerner*, Am. Law of Adm. (2 ed.) § 23; L. R. A. 1915A, 444.

his will, have such mind and memory as enabled him to understand the particular business in which he was then engaged. If a will is made by a mentally unsound person during a lucid interval, and when he possessed the power of intelligent comprehension, the will is valid.²⁵ A person may have testamentary capacity though he is subject to a particular form of insanity such as "kleptomania," or is laboring under insane delusions.²⁶ Not so much capacity is required to enable a person to make a will as to make a contract where he must hold his own with another at arm's length and with antagonistic interests.²⁷ It requires somewhat greater capacity to dispose of a large and diversified estate among numerous recipients with various gradations of claims than it does to dispose of a small and simple estate among the members of one's own immediate family.²⁸ A person may have testamentary capacity though subject to melancholy.²⁹ A person may have capacity to make a will though the state of his health and mental condition may render him unequal to business transactions of a more exacting nature; and his strength might be equal to making a short will involving few details, but unequal to making an elaborate will disposing of a large estate.³⁰ Mere mental and physical weakness, caused by age or sickness, does not in itself incapacitate. But a low physical condition, particularly in certain diseases, often causes a decay of mental powers.³¹ Mere eccentric, erratic or unbecoming conduct is not alone conclusive of incapacity.³² A person who is unable to understand without being prompted, the nature and importance of the act of making a will, is not competent to make one. But a person may have testamentary capacity though his memory needs prompting as to details.³³ A belief in spiritualism is not alone sufficient

²⁵ *Church v. St. Vincent De Paul v. Brannan*, 97 Minn. 349, 107 N. W. 141; *Schleiderer v. Gergen*, 129 Minn. 248, 152 N. W. 541; *Woodville v. Morrill*, 130 Minn. 92, 153 N. W. 131; *In re Olson's Estate*, 148 Minn. 122, 180 N. W. 1009; 181 N. W. 569. See 27 L. R. A. (N. S.) 2; L. R. A. 1915A, 443.

²⁶ *Lewis v. Lewis*, 44 Minn. 124, 46 N. W. 323; *Church of St. Vincent De Paul v. Brannan*, 97 Minn. 349, 107 N. W. 141; 28 A. & E. Ency. of Law (2 ed.) 79; 40 Cyc. 1013; 28 R. C. L. 102; *Woerner*, Am. Law of Adm. (2 ed.) § 25; 63 Am. St. Rep. 80; L. R. A. 1915A, 458; Ann. Cas. 1916C, 4.

²⁷ *Schleiderer v. Gergen*, 129 Minn. 248, 251, 152 N. W. 541; 28 A. & E. Ency. of Law (2 ed.) 74; 40 Cyc. 1007; L. R. A. 1915A, 457; Ann. Cas. 1915A, 362.

²⁸ *Schleiderer v. Gergen*, 129 Minn. 248, 152 N. W. 541; 28 A. & E. Ency. of Law (2 ed.) 76.

²⁹ *Reed v. McIntyre*, 86 Minn. 163, 90 N. W. 319.

³⁰ *Hammond v. Dike*, 42 Minn. 273, 275, 44 N. W. 61; *Schleiderer v. Gergen*, 129 Minn. 248, 152 N. W. 541. See *Sass v. McCormick*, 62 Minn. 234, 236, 64 N. W. 385; 28 A. & E. Ency. of Law (2 ed.) 74, 76; 40 Cyc. 1007.

³¹ *Schmidt v. Schmidt*, 47 Minn. 451, 457, 50 N. W. 598; *Little v. Little*, 83 Minn. 324, 86 N. W. 408; *Crowley v. Farley*, 129 Minn. 460, 152 N. W. 872.

³² *In re Nelson's Will*, 39 Minn. 204, 210, 39 N. W. 143; *Reed v. McIntyre*, 86 Minn. 163, 90 N. W. 319; *Schleiderer v. Gergen*, 129 Minn. 248, 152 N. W. 541; *Woodville v. Morrill*, 130 Minn. 92, 153 N. W. 131; 28 A. & E. Ency. of Law (2 ed.) 83; 40 Cyc. 1011; L. R. A. 1915A, 458.

³³ *Schleiderer v. Gergen*, 129 Minn. 248, 152 N. W. 541.

to deprive one of testamentary capacity.³⁴ To affect testamentary capacity a particular delusion must be operative in the testamentary act.³⁵ Religious belief may assume such a form as to deprive the testator of testamentary capacity.³⁶ One may have testamentary capacity though suffering from epilepsy.³⁷

162. Effect of incapacity—Will void in toto—If the testator was without testamentary capacity the will is void for all purposes. It cannot be held invalid as to personalty and valid as to realty.³⁸

163. Burden and order of proof—The burden of establishing the sanity or testamentary capacity of the testator is on the proponent, but he need make only a prima case in the first instance. The contestant may then introduce evidence of the insanity and the proponent may subsequently introduce further evidence of sanity.³⁹ Evidence of incapacity offered by the contestant must, in the first instance, be confined to a reasonable time after the execution of the will.⁴⁰

164. Evidence—Admissibility—In general—The nature and terms of the will itself are to be judicially regarded as an essential and important part of the evidence of testamentary capacity; and so, also, must be regarded its consistency or inconsistency with the situation, natural inclinations, and previously declared intentions of the testator. This rule is just as applicable in cases of doubtful capacity from death-bed sickness as from other causes. Such declarations, especially if recent, inform the jury of the state of mind of the testator when confessedly sound, and so aid in determining whether the instrument is the product of the same will. Where a testator executed a codicil to his will, during a sudden and fatal illness, his declarations made a short time before, showing an intention to make the changes made by the codicil, were held admissible.⁴¹ Evidence of incapacity within a reasonable time before and after the execution of the will is admissible. No hard and fast rule can be laid down fixing the limits of such time. The circumstances of each case must con-

³⁴ *Irwin v. Lattin*, 29 S. D. 1, 135 N. W. 759; *Dunham v. Holmes*, 225 Mass. 68, 113 N. E. 845; 28 A. & E. Ency. of Law (2 ed.) 89; 40 Cyc. 1012; 28 R. C. L. 106; 10 Ann. Cas. 606; Ann. Cas. 1914C, 1044; 63 Am. St. Rep. 72.

³⁵ *In re Olson's Estate*, 148 Minn. 122, 180 N. W. 1009, 181 N. W. 569; *Irwin v. Lattin*, 29 S. D. 1, 135 N. W. 759; 28 A. & E. Ency. of Law (2 ed.) 80; 40 Cyc. 1015; 28 R. C. L. 104; Ann. Cas. 1914C, 1044.

³⁶ *Ingersoll v. Gourley*, 78 Wash. 406, 139 Pac. 207. See Ann. Cas. 1915D, 573; 28 R. C. L. 106.

³⁷ *In re Derousseau's Will* (Wis.) 184 N. W. 705; 16 A. L. R. 1418.

³⁸ *Sheeran v. Sheeran*, 96 Minn. 484, 105 N. W. 677.

³⁹ *In re Layman's Will*, 40 Minn. 371, 42 N. W. 286; *Kennedy v. Kelly*, 123 Minn. 259, 143 N. W. 726; *Bush v. Hetherington*, 132 Minn. 379, 157 N. W. 505; *Rasmussen v. Evans* (Minn.) 185 N. W. 297. See § 269.

⁴⁰ *In re Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144.

⁴¹ *Hammond v. Dike*, 42 Minn. 273, 44 N. W. 61; 28 A. & E. Ency. of Law (2 ed.) 106; 40 Cyc. 1032; 13 Ann. Cas. 1037; Ann. Cas. 1917E, 130; 117 Am. St. Rep. 579.

trol and the determination of the trial judge is practically final.⁴² Where the only mental incapacity claimed is by gradual decay of the faculties from great age, proof of capacity after the execution of the will, however long, is admissible.⁴³ Evidence of the insanity of blood ancestors of the testator is admissible, but only by way of corroboration of other evidence of the insanity of the testator and after proof of the transmissible character of the insanity of the ancestor.⁴⁴ A judgment in proceedings for the appointment of a guardian of an incompetent person is admissible in evidence, but not conclusive, in any litigation, to prove the mental condition of the person at the time the judgment is rendered, or at any past time during which the judgment finds the person incompetent. When such a judgment is rendered in proceedings instituted after the will is made, and does not find the testator incompetent at such prior time, it is competent evidence, and whether it should be admitted depends upon its probative value as tending to prove the fact at issue. It stands on the same basis as would other evidence of the mental condition of the testator at a subsequent time. Whether it has probative value, or is too remote, is largely for the trial court to determine. In this case, the decision of the trial court that the exclusion of such judgment was prejudicial error is sustained. That the application was not to have the testatrix declared insane, but only to have a guardian appointed because of the impairment of her mental faculties by reason of old age, and her consequent inability to manage her affairs, did not render the adjudication inadmissible. The petition for such an adjudication is not admissible on the ground that it was made by one of the devisees and therefore an admission against interest, when there are others financially interested in sustaining the will.⁴⁵ A person who has been adjudged insane and committed to an insane hospital, though at liberty on parole but not discharged, is presumed to be mentally incompetent to make a will. The presumption is not conclusive and may be rebutted by showing that the derangement of mind was not general, but limited, and had no necessary reference to the subject-matter of the will.⁴⁶ The business acts of the testator and his declarations, oral or written, tending to show his comprehension or non-comprehension of daily occurrences in his business, or relating to his business, including contracts made by him and entries in his diary, are admissible if not too remote in time to

⁴² *In re Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; *McAllister v. Rowland*, 124 Minn. 27, 144 N. W. 412; 28 A. & E. Ency. of Law (2 ed.) 78; 40 Cyc. 1028.

⁴³ *In re Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144.

⁴⁴ *State v. Hayward*, 62 Minn. 474, 65 N. W. 63; *Boston Safe Deposit & Trust Co. v. Bacon*, 229 Mass. 585, 118 N. E. 906.

⁴⁵ *McAllister v. Rowland*, 124 Minn. 27, 144 N. W. 412; Ann. Cas. 1915B, 1005; 7 A. L. R. 581, 603. See as to admissibility of judgment appointing a guardian for a blood ancestor of the testator, *Boston Safe Deposit & Trust Co. v. Bacon*, 229 Mass. 585, 118 N. E. 906.

⁴⁶ *Woodville v. Morrill*, 130 Minn. 92, 153 N. W. 131; *In re Staab's Estate*, 166 Wis. 587, 166 N. W. 326.

be material.⁴⁷ Communications made by the testator to his attorney on business matters prior to and without reference to the execution of the will have been held admissible as a foundation for the opinion evidence of the attorney as to the sanity of the testator.⁴⁸ It may be shown that the testator was frugal, saving and appreciative of the value of property, for such qualities tend to negative the existence of an unsound mind.⁴⁹ A bond executed by the testator has been held inadmissible, it appearing that he neither read it nor heard it read.⁵⁰ The declarations of an attesting witness that the testator was of unsound mind when the will was made are inadmissible.⁵¹ A contestant may testify as to what the testator said and did, prior to the making of the will, indicating his state of mind, including angry exclamations, but a contestant cannot testify as to any conversation between the testator and the contestant relative to the will.⁵² A mistake of the testator as to the extent of his property is admissible but does not show as a matter of law a want of testamentary capacity.⁵³

165. Opinion evidence—Attesting witnesses to a will are competent to testify and give their opinion as to the testamentary capacity of the testator without laying any foundation by giving the facts upon which the opinion is based.⁵⁴ A witness, not an expert and not an attesting witness, cannot testify generally as to the mental capacity of the testator, but must first testify as to the facts within his knowledge upon which his opinion is based, and then can testify only as to his opinion formed from those facts.⁵⁵ A non-expert witness who has observed the testator may testify that he acted like an insane person.⁵⁶ Medical experts may testify as to the effect of physical disease on the mind, but not as to whether certain mental acts or operations indicate a strong or weak mind.⁵⁷ An expert witness may be asked whether, assuming the statements of the other witnesses as to symptoms and indications of testator to be true, the testator was of sound mind.⁵⁸ An expert witness may give his opin-

⁴⁷ *In re Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; *Woodcock v. Johnson*, 36 Minn. 217, 30 N. W. 894; *Wheeler v. McKeon*, 137 Minn. 92, 162 N. W. 1070.

⁴⁸ *In re Layman's Will*, 40 Minn. 371, 42 N. W. 286.

⁴⁹ *Buck v. Buck*, 126 Minn. 275, 148 N. W. 117.

⁵⁰ *In re Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144.

⁵¹ *Speer v. Speer*, 146 Iowa 6, 123 N. W. 176; 23 Harv. L. Rev. 409.

⁵² See § 286.

⁵³ *Ann. Cas.* 1914A, 478.

⁵⁴ *Geraghty v. Kilroy*, 103 Minn. 286, 114 N. W. 838. See § 280; 28 A. & E. Ency. of Law (2 ed.) 101; 40 Cyc. 1035, *Woerner*, *Am. Law of Adm.* (2 ed.) § 28.

⁵⁵ *In re Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; *Collins v. Dowlan*, 118 Minn. 214, 136 N. W. 854. See *Woodcock v. Johnson*, 36 Minn. 217, 30 N. W. 894; *In re Layman's Will*, 40 Minn. 371, 42 N. W. 286; *McKillop v. Duluth St. Ry. Co.*, 53 Minn. 532, 537, 55 N. W. 739; 28 A. & E. Ency. of Law (2 ed.) 96, 98; 40 Cyc. 1038; *Woerner*, *Am. Law of Adm.* (2 ed.) § 28; *Ann. Cas.* 1914D, 336, 343.

⁵⁶ *Cannady v. Lynch*, 27 Minn. 435, 8 N. W. 164; *Killop v. Duluth St. Ry. Co.*, 53 Minn. 532, 537, 55 N. W. 739.

⁵⁷ *In re Nelson's Will*, 39 Minn. 204, 210, 39 N. W. 143.

⁵⁸ *In re Storer's Will*, 28 Minn. 9, 8 N. W. 827. See *Buck v. Buck*, 126 Minn. 275, 148 N. W. 117.

ion directly on the issue in controversy, namely, whether the testator was of sound mind.⁵⁹ A physician who had treated the testator professionally about the time of the execution of the will was asked, "What was the infirmity of which he complained and he was consulting you?" This was objected to as calling for a confidential communication between physician and patient, and the objection was sustained. There was no offer to show that the ailment which the physician was treating had any relation to testator's mental condition. Held, no error.⁶⁰

166. Evidence—Sufficiency—Findings that the testator had testamentary capacity held justified by the evidence.⁶¹ Findings that the testator was not of sound mind held justified by the evidence.⁶² Findings that the testator had testamentary capacity held not justified by the evidence.⁶³ The supreme court will not reverse the findings of the trial court or jury on the question of the competency of the testator unless they are clearly and manifestly against the evidence. It will not do so merely because it would have found differently if the question had been presented to it originally.⁶⁴

UNDUE INFLUENCE

167. What constitutes—A will must be the voluntary act of the testator. If a will is the result of undue influence exerted on the testator by others it is void. A testator may be influenced by others in making his will, but he must not be unduly influenced. Undue influence is influence of such a degree that it destroys the free agency of the testator, so that the will which he executes is not his will but that of another. It may be exerted through threats, fraud, importunity, excessive entreaty, or by the silent, resistless power which the strong can exercise over the weak and infirm. Entreaty, importunity, suggestion, advice, persuasion,

⁵⁹ *Buck v. Buck*, 126 Minn. 275, 148 N. W. 117.

⁶⁰ *Buck v. Buck*, 126 Minn. 275, 148 N. W. 117.

⁶¹ *Mitchell v. Mitchell*, 43 Minn. 73, 44 N. W. 885; *Schmidt v. Schmidt*, 47 Minn. 451, 50 N. W. 598; *Coates v. Semper*, 82 Minn. 460, 85 N. W. 217; *Little v. Little*, 83 Minn. 324, 86 N. W. 408; *Reed v. McIntyre*, 86 Minn. 163, 90 N. W. 319; *Cady v. Cady*, 91 Minn. 137, 97 N. W. 580; *Clarity v. Davis*, 92 Minn. 60, 99 N. W. 363; *Church of St. Vincent De Paul v. Brannan*, 97 Minn. 349, 107 N. W. 141; *Geraghty v. Kilroy*, 103 Minn. 286, 114 N. W. 838; *Collins v. Dowlan*, 118 Minn. 214, 136 N. W. 854; *Buck v. Buck*, 126 Minn. 275, 148 N. W. 117; *Woodville v. Morrill*, 130 Minn. 92, 153 N. W. 131;

Bush v. Hetherington, 132 Minn. 379, 157 N. W. 505; *Hanson v. Hanson*, 141 Minn. 373, 170 N. W. 348; *In re Olson's Estate*, 148 Minn. 122, 180 N. W. 1009, 181 N. W. 569; *In re Brewster's Estate* (Minn.) 184 N. W. 564; *In re Wood's Estate* (Minn.) 184 N. W. 955; *Rasmussen v. Evans* (Minn.) 185 N. W. 297.

⁶² *Sheehan v. Sheehan*, 96 Minn. 484, 105 N. W. 677; *Kletschka v. Kletschka*, 113 Minn. 228, 129 N. W. 372; *Kennedy v. Kelly*, 123 Minn. 259, 143 N. W. 726; *Schleiderer v. Gergen*, 129 Minn. 248, 152 N. W. 541; *Crowley v. Farley*, 129 Minn. 460, 152 N. W. 872.

⁶³ *Kennedy v. Kelly*, 119 Minn. 531, 137 N. W. 456.

⁶⁴ *Woodville v. Morrill*, 130 Minn. 92, 153 N. W. 131.

or urging considerations of gratitude, love, esteem, affection or charity, does not constitute undue influence, unless it is so persistent and strong that it amounts to constraint, overpowering the will of the testator, so that he does not act freely but merely registers the wishes of others, and not his own wishes, in making his will. A testator may be influenced by fair means but he must not be coerced. His free agency must not be destroyed.⁶⁵ A person with testamentary capacity has a right to dispose of his property by will as he pleases, though he is affected by his prejudices and predilections arising from his associations and external influences.⁶⁶

168. Burden of proof—The burden of proving undue influence is on the contestant.⁶⁷ When the contestant has made out a prima facie case of undue influence, the burden of going on with the evidence shifts back upon the proponent, who has the burden throughout the trial of establishing the validity of the will. There is no definite rule by which to determine the amount and character of evidence which will make a prima facie case of undue influence and shift the burden of going on with the evidence.⁶⁸ Proof of inequality in the will and motive and opportunity of a preferred beneficiary to exert undue influence is not sufficient to make out a prima facie case of undue influence. There must be some evidence that he did exert it.⁶⁹

⁶⁵ In re Nelson's Will, 39 Minn. 204, 39 N. W. 143; Mitchell v. Mitchell, 43 Minn. 73, 44 N. W. 885; Schmidt v. Schmidt, 47 Minn. 451, 457, 50 N. W. 598; In re Hess' Will, 48 Minn. 504, 509, 51 N. W. 614; Will v. Sisters of St. Benedict, 67 Minn. 335, 69 N. W. 1090; Tyner v. Varlen, 97 Minn. 181, 106 N. W. 898; Howard v. Farr, 115 Minn. 86, 92, 131 N. W. 1071; Buck v. Buck, 122 Minn. 463, 142 N. W. 729; Woodville v. Morrill, 130 Minn. 92, 153 N. W. 131; Lewis v. Murray, 131 Minn. 439, 447, 155 N. W. 392; Thill v. Freiermuth, 132 Minn. 242, 156 N. W. 260; Rasmussen v. Evans (Minn.) 185 N. W. 297; Whitcomb v. Whitcomb, 205 Mass. 310, 91 N. E. 210; Emery v. Emery, 222 Mass. 439, 111 N. E. 287 (undue influence by a wife over her husband); 29 A. & E. Ency. of Law (2 ed.) 103, 105; 40 Cyc. 1144; 28 R. C. L. 137; Woerner, Am. Law of Adm. (2 ed.) § 31; 9 Ann. Cas. 783; 28 Id. 143; 31 Am. St. Rep. 670; 17 L. R. A. (N. S.) 477.

⁶⁶ In re Storer's Will, 28 Minn. 9, 8 N. W. 827; Mitchell v. Mitchell, 43 Minn. 73, 75, 44 N. W. 885; In re Hess' Will,

48 Minn. 504, 512, 51 N. W. 614; Will v. Sisters of St. Benedict, 67 Minn. 335, 69 N. W. 1090; Tyner v. Varlen, 97 Minn. 181, 106 N. W. 898; Bush v. Hetherington, 132 Minn. 379, 157 N. W. 505.

⁶⁷ Mitchell v. Mitchell, 43 Minn. 73, 75, 44 N. W. 885; In re Hess' Will, 48 Minn. 504, 511, 51 N. W. 614; Fischer v. Sperl, 94 Minn. 421, 103 N. W. 502; Tyner v. Varlen, 97 Minn. 181, 106 N. W. 898; Burmeister v. Gust, 117 Minn. 247, 135 N. W. 980; Buck v. Buck, 122 Minn. 463, 142 N. W. 729; Bush v. Hetherington, 132 Minn. 379, 157 N. W. 505; Thill v. Freiermuth, 132 Minn. 242, 156 N. W. 260; Rasmussen v. Evans (Minn.) 185 N. W. 297; 36 L. R. A. 737; 24 Harv. L. Rev. 329; 29 A. & E. Ency. of Law (2 ed.) 110; 40 Cyc. 1150; 28 R. C. L. 144.

⁶⁸ Tyner v. Varlen, 97 Minn. 181, 183, 106 N. W. 898; Buck v. Buck, 122 Minn. 463, 142 N. W. 729. See Howard v. Farr, 115 Minn. 86, 131 N. W. 1071.

⁶⁹ Fischer v. Sperl, 94 Minn. 421, 103 N. W. 502; Buck v. Buck, 122 Minn. 463, 142 N. W. 729. See § 171.

169. Degree of proof required—Proof of undue influence must be clear and convincing. It is not enough to raise a mere suspicion or conjecture.⁷⁰

170. Law and fact—Jury trial—The question of undue influence is one of fact and is often submitted to a jury in the district court on appeal, but there is no constitutional or statutory right to a jury trial. Whether the issue shall be submitted to a jury rests in the discretion of the trial court. After the submission of such an issue to a jury the trial court may withdraw it before a verdict is returned and itself make a finding thereon.⁷¹

171. Evidence—Admissibility—Undue influence may be proved by circumstantial evidence. Indeed, that is usually the only kind of evidence available.⁷² Evidence reasonably tending to show a mental condition of the testator rendering him susceptible to undue influence is admissible.⁷³ The condition of the testator's mind and health, and his peculiar mental characteristics, may be considered. The fact that he was a person of strongly marked characteristics, of sound mind and strong will, abundantly able to protect himself, is relevant.⁷⁴ The declarations of the testator, whether made before, after, or at the time of the execution of the will, are admissible to show the effect of undue influence otherwise proved to have been exerted, but they are insufficient alone to prove undue influence, unless possibly where they are so connected with the execution of the will as to be a part of the *res gestæ*.⁷⁵ Prior statements of a testator as to how he intended to dispose of his property, disconnected from the act of making his will, are not evidence of undue influence, but are evidence only of the effect which influence otherwise shown to have been exerted upon him had on his mind.⁷⁶ The mere

⁷⁰ *In re Nelson's Will*, 39 Minn. 204, 206, 39 N. W. 143; *In re Hess' Will*, 48 Minn. 504, 511, 51 N. W. 614. See *Howard v. Farr*, 115 Minn. 86, 131 N. W. 1071; 29 A. & E. Ency. of Law (2 ed.) 111; 40 Cyc. 1164.

⁷¹ *Schmidt v. Schmidt*, 47 Minn. 451, 50 N. W. 598; *Lewis v. Murray*, 131 Minn. 439, 155 N. W. 392. See *Fischer v. Sperl*, 94 Minn. 421, 103 N. W. 502; *Id.*, 100 Minn. 198, 110 N. W. 853; *Church of St. Vincent De Paul v. Brannan*, 97 Minn. 349, 354, 107 N. W. 141; *Buzalsky v. Buzalsky*, 108 Minn. 422, 122 N. W. 322; *Grattan v. Rogers*, 110 Minn. 493, 126 N. W. 134; *Buck v. Buck*, 122 Minn. 463, 142 N. W. 729.

⁷² *In re Nelson's Will*, 39 Minn. 204, 206, 39 N. W. 143; *In re Hess' Will*, 48 Minn. 504, 511, 51 N. W. 614; *Fischer v. Sperl*, 94 Minn. 421, 103 N. W. 502; *Buck*

v. Buck, 122 Minn. 463, 142 N. W. 729; 29 A. & E. Ency. of Law (2 ed.) 110; 40 Cyc. 1155, 1164. See *In re Brewster's Estate (Minn.)* 184 N. W. 564.

⁷³ *Fischer v. Sperl*, 94 Minn. 421, 103 N. W. 502.

⁷⁴ *In re Hess' Will*, 48 Minn. 504, 514, 51 N. W. 614; 29 A. & E. Ency. of Law (2 ed.) 111; 40 Cyc. 1156.

⁷⁵ *In re Storer's Will*, 28 Minn. 9, 8 N. W. 827; *In re Hess' Will*, 48 Minn. 504, 511, 51 N. W. 614; *Burmeister v. Gust*, 117 Minn. 247, 135 N. W. 980; *Woodville v. Morrill*, 130 Minn. 92, 153 N. W. 131; *Thill v. Freiermuth*, 132 Minn. 242, 156 N. W. 260. See 107 Am. St. Rep. 459; 3 L. R. A. (N. S.) 749; Ann. Cas. 1917D, 717; 29 A. & E. Ency. of Law (2 ed.) 117; 40 Cyc. 1157; 28 R. C. L. 151.

⁷⁶ *In re Storer's Will*, 28 Minn. 9, 8 N. W. 827.

fact that a will is inofficious, harsh, or unjust, is not alone evidence of undue influence, but if there is other evidence of undue influence it may be considered in corroboration thereof. Mere inequality, however great, is not alone evidence of undue influence, even though the testator was of impaired mind and memory. A person with testamentary capacity has a perfect legal right to be unjust, unreasonable or whimsical in the disposition of his property by will and his motives are not subject to judicial inquiry.⁷⁷ The failure of a testator to provide for a child does not raise a presumption of undue influence, but it may be considered, if there is other evidence of undue influence, in corroboration thereof.⁷⁸ It is not sufficient to show that a beneficiary under the will had motive and opportunity to exert undue influence; there must be evidence that he did exert it.⁷⁹ Declarations of a beneficiary showing an intention to exert undue influence are admissible though the declarant is dead.⁸⁰

172. Evidence—Sufficiency—Findings of want of undue influence held justified by the evidence.⁸¹ Findings of want of undue influence held not justified by the evidence.⁸² Findings of undue influence held justi-

⁷⁷ *In re Storer's Will*, 28 Minn. 9, 8 N. W. 827; *In re Nelson's Will*, 39 Minn. 204, 209, 39 N. W. 143; *Mitchell v. Mitchell*, 43 Minn. 73, 44 N. W. 885; *In re Hess' Will*, 48 Minn. 504, 51 N. W. 614; *Tyner v. Varien*, 97 Minn. 181, 106 N. W. 898; *Buzalsky v. Buzalsky*, 108 Minn. 422, 122 N. W. 322; *Kletschka v. Kletschka*, 113 Minn. 228, 129 N. W. 372; *Buck v. Buck*, 122 Minn. 463, 142 N. W. 729; *Bush v. Hetherington*, 132 Minn. 379, 157 N. W. 505. See *Hogan v. Vinje*, 88 Minn. 499, 503, 93 N. W. 523; 29 A. & E. Ency. of Law (2 ed.) 115; 40 Cyc. 1160; 6 L. R. A. (N. S.) 202; 22 Id. 1024.

⁷⁸ *Kletschka v. Kletschka*, 113 Minn. 228, 129 N. W. 372.

⁷⁹ *In re Storer's Will*, 28 Minn. 9, 8 N. W. 827; *In re Nelson's Will*, 39 Minn. 204, 208, 39 N. W. 143; *In re Hess' Will*, 48 Minn. 504, 511, 51 N. W. 614; *Little v. Little*, 83 Minn. 324, 86 N. W. 408; *Thill v. Freiermuth*, 132 Minn. 242, 156 N. W. 260.

⁸⁰ *Ex parte McKie*, 107 S. C. 57, 91 S. E. 978.

⁸¹ *In re Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; *In re Storer's Will*, 28 Minn. 9, 8 N. W. 827; *In re Nelson's Will*, 39 Minn. 204, 39 N. W.

143; *Mitchell v. Mitchell*, 43 Minn. 73, 44 N. W. 885; *Schmidt v. Schmidt*, 47 Minn. 451, 50 N. W. 598; *Will v. Sisters of St. Benedict*, 67 Minn. 335, 69 N. W. 1090; *Little v. Little*, 83 Minn. 324, 86 N. W. 408; *Reed v. McIntyre*, 86 Minn. 163, 90 N. W. 319; *Hogan v. Vinje*, 88 Minn. 499, 93 N. W. 523; *Cady v. Cady*, 91 Minn. 137, 97 N. W. 580; *Clarity v. Davis*, 92 Minn. 60, 99 N. W. 363; *Church of St. Vincent De Paul v. Braunan*, 97 Minn. 349, 107 N. W. 141; *Grattan v. Rogers*, 110 Minn. 493, 126 N. W. 134; *Collins v. Dowlan*, 118 Minn. 214, 136 N. W. 854; *Moe v. Paulson*, 128 Minn. 277, 150 N. W. 914; *Woodville v. Morrill*, 130 Minn. 92, 153 N. W. 131; *Lewis v. Murray*, 131 Minn. 439, 155 N. W. 392; *Kroschel v. Drusch*, 138 Minn. 322, 164 N. W. 1023; *In re Hetherington's Estate*, 139 Minn. 501, 166 N. W. 1084; *Hanson v. Hanson*, 141 Minn. 373, 170 N. W. 348; *In re Olson's Estate*, 148 Minn. 122, 180 N. W. 1009, 181 N. W. 569; *In re Brewster's Estate (Minn.)* 184 N. W. 564; *In re Wood's Estate (Minn.)* 184 N. W. 955; *Rasmussen v. Evans (Minn.)* 185 N. W. 297.

⁸² *Kennedy v. Kelly*, 119 Minn. 531, 137 N. W. 456.

fied by the evidence.⁸³ Findings of undue influence held not justified by the evidence.⁸⁴

173. Effect of undue influence—Will void in part—The fact that a particular gift in a will was procured by undue influence does not necessarily invalidate the whole will.⁸⁵

174. Question on appeal—The supreme court will not set aside the findings of the trial court or jury as to undue influence unless they are manifestly and palpably contrary to the evidence. It will not do so merely because it would have found differently had the question been submitted to it originally.⁸⁶

EXECUTION

175. Who may make a will—Manner of execution—Statute—Every person of full age and sound mind, by his last will in writing, signed by him, or by some person in his presence and by his express direction, and attested and subscribed in his presence by two or more competent witnesses, may dispose of his estate, real and personal, or any part thereof, or right or interest therein; and the words "every person" shall include married women.⁸⁷ The mere fact that one is under guardianship does not disqualify him from making a will.⁸⁸ Blindness does not disqualify a person.⁸⁹ A female is of full age and qualified to make a will at eighteen.⁹⁰

176. Strict compliance with statute required—The right to dispose of property by will is purely statutory and the statutory requirements as to the execution of wills must be followed with reasonable strictness.⁹¹

177. Date—A will need not be dated.⁹² The written date of a will or its attestation is *prima facie* evidence of the date of its execution.⁹³

⁸³ *Tyner v. Varlen*, 97 Minn. 181, 106 N. W. 898; *Kletschka v. Kletschka*, 113 Minn. 228, 129 N. W. 372; *Chamberlain v. Gordon*, 129 Minn. 523, 151 N. W. 529.

⁸⁴ *In re Hess' Will*, 48 Minn. 504, 51 N. W. 614; *Buzalsky v. Buzalsky*, 108 Minn. 422, 122 N. W. 322; *Buck v. Buck*, 122 Minn. 463, 142 N. W. 729; *Bush v. Hetherington*, 132 Minn. 379, 157 N. W. 505.

⁸⁵ *Woodville v. Morrill*, 130 Minn. 92, 98, 153 N. W. 131; *Old Colony Trust Co. v. Bailey*, 202 Mass. 283, 88 N. E. 898; *Note*, 34 L. R. A. (N. S.) 975; 29 A. & E. Ency. of Law (2 ed.) 108; 40 Cyc. 1149; *Woerner*, Am. Law of Adm. (2 ed.) § 34.

⁸⁶ *Woodville v. Morrill*, 130 Minn. 92, 153 N. W. 131; *Emery v. Emery*, 222 Mass. 439, 111 N. E. 287.

⁸⁷ G. S. 1913, § 7250.

⁸⁸ *In re Sturtevant's Estate*, 92 Or. 260, 178 Pac. 192. See 8 A. L. R. 1375.

⁸⁹ See §§ 185, 191, 201, 268.

⁹⁰ See § 18.

⁹¹ *In re Penniman's Will*, 20 Minn. 245 (220); *Waite v. Frisbie*, 45 Minn. 361, 365, 47 N. W. 1069; *Tobin v. Haack*, 79 Minn. 101, 106, 81 N. W. 758; *Pederson v. Christofferson*, 97 Minn. 491, 500, 106 N. W. 958. See for an extremely liberal construction, *Cunningham v. Cunningham*, 80 Minn. 180, 83 N. W. 58.

⁹² *Peace v. Edwards*, 170 N. C. 64, 86 S. E. 807; 30 A. & E. Ency. of Law (2 ed.) 591; 40 Cyc. 1098; L. R. A. 1916E, 499.

⁹³ *In re Kohn's Estate*, 172 Mich. 342, 137 N. W. 735.

178. Seal—Our statute does not require a seal to a will.⁸⁶

179. On Sunday—A will may be executed on Sunday.⁸⁷

180. Intention of testator immaterial—In determining whether a will has been executed with the requisite formality the intention of the testator is immaterial.⁸⁸

181. Fraudulent interference—The law will not permit the formalities of the execution of a will to be dispensed with because of fraudulent interference.⁸⁹

182. Variance between will and instructions—In the absence of fraud or undue influence, a variance between the will and the instructions from which it was drawn will not defeat probate.⁹⁰

183. Incorporation by reference—It is generally held that another document may be made a part of a will by apt reference though it is not itself executed and attested as a will and is of a testamentary nature. It is essential that the document should have been in existence at the time of the execution of the will and be clearly proved.⁹¹ It is the better practice to admit the extraneous document to probate as part of the will, but this is not necessary to render it a part of the will for purposes of administration.¹

184. Conflict of laws—At common law the *lex loci rei sitæ* governs the execution of a will of real property and the law of the last domicile of the testator governs the execution of a will of personal property. These common-law rules have been materially modified by statute in this state.²

⁸⁶ *Avery v. Pixley*, 4 Mass. 460. See 30 A. & E. Ency. of Law (2 ed.) 591; 40 Cyc. 1099; 28 R. C. L. 118; Woerner, Am. Law of Adm. (2 ed.) § 39; *Fitzgerald v. English*, 73 Minn. 266, 76 N. W. 27.

⁸⁷ *Bennett v. Brooks*, 9 Allen (Mass.) 118.

⁸⁸ *In re Manchester's Estate*, 174 Cal. 417, 163 Pac. 358.

⁸⁹ *Graham v. Burch*, 47 Minn. 171, 174, 49 N. W. 697.

⁹⁰ *In re Gluckman's Will*, 87 N. J. Eq. 638, 101 Atl. 295. See *In re Knutson's Estate*, 144 Minn. 111, 174 N. W. 617.

⁹¹ *Taft v. Stearns*, 234 Mass. 273, 125 N. E. 570; *In re Bresler's Estate*, 155 Mich. 567, 119 N. W. 1104 (reference to books of account of testator held sufficient); *Shulsky v. Shulsky*, 98 Kan. 69, 157 Pac. 407 (reference to deed held sufficient); *Jennings v. Reeson*, 200 Mich. 559, 166 N. W. 931 (id.); *In re Hopper's Estate*, 90 Neb. 622, 134 N. W. 237 (id.);

Magnus v. Magnus, 80 N. J. Eq. 346, 84 Atl. 705 (a bequest to one "to dispose of in accordance with my instructions" held invalid); 30 A. & E. Ency. of Law (2 ed.) 574; 40 Cyc. 1094; 28 R. C. L. 112; Woerner, Am. Law of Adm. (2 ed.) § 222; 68 L. R. A. 353; 107 Am. St. Rep. 64; 10 Harv. L. Rev. 528; 26 Id. 278; 31 Id. 1170; 11 Colo. L. Rev. 456; 1 Ann. Cas. 393; Ann. Cas. 1915A, 870; 13 Probate Reports Ann. 111. In New York extraneous instruments of a testamentary character cannot be incorporated by reference. *Booth v. Baptist Church*, 126 N. Y. 215, 247, 28 N. E. 238; *Smith v. Browne*, 222 N. Y. 232, 118 N. E. 611; *Reynolds v. Reynolds*, 224 N. Y. 61, 121 N. E. 61.

¹ *Newton v. Seaman's Friend Soc.*, 130 Mass. 91; *In re Willey's Estate*, 128 Cal. 1, 60 Pac. 471.

² See §§ 155, 156, 293, 299.

SIGNING BY TESTATOR

185. In general—What constitutes—The statute does not prescribe how the will shall be signed by the testator.² An imperfect signature is sufficient if the name can be made out without difficulty, and it is written by the testator voluntarily and with knowledge of the fact that he is signing a will.⁴ It is no objection to a signature that it is fantastic or illegible if the testator had mental capacity.⁵ A blind person may execute a will. It is not essential that it should be read to him at the time of its execution. It is sufficient if he is in any way made aware of its contents.⁶

186. Signing by mark—The testator may sign by making his mark and it is not necessary to prove his inability to write.⁷ The signature of a testator by mark is valid, though his name, leaving a space for his mark, is written at the end of the will by another, without his express direction.⁸

187. Hand of testator may be guided by another—The hand of the testator may be guided by another, at his request or with his consent, either in signing his name or making his mark.⁹ It is not necessary to prove an express request for such assistance. It is not a case under the statute of a signing by another at the "express direction" of the testator. It is regarded as a signing by the testator himself.¹⁰

188. Place of signature—Formerly the statute expressly provided that the testator should sign the will at the end thereof, but this is no longer necessary.¹¹ The signature of the testator may be below that of the witnesses and the attestation clause.¹² It is sufficient if the name of

² *Geraghty v. Kilroy*, 103 Minn. 286, 114 N. W. 838. See *Woerner, Am. Law of Adm.* (2 ed.) § 39; *L. R. A.* 1915D, 902; *Ann. Cas.* 1917B, 874.

⁴ *Hanson v. Hanson*, 141 Minn. 373, 170 N. W. 348.

⁵ *Crowley v. Farley*, 129 Minn. 460, 466, 152 N. W. 872.

⁶ *Ann. Cas.* 1916D, 792; 9 A. L. R. 1416.

⁷ *Geraghty v. Kilroy*, 103 Minn. 286, 114 N. W. 838; *Wilson v. Craig*, 86 Wash. 465, 150 Pac. 1179; *Scott v. Hawks*, 107 Iowa 723, 77 N. W. 467; *In re Hersperger's Estate*, 245 Pa. St. 569, 91 Atl. 942; *Reed v. Hendrix's Executor*, 180 Ky. 57, 201 S. W. 482; 30 A. & E. Ency. of Law (2 ed.) 584; 40 Cyc. 1102; 28 R. C. L. 116; *Woerner, Am. Law of Adm.* (2 ed.) § 39.

⁸ *Geraghty v. Kilroy*, 103 Minn. 286, 114 N. W. 838.

⁹ *In re Allen's Will*, 25 Minn. 39; *In re Baumann's Will*, 148 N. Y. S. 1049; *In re Knight's Will*, 150 N. Y. S. 137; *In re Clark's Estate*, 170 Cal. 418, 149 Pac. 828; 30 A. & E. Ency. of Law (2 ed.) 585; 40 Cyc. 1104; *Woerner, Am. Law of Adm.* (2 ed.) § 39; *L. R. A.* 1915D, 906.

¹⁰ *In re Cozzen's Will*, 61 Pa. St. 201; 40 Cyc. 1104.

¹¹ See *In re Penniman's Will*, 20 Minn. 245 (220, 226); *Waite v. Frisbie*, 45 Minn. 361, 365, 47 N. W. 1069; 40 Cyc. 1105.

¹² *In re Busch's Will*, 150 N. Y. S. 419; *Matter of Laudy*, 161 N. Y. 432, 55 N. E. 914; *In re Young's Will*, 153 Wis. 337,

the testator appears in the body of the will in his handwriting.¹³ It is sufficient if the name of the testator appears in the exordium in his own handwriting if the evidence shows that he intended that as his signature to the will.¹⁴ Where a testator signed his name on the margin of one of the pages intending it as his signature to the will, and the will was then duly attested, a subsequent signing by him between the testimonium and attestation clauses, was held no part of the will.¹⁵

189. Testator must sign before witnesses—It is generally held that the testator must sign the will, or it must be signed in his behalf by another, before it is subscribed by the witnesses.¹⁶ There are many cases to the effect that if the signing by the testator and the witnesses is substantially one transaction the order of their signing is immaterial. The question is an open one in this state.¹⁷ A witness cannot sign after the death of the testator though the testator requested him to do so.¹⁸ The fact that the testator signed the will before the witness may be proved by his subsequent declarations.¹⁹ It will be presumed that the testator signed before the witnesses, in the absence of clear proof to the contrary.²⁰ Where the signatures of the testator and witnesses are undisputed there is a conclusive presumption that the testator signed before the witnesses.²¹

190. Need not sign in presence of witnesses—Concealment of signature—It is not necessary that the testator should sign the will in the presence of the attesting witnesses, or that they should see his signature if it is not concealed from them.²² But if the will is not signed by the testator in the presence of the attesting witnesses they must see it

141 N. W. 226; *In re Dutcher's Will*, 172 Cal. 488, 157 Pac. 242.

¹³ *Peace v. Edwards*, 170 N. C. 64, 86 S. E. 807. See *Ann. Cas.* 1916E, 137.

¹⁴ *Meads v. Earle*, 205 Mass. 553, 91 N. E. 916. See *Barnes v. Chase*, 208 Mass. 490, 94 N. E. 694; *Better v. Hirsch*, 115 Miss. 614, 76 So. 555; *In re McMahon's Estate*, 174 Cal. 423, 163 Pac. 609; *In re Manchester's Estate*, 174 Cal. 417, 163 Pac. 358; *In re Hurley's Estate*, 178 Cal. 713, 174 Pac. 669; 29 L. R. A. (N. S.) 63; L. R. A. 1917D, 778; *Ann. Cas.* 1916E, 137.

¹⁵ *Thomas v. Carruth*, 220 Mass. 77, 107 N. E. 395.

¹⁶ *Chase v. Kittredge*, 11 Allen (Mass.) 49; *Marshall v. Mason*, 176 Mass. 216, 57 N. E. 340; *Barnes v. Chase*, 208 Mass. 490, 94 N. E. 694; *In re Kunkler's Will*, 147 N. Y. S. 1094; *Lacey v. Dobbs*, 63 N. J. Eq. 325. See 14 L. R. A. 160; 26 L. R. A. (N. S.) 1126; L. R. A. 1916D, 1063;

30 A. & E. Ency. of Law (2 ed.) 597; 40 Cyc. 1101, 1127; 28 R. C. L. 128.

¹⁷ *Horn's Estate v. Bartow*, 161 Mich. 20, 125 N. W. 696; *Enright v. Griffith*, 165 Wis. 601, 163 N. W. 138. See 26 L. R. A. (N. S.) 1126; L. R. A. 1916D, 1063; 12 Probate Reports Ann. 286; 30 A. & E. Ency. of Law (2 ed.) 597; 40 Cyc. 1101, 1127; 28 R. C. L. 128.

¹⁸ *In re Fish's Will*, 34 N. Y. S. 536, 153 N. Y. 679, 48 N. E. 1104.

¹⁹ *Nixon v. Snellbaker*, 155 Iowa 390, 136 N. W. 223.

²⁰ *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21; *Flood v. Kerwin*, 133 Wis. 673, 89 N. W. 845. See 28 R. C. L. 128.

²¹ *Nixon v. Snellbaker*, 155 Iowa 390, 136 N. W. 223.

²² *Nickerson v. Buck*, 12 Cush. (Mass.) 332; *Dewey v. Dewey*, 1 Met. (Mass.) 349; *Hogan v. Grosvenor*, 10 Met. (Mass.) 54; *Ela v. Edwards*, 16 Gray (Mass.) 91; *Nunn v. Ehlert*, 218 Mass. 471, 106

and he must acknowledge it to be his. If the signature is kept from their sight and he merely tells them that he has signed the will it is not enough.²³ A will is not properly attested if the testator conceals his signature from the subscribing witnesses so that they cannot see it or know that it is there.²⁴ This rule does not apply where the will is folded but not so as to conceal the signature of the testator.²⁵

191. Signature of testator by another—Where a will is not personally signed by the testator by writing his name or making his mark, but his name and mark are written by another, the will is void, unless his name was so signed by his direction and in his presence. It is not, however, necessary that such direction should be given in express words. It may be by pantomime; but the acts relied upon to show such direction must be unambiguous, and clearly indicate the necessary direction or request, and the act of signing must be in obedience to the direction thus conveyed. Where another signs for the testator by the latter's "express direction," the direction must precede the signing and the signing must be in obedience to the direction. Subsequent acquiescence by the testator is alone insufficient. If the direction is by gestures they must be as unambiguous as words.²⁶ One of the witnesses may sign the name of the testator at his request.²⁷ The "express direction" to another to sign for the testator may be a nod or simple "yes" to a query whether another should sign his name for him.²⁸ A blind person may have his will signed for him by another.²¹ The signature of the testator by mark may be made for him by another at his request.²²

192. Same—Will not drafted according to instructions—Where a will is not read by or to the testator, and it has been prepared by another person from instructions given by him, and is then signed upon an assurance that it expresses what he desires, if the language inserted is not the language of the instructions, and if it does not make, in legal effect, the provisions which the testator apparently desired, it is not his will. But this rule should not be applied where by the terms of the will there is no departure from the instructions given, and where the property of

N. E. 163; *Pratt v. Dalby*, 223 Mass. 559, 112 N. E. 232; *Dougherty v. Crandall*, 168 Mich. 281, 134 N. W. 24; *Flynn v. Flynn*, 283 Ill. 206, 119 N. E. 304. See 38 L. R. A. (N. S.) 161.

²³ *Nunn v. Ehlert*, 218 Mass. 471, 106 N. E. 163.

²⁴ *Tobin v. Haack*, 79 Minn. 101, 81 N. W. 758; *Nunn v. Ehlert*, 218 Mass. 471, 106 N. E. 163; *Hawkes v. Hawkes*, 230 Mass. 11, 119 N. E. 122.

²⁵ *Pratt v. Dalby*, 223 Mass. 559, 112 N. E. 232; *Dougherty v. Crandall*, 168 Mich. 281, 134 N. W. 24.

²⁶ *Waite v. Frisbie*, 45 Minn. 361, 47

N. W. 1069; *Pederson v. Christofferson*, 97 Minn. 491, 106 N. W. 958; *Geraghty v. Kilroy*, 103 Minn. 286, 114 N. W. 838; *Reed v. Hendrix's Executor*, 180 Ky. 57, 201 S. W. 482; 30 A. & E. Ency. of Law (2 ed.) 585; 40 Cyc. 1102; 28 R. C. L. 118; *Woerner*, Am. Law of Adm. (2 ed.) § 39.

²⁷ *Steele v. Marble*, 221 Mass. 485, 109 N. E. 357.

²⁸ *Steele v. Marble*, 221 Mass. 485, 109 N. E. 357.

²¹ *Welch v. Kirby*, 255 Fed. 451.

²² *Flynn v. Flynn*, 283 Ill. 206, 119 N. E. 304, Ann. Cas. 1918E, 1034.

the testator is not diverted from the source or sources intended by him. If, under the will, as prepared in any particular case, in connection with the statutes of inheritance, the property of the testator passes to the persons intended, the will should not be held invalid, for the failure to incorporate therein a provision which the statutes supply.²⁹

ATTESTATION

193. Attestation and subscription distinguished—There is a distinction between attestation and subscription. Attestation is the act of witnessing the performance of the statutory requirements for the valid execution of a will. Subscription is the signing of the names of the witnesses upon the will for the purpose of identifying it. The one is mental while the other is mechanical. There may be perfect attestation in fact without subscription, and there may be a subscription in fact without attestation.³⁰ Attestation is the act of witnessing the execution of an instrument and subscribing the name of the witness in testimony of such fact.³¹ To attest the execution of a will is to witness and observe the execution and signing thereof by the testator, or to be expressly and clearly informed by the testator, before signing as witness, that he has signed and executed it.³² To “attest” means to bear witness. When the statute requires that the witnesses shall attest, what is it that they must bear witness to? Plainly to those facts to which they have to testify when put on the stand as attesting witnesses, namely, that those things existed and were done which the statute requires must exist and be done to make the writing a valid will.³³ The statute not only requires the witnesses to attest but to subscribe also. It is not sufficient for the witnesses to be called upon to witness the testator’s signature, or to stand by while he makes or acknowledges it, and be prepared to testify afterwards to his sanity and due execution of the instrument, but they must subscribe. This subscription is the evidence of their previous attestation, and to preserve the proof of that attestation in case of their death or absence when after the testator’s death the will is presented for probate.³⁴

²⁹ *Waite v. Frisbie*, 45 Minn. 361, 47 N. W. 1069; *Id.*, 48 Minn. 420, 51 N. W. 217; *Church of St. Vincent De Paul v. Brannan*, 97 Minn. 349, 107 N. W. 141; 40 Cyc. 1103. See §§ 182, 191.

³⁰ *Tobin v. Haack*, 79 Minn. 101, 81 N. W. 758; *Baxter v. Baxter*, 136 Minn. 59, 161 N. W. 261 (the language in this case suggesting that the witnesses must know that the instrument is a will is inaccurate); *Hanson v. Hanson*, 141 Minn. 373, 170 N. W. 348; *Nunn v. Ehlert*, 218 Mass. 471, 106 N. E. 163; *Smith v. Buffum*,

226 Mass. 400, 115 N. E. 669; 30 A. & E. Ency. of Law (2 ed.) 591; 40 Cyc. 1108; 28 R. C. L. 123.

³¹ *Kroschel v. Drusch*, 138 Minn. 322, 164 N. W. 1023.

³² *Tobin v. Haack*, 79 Minn. 101, 81 N. W. 758.

³³ *Nunn v. Ehlert*, 218 Mass. 471, 106 N. E. 163; *Smith v. Buffum*, 226 Mass. 400, 115 N. E. 669; *Pope v. Rogers*, 92 Conn. 248, 102 Atl. 583.

³⁴ *Chase v. Kittredge*, 11 Allen (Mass.) 49.

194. Publication not necessary—The publication of a will is the act or acts by which the testator informs the prospective subscribing witnesses that the instrument which they are about to sign is his last will. It may consist of words, signs, motions or other conduct.³⁵ Under statutes such as ours it is held that no publication is necessary. It is not necessary that the testator should request the witnesses to attest his "will," or that he should declare to them that the instrument is his will. They need not know its contents, or that it is a will.³⁶ If the testator signs an instrument which the law regards as a will and the witnesses duly attest it, it is immaterial that the testator and witnesses did not know that the instrument was in legal effect a will.³⁷ The law requires a subscription by witnesses only in order that the paper which is offered for probate as a will may be then identified as the same instrument which was executed by the testator in the presence of the witnesses.³⁸

195. Acknowledgment of will or signature by testator—If the will is not signed by the testator in the presence of the subscribing witnesses he must either acknowledge to them that the signature attached to the instrument is his or that the instrument is his will, or in some other way clearly indicate to them that he has signed the instrument or that the instrument is his will.³⁹ If the testator does not sign the will in the presence of the subscribing witnesses he must acknowledge it to them before they subscribe it, either directly or by acts or declarations from which such acknowledgment may be inferred. A declaration by

³⁵ *In re Spier's Estate*, 99 Neb. 853, 157 N. W. 1014; *In re Kohn's Estate*, 172 Mich. 342, 137 N. W. 735. See *Geraghty v. Kilroy*, 103 Minn. 286, 114 N. W. 838; *Hanson v. Hanson*, 141 Minn. 373, 170 N. W. 348; 30 A. & E. Ency. of Law (2 ed.) 587; 40 Cyc. 1116; 28 R. C. L. 122.

³⁶ *Kroschel v. Drusch*, 138 Minn. 322, 164 N. W. 1023 (strong intimation in favor of rule but question left open); *Steele v. Marble*, 221 Mass. 485, 109 N. E. 357; *Long v. Mickler*, 133 Tenn. 51, 179 S. W. 477; *Herring v. Watson*, 182 Ind. 374, 105 N. E. 900; *Notes v. Doyle*, 32 D. C. App. 413; *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21; *Nixon v. Snellbaker*, 155 Iowa 390, 186 N. W. 226; *Danley v. Jefferson*, 150 Mich. 590, 114 N. W. 470; *In re Kennedy's Will*, 159 Mich. 548, 124 N. W. 516; *In re Kohn's Estate*, 172 Mich. 342, 137 N. W. 735; *Stone v. Stone*, 231 Ill. 474, 118 N. E. 45 (will need not be read to them); *In re Bybee's Estate*, 179 Iowa 1089, 160 N. W. 900; *Goldsmith v. Gates* (Ala.) 88 So. 861. See 30 A. & E.

Ency. of Law (2 ed.) 587; 40 Cyc. 1116, 1117.

³⁷ *In re Bybee's Estate*, 179 Iowa 1089, 160 N. W. 900.

³⁸ *Long v. Mickler*, 133 Tenn. 51, 179 S. W. 477.

³⁹ *Tobin v. Haack*, 79 Minn. 101, 81 N. W. 758 (the syllabus in this case is misleading in that it suggests that it is essential that the witnesses be informed of the nature of the instrument—an acknowledgment that the instrument is his will is sufficient because that implies that he has signed it—an acknowledgment of the signature alone is sufficient); *Collins v. Dowlan*, 118 Minn. 214, 136 N. W. 854; *Kroschel v. Drusch*, 138 Minn. 322, 164 N. W. 1023 (*Tobin* case limited—whether witnesses must know that instrument is a will an open question in this state). See *Geraghty v. Kilroy*, 103 Minn. 286, 114 N. W. 838; *Hanson v. Hanson*, 141 Minn. 373, 170 N. W. 348; 30 A. & E. Ency. of Law (2 ed.) 589; 40 Cyc. 1120; 28 R. C. L. 125; 38 L. R. A. (N. S.) 164.

the testator to the witnesses that the instrument is his will, or even a request by him to them to attest his will, or other form of expression implying that the instrument has been signed by him or is his will, is a sufficient acknowledgment, the instrument being then exhibited to them with the signature visible.⁴⁰ While an acknowledgment of a signature then exhibited to the witnesses is equivalent to signing in their presence, an acknowledgment to the witnesses of the fact that a signature has been made is not equivalent to signing in their presence, the signature not being visible to them.⁴¹ It is a sufficient acknowledgment if the testator presents the will to the witnesses, with his signature thereon plainly visible, and requests them to witness it.⁴²

196. Request by testator that witnesses sign—It is not necessary that the testator should formally request the witnesses to attest the will. The statute does not require it.⁴³ A request made by the draftsman of the will or other person in the presence of the testator and witnesses is sufficient if the testator acquiesces freely and intelligently.⁴⁴ It is sufficient if it may be inferred from the conduct of the testator that he wished the witnesses to attest the will.⁴⁵ There is evidence that, when one of the witnesses was called, he was told that he was to witness a testament, that he saw the testator and the other witness sign, and was told, in the conscious presence of the testator and within his hearing, that the instrument was the testator's will and he was asked to sign it

⁴⁰ Nickerson v. Buck, 12 Cush. (Mass.) 332; Ela v. Edwards, 16 Gray (Mass.) 91; Dewey v. Dewey, 1 Met. (Mass.) 349; Hogan v. Grosvenor, 10 Met. (Mass.) 54; Meads v. Earl, 205 Mass. 553, 91 N. E. 916; Nunn v. Ehlert, 218 Mass. 471, 106 N. E. 163; Pratt v. Dahlby, 223 Mass. 559, 112 N. E. 232; 30 A. & E. Ency. of Law (2 ed.) 589; 40 Cyc. 1121; 28 R. C. L. 125; 38 L. R. A. (N. S.) 164.

⁴¹ Nunn v. Ehlert, 218 Mass. 471, 106 N. E. 163. See Pope v. Rogers, 92 Conn. 248, 102 Atl. 583; Dougherty v. Crandall, 168 Mich. 281, 134 N. W. 24 (holding that the mere failure of the witnesses to see the signature of the testator was not fatal).

⁴² Nickerson v. Buck, 12 Cush. (Mass.) 342; Tilden v. Tilden, 13 Gray (Mass.) 110; Woodstock College v. Hankey, 129 Md. 675, 99 Atl. 962; 30 A. & E. Ency. of Law (2 ed.) 590; 40 Cyc. 1122.

⁴³ In re Allen's Will, 25 Minn. 39; Kroschel v. Drusch, 138 Minn. 322, 164 N. W. 1023; In re Gates' Estate, 149 Minn. 391, 183 N. W. 958; Thompson v. Thompson, 49 Neb. 157, 68 N. W. 372; Burnham

v. Grant, 24 Colo. App. 131, 134 Pac. 254; Enright v. Griffith, 165 Wis. 601, 163 N. W. 138; 30 A. & E. Ency. of Law (2 ed.) 596; 40 Cyc. 1115; 28 R. C. L. 127.

⁴⁴ Madson v. Christenson, 128 Minn. 17, 150 N. W. 213; Baxter v. Baxter, 136 Minn. 59, 161 N. W. 261; Kroschel v. Drusch, 138 Minn. 322, 164 N. W. 1023; Hanson v. Hansen, 141 Minn. 373, 170 N. W. 348; In re Gates' Estate, 149 Minn. 391, 183 N. W. 958; In re Cullberg's Estate, 169 Cal. 365, 146 Pac. 888; Thomas v. English, 180 Mo. App. 358, 167 S. W. 1147 (no words passed between testator and witness); Enright v. Griffith, 165 Wis. 601, 163 N. W. 138; 30 A. & E. Ency. of Law (2 ed.) 596; 40 Cyc. 1116.

⁴⁵ Baxter v. Baxter, 136 Minn. 59, 161 N. W. 261; Kroschel v. Drusch, 138 Minn. 322, 164 N. W. 1023; Brengle v. Tucker, 114 Md. 597, 80 Atl. 224; Contrades v. Heller, 119 Md. 448, 87 Atl. 28; Avaro v. Avaro, 235 Mo. 444, 138 S. W. 500; 30 A. & E. Ency. of Law (2 ed.) 596; 40 Cyc. 1115; 28 R. C. L. 127.

as a witness, and that he then did so. This evidence was sufficient to sustain a finding of attestation under any definition of that term.⁴⁶ Where a will is attested in the presence of the testator, who knows what is being done, and does not object thereto, the attestation is valid, though he does nothing to show his acquiescence.⁴⁷

197. Number of witnesses—If there are two competent witnesses it is immaterial that there was an ineffectual attempt to have other witnesses.⁴⁸ Though a third witness is unnecessary his testimony is entitled to the same weight as that of the other witnesses.⁴⁹

198. Signature of witnesses—Sufficiency—Our statute does not require the witness to subscribe his name. While the word "subscribe" ordinarily means the signing of the subscriber's name, yet, when applied to the witnessing of a will, it means the attachment to the instrument of any identifying writing for the purpose of identifying the paper as the one signed by the testator and attested by the witness. In other words, if the witness signs any name, *animo attestandi*, it is sufficient.⁵⁰ A subscribing witness may subscribe by a mark as well as by writing his name in full.⁵¹ The witness must sign *animo attestandi*.⁵²

199. Witnesses need not sign in presence of each other—It is not necessary that the subscribing witnesses should sign in the presence of each other, though it is obviously desirable that they should.⁵³

200. Place of signatures of witnesses—It is immaterial where on the will the witnesses sign their names.⁵⁴ If there are several sheets to the will the witnesses need not sign each sheet.⁵⁵

201. Witnesses must sign in presence of testator—The witnesses must sign in the presence of the testator.⁵⁶ If the witnesses sign in the immediate and conscious presence of the testator so that he could have seen them sign if he had been so disposed it is sufficient, though in fact he did not see them.⁵⁷ If the witnesses sign in the same room with the

⁴⁶ *Kroschel v. Drusch*, 138 Minn. 322, 164 N. W. 1023.

⁴⁷ *In re Hull's Will*, 117 Iowa 738, 89 N. W. 979.

⁴⁸ *Gore v. Ligon*, 105 Miss. 652, 63 So. 188.

⁴⁹ *In re Sizer's Will*, 113 N. Y. S. 210, 195 N. Y. 928, 88 N. E. 1132.

⁵⁰ *Smith v. Buffum*, 226 Mass. 400, 115 N. E. 669. See 25 Harv. L. Rev. 395; L. R. A. 1917D, 896; 28 R. C. L. 132.

⁵¹ *Chase v. Kittredge*, 11 Allen (Mass.) 49, 59. See 28 R. C. L. 131.

⁵² *In re Jones' Estate*, 101 Wash. 128, 172 Pac. 206.

⁵³ *In re Gates' Estate* (Minn.) 183 N. W. 958. See 30 A. & E. Ency. of Law (2

ed.) 601; 40 Cyc. 1125; L. R. A. 1917F, 872.

⁵⁴ *In re Bybee's Estate*, 179 Iowa 1089, 160 N. W. 900; 40 Cyc. 1128; 10 A. L. R. 429.

⁵⁵ *Ela v. Edwards*, 16 Gray (Mass.) 91, 99.

⁵⁶ G. S. 1913, § 7250; *Hanson v. Hanson*, 141 Minn. 373, 170 N. W. 348; 30 A. & E. Ency. of Law (2 ed.) 597; 40 Cyc. 1123; 28 R. C. L. 129; *Woerner*, Am. Law of Adm. (2 ed.) § 40; L. R. A. 1916C, 950; 114 Am. St. Rep. 225; 6 Ann. Cas. 414.

⁵⁷ *In re Allen's Will*, 25 Minn. 39; *Cunningham v. Cunningham*, 80 Minn. 180, 83 N. W. 58; *Church of St. Vincent*

testator it is sufficient though there were intervening objects which intercepted or might have intercepted his view, if he could have seen them sign by a reasonable exertion.⁵⁸ If the witnesses sign in an adjoining room to that of the testator, but within the range of his vision, it is sufficient. It is sufficient in such case, if the signing would have been within the range of his vision by a slight exertion on his part.⁵⁹ Where the witnesses signed in an adjoining room and immediately afterwards showed the testator their signatures and he pronounced it "all right" after examination it was held that the statute was satisfied.⁶⁰ If the testator is blind it is sufficient if the witnesses sign in his presence and to his knowledge through other senses.⁶¹ It is not sufficient for the witnesses to sign out of the presence of the testator and afterwards acknowledge to him their signatures.⁶²

202. Attestation clause—Under statutes similar to ours it is held that no attestation clause is necessary.⁶³ The fact that an attestation clause was withheld from the consideration of the jury has been held immaterial.⁶⁴ It is sufficient if the witnesses sign after the testator under the heading "witnesses."⁶⁵

203. Competency of witnesses—Statute—If a witness to a will is competent at the time of his attestation, his subsequent incompetency shall

De Paul v. Brannan, 97 Minn. 349, 107 N. W. 141; *Burnham v. Grant*, 24 Colo. App. 131, 134 Pac. 254; *In re Cherry's Will*, 164 N. C. 363, 79 S. E. 288; 40 Cyc. 1123; 28 R. C. L. 129.

⁵⁸ *Cunningham v. Cunningham*, 80 Minn. 180, 83 N. W. 58.

⁵⁹ *Cunningham v. Cunningham*, 80 Minn. 180, 83 N. W. 58; *Hanson v. Hanson*, 141 Minn. 373, 170 N. W. 348. The *Cunningham* case is extremely liberal and is contrary to many cases in other jurisdictions. See *Riggs v. Riggs*, 135 Mass. 238; *Mendell v. Dunbar*, 169 Mass. 74, 47 N. E. 402; *Raymond v. Wagner*, 178 Mass. 315, 59 N. E. 811; *McKee v. McKee*, 155 Ky. 738, 160 S. W. 261; *In re Jones' Estate*, 101 Wash. 128, 172 Pac. 206; 30 A. & E. Ency. of Law (2 ed.) 599; 40 Cyc. 1124; 28 R. C. L. 129; *Woerner*, Am. Law of Adm. (2 ed.) § 40; L. R. A. 1916C, 950.

⁶⁰ *Cunningham v. Cunningham*, 80 Minn. 180, 83 N. W. 58. See *Sheeran v. Sheeran*, 96 Minn. 484, 105 N. W. 677; *Cook v. Winchester*, 81 Mich. 581, 46 N. W. 106.

⁶¹ *Cunningham v. Cunningham*, 80 Minn. 180, 83 N. W. 58; *Riggs v. Riggs*, 135 Mass. 238; 30 A. & E. Ency. of Law

(2 ed.) 600; 40 Cyc. 1124; 28 R. C. L. 131; Ann. Cas. 1916D, 792; 33 Harv. L. Rev. 566.

⁶² *Chase v. Kittredge*, 11 Allen (Mass.) 49; *Mendell v. Dunbar*, 169 Mass. 74, 47 N. E. 402; *Marshall v. Mason*, 176 Mass. 216, 57 N. E. 340; *Barres v. Chase*, 208 Mass. 490, 94 N. E. 694. See *Cunningham v. Cunningham*, 80 Minn. 180, 83 N. W. 58 (this case is not to be taken as holding that an acknowledgment alone is sufficient); 14 L. R. A. 160; 26 L. R. A. (N. S.) 1126; 30 A. & E. Ency. of Law (2 ed.) 598; 40 Cyc. 1125.

⁶³ *Nixon v. Snellbaker*, 155 Iowa 390, 136 N. W. 223; *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705; *In re Delner's Estate*, 79 Neb. 569, 113 N. W. 149 (mistake of name of testatrix in attestation clause held immaterial); *In re Sizer's Will*, 113 N. Y. S. 210, 195 N. Y. 928, 88 N. E. 1132; *Avaro v. Avaro*, 235 Mo. 424, 138 S. W. 500; *In re Bybee's Estate*, 179 Iowa 1089, 160 N. W. 900; 30 A. & E. Ency. of Law (2 ed.) 593; 40 Cyc. 1125; *Woerner*, Am. Law of Adm. (2 ed.) § 40.

⁶⁴ *In re Dovey's Estate*, 101 Neb. 11, 162 N. W. 134.

⁶⁵ *In re Aker's Will*, 77 N. Y. S. 643, 173 N. Y. 620, 66 N. E. 1103.

not prevent the probate and allowance of such will, nor shall a mere charge on the land of the testator for the payment of his debts prevent a creditor from being a competent witness to his will.⁶⁶ The test of competency is that defined by G. S. 1913, §§ 8369, 8375. In other words a person is competent to attest a will if at the time he would be competent to testify in a court as to the facts which he attests.⁶⁷ If a witness is competent at the time he attests the will his subsequent incompetency from any cause will not defeat the probate of the will.⁶⁸ Incompetency of a witness is not presumed and the question of competency is to be determined when the offer to examine the witnesses is made in the proceedings for the probate of the will, and then the facts are to be ascertained by the court.⁶⁹ A minor is a competent witness if he is old enough to testify in court.⁷⁰ Devisees and legatees are competent witnesses though the gifts to them are avoided by the statute.⁷¹ A married person is not incompetent simply because the wife or husband of such person is a beneficiary under the will.⁷² A person who is named in the will as executor is competent.⁷³ The wife of a person named in the will as executor is competent.⁷⁴ The fact that the will makes the executor a residuary legatee does not disqualify him or his wife.⁷⁵ Members of a religious order to which the testator belonged and to which he devised his property have been held competent witnesses.⁷⁶ Brothers and sisters of a beneficiary under the will are competent.⁷⁷ A judge of probate is not disqualified by his office from acting as a witness. But if he witnesses a will he is disqualified from acting in proceedings there-

⁶⁶ G. S. 1913, § 7251.

⁶⁷ *In re Holt's Will*, 56 Minn. 33, 57 N. W. 219; *Geraghty v. Kilroy*, 103 Minn. 286, 114 N. W. 838; *In re Sullivan's Will*, 114 Mich. 189, 72 N. W. 135; *In re Wiese's Estate*, 98 Neb. 463, 153 N. W. 556; *Carlton v. Carlton*, 40 N. H. 17; *In re Spier's Will*, 99 Neb. 853, 157 N. W. 1014. See 35 L. R. A. (N. S.) 688; 77 Am. St. Rep. 459; *Woerner*, Am. Law of Adm. (2 ed.) § 41; 40 Cyc. 1110; 28 R. C. L. 132.

⁶⁸ *In re Holt's Will*, 56 Minn. 33, 57 N. W. 219; *Geraghty v. Kilroy*, 103 Minn. 286, 114 N. W. 838; *In re Sullivan's Will*, 114 Mich. 189, 72 N. W. 135; *In re Delavergne's Will*, 259 Ill. 589, 102 N. E. 1081; *Cochran v. Brown*, 76 N. H. 9, 78 Atl. 1072; 30 A. & E. Ency. of Law (2 ed.) 604; 40 Cyc. 1110.

⁶⁹ *In re Holt's Will*, 56 Minn. 33, 57 N. W. 219.

⁷⁰ *In re Spier's Will*, 99 Neb. 853, 157 N. W. 1014 (girl fourteen years old held competent). See L. R. A. 1916E, 692; 30

A. & E. Ency. of Law (2 ed.) 604; 40 Cyc. 1115.

⁷¹ *Benrud v. Anderson*, 144 Minn. 111, 174 N. W. 617. See § 374.

⁷² *In re Holt's Will*, 56 Minn. 33, 57 N. W. 219; *White v. Bower*, 56 Colo. 575, 136 Pac. 1053; *Lanning v. Gay*, 70 Kan. 353, 78 Pac. 810; *Lippincott v. Wilkoff*, 54 N. J. Eq. 107; 40 Cyc. 1112; Ann. Cas. 1917A, 833.

⁷³ *Geraghty v. Kilroy*, 103 Minn. 286, 114 N. W. 838; *Stewart v. Harriman*, 56 N. H. 25. See 22 Harv. L. Rev. 616; 30 A. & E. Ency. of Law (2 ed.) 605; 40 Cyc. 1113.

⁷⁴ *In re Lyon's Will*, 96 Wis. 337, 71 N. W. 362.

⁷⁵ *Cochran v. Brown*, 76 N. H. 9, 78 Atl. 1072.

⁷⁶ *Will v. Sisters, Order of St. Benedict*, 67 Minn. 335, 69 N. W. 1090. See 40 Cyc. 1114.

⁷⁷ *Burnham v. Grant*, 24 Colo. App. 131, 134 Pac. 254.

on.⁷⁸ A draftsman who draws a will may attest it.⁷⁹ A trust estate created by a will is not invalidated by the fact that the trustee is one of the witnesses.⁸⁰ Membership in a church which is a beneficiary under the will does not disqualify.⁸¹ A taxpayer of a municipality which is a beneficiary under a will is not disqualified.⁸² The fact that the will provides that a witness shall be employed by the executor as attorney does not disqualify him.⁸³ A subsequent purchase by a witness of the interest of the beneficiary under the will does not disqualify him.⁸⁴ A guarantor on a mortgage note given by a church has been held disqualified as a witness to a will giving a bequest to the church to be used for reducing the mortgage.⁸⁵ One who signs the testator's name to the will at his request is competent.⁸⁶

ALTERATIONS AND ERASURES

204. Presumptions—Where a will has remained in the possession of the testator from the date of its execution until his death, and is then found, the presumption is that erasures or interlineations were made by himself.⁸⁷ It is generally held that where unattested alterations or interlineations appear on the face of a will there is a presumption of fact that they were made after its execution, at least if they change its effect, and the burden is on the proponent to prove that they were made before its execution. If they do not change its effect it is generally held that the burden of proving that they were made after the execution of the will rests on the contestant.⁸⁸

⁷⁸ G. S. 1913, § 7206 (see § 13, *supra*); *McLean v. Barnard*, 1 Root (Conn.) 462; *Patten v. Tallman*, 27 Me. 17; 30 A. & E. Ency. of Law (2 ed.) 606; 40 Cyc. 1115.

⁷⁹ *Schleffelin v. Schleffelin*, 127 Ala. 14, 28 So. 687. See *Coates v. Semper*, 82 Minn. 460, 85 N. W. 217; *Geraghty v. Kilroy*, 103 Minn. 286, 114 N. W. 838; 40 Cyc. 1115.

⁸⁰ *In re Wiese's Estate*, 98 Neb. 463, 153 N. W. 556.

⁸¹ *Conrades v. Heller*, 119 Md. 448, 87 Atl. 28.

⁸² *In re Potter's Will*, 89 Vt. 361, 95 Atl. 646; 40 Cyc. 1114.

⁸³ *In re Rehard's Estate*, 163 Iowa 810, 143 N. W. 1106.

⁸⁴ *In re Delavergne's Will*, 259 Ill. 589, 102 N. E. 1081.

⁸⁵ *Crowell v. Tuttle*, 218 Mass. 445, 105 N. E. 980.

⁸⁶ *Bocquin v. Theures*, 133 Ark. 448, 202 S. W. 845.

⁸⁷ *Thomas v. Thomas*, 76 Minn. 237, 246, 79 N. W. 104. See § 221.

⁸⁸ *Wilton v. Humphreys*, 176 Mass. 253, 57 N. E. 375; *O'Connell v. Dow*, 182 Mass. 541, 66 N. E. 788; *Smith v. Runkle* (N. J.) 97 Atl. 296; *In re Atkinson's Estate* (N. J.) 115 Atl. 370; *City Nat. Bank v. Slocum*, 272 Fed. 11; *Jersey v. Jersey*, 146 Mich. 660, 110 N. W. 54; *In re Ross' Will*, 160 N. Y. S. 518; 2 A. & E. Ency. of Law (2 ed.) 280; 40 Cyc. 1275; *Woerner, Am. Law of Adm.* (2 ed.) § 49; 17 L. R. A. (N. S.) 184; *Ann. Cas.* 1915C, 74; 14 Col. L. Rev. 264; 25 Harv. L. Rev. 699. See *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. 467.

205. Attestation—Certain erasures and interlineations made in an executed will by the testator have been held ineffectual as alterations or partial revocation for an insufficient attestation by witnesses.⁸⁹

206. Fraudulent—Erasures and alterations made by a third party, without the procurement of the proponent, do not avoid a will, either in whole or in part. If made by the proponent, or by his procurement, they avoid the provisions of the will in his favor.⁹⁰

207. Effect of invalid alteration after execution—Where interlineations and additions made by a testator after the execution of the will cannot be upheld, erasures must fall also, though they might operate as a pro tanto revocation if they stood alone. In such a case the will as originally written and executed is entitled to probate. Parol evidence is admissible to prove the erased words if they are illegible.⁹¹

CODICILS

208. Definition—A codicil is a supplement to a will, executed by the testator with the same formalities as a will, designed to be considered as a part of the will, and to alter it by addition or subtraction or otherwise, or to explain, revive, confirm or revoke some or all of its provisions.⁹²

209. Will includes codicil—When used in statutes the word "will" is to be construed as including codicils.⁹³

210. Will and codicil construed together—A will and codicil are to be construed together and all their provisions harmonized so far as possible. Unless there is an irreconcilable conflict between them the codicil is no more the last expression of the testator's intention than if it had been a part of the will.⁹⁴ Though a codicil contains invalid provisions it is to be read in connection with the will to ascertain the intention of the testator.⁹⁵

211. Presumption that testator knew contents of will—In construing a codicil and will it will be presumed that the testator, when executing

⁸⁹ *In re Penniman's Will*, 20 Minn. 245 (220). See 51 L. R. A. (N. S.) 169; Ann. Cas. 1915C, 74.

⁹⁰ *Thomas v. Thomas*, 76 Minn. 237, 243, 79 N. W. 104.

⁹¹ *In re Penniman's Will*, 20 Minn. 245 (220); *Thomas v. Thomas*, 76 Minn. 237, 79 N. W. 104; *In re Knapen's Will*, 75 Vt. 146, 53 Atl. 1003; 2 A. & E. Ency. of Law (2 ed.) 266; 40 Cyc. 1097.

⁹² Century Dict.; 6 A. & E. Ency. of Law (2 ed.) 175; 28 R. C. L. 197.

⁹³ G. S. 1913, § 9412 (23).

⁹⁴ *Atwater v. Russell*, 49 Minn. 22, 51 N. W. 624; *Carpenter's Estate v. Wiley*, 166 Iowa 48, 147 N. W. 175; *Goodwin v. Coddington*, 154 N. Y. 283, 48 N. E. 729; *Bloodgood v. Lewis*, 209 N. Y. 95, 102 N. E. 610; *Lovering v. Balch*, 210 Mass. 105, 96 N. E. 142; *Joiner v. Joiner*, 78 Miss. 369, 78 So. 369; 6 A. & E. Ency. of Law (2 ed.) 179; 40 Cyc. 1421; 28 R. C. L. 199; *Woerner*, Am. Law of Adm. (2 ed.) § 415. See § 224.

⁹⁵ *In re Megrue*, 120 N. Y. 651, 120 N. E. 651.

the codicil, knew the contents of the will and the effect of the codicil thereon.⁹⁶

212. Change or substitution of beneficiaries—A certain will and codicil construed and held that it was the intention of the testator, by the codicil, to substitute to the residuary bequest in the will, in lieu of the legatee mentioned in it, a new beneficiary brought in by the codicil, though the codicil made no express reference to the residuary clause in the will.⁹⁷

213. Adding another trustee or grantee of a power—A testator may add another trustee or grantee of a power by a codicil, but the addition by a codicil of another as co-executor, without referring in any manner to the trust and power vested by the will in the person first named as executor, does not show an intention to add another trustee or grantee of the power.⁹⁸

214. Substitutional legacies—Where a codicil gives a legacy as a substitute for a legacy given by the will, the new legacy will have all the incidents, conditions and limitations attaching to the original legacy unless a contrary intention is manifested by the will and codicil construed together in the light of the circumstances.⁹⁹

215. Republication of will by codicil—It is the general rule that a codicil republishes the will and causes it to take effect as of the date of the execution of the codicil. The two instruments are treated as one, speaking from the date of the codicil. No precise words or express intention are necessary to effect a republication. This doctrine, however, will not be allowed to defeat the manifest intention of the testator disclosed by the will and the circumstances.¹ This rule originated at a time when property acquired by a testator after the execution of a will and before his death did not pass by the will. Since the enactment of statutes abolishing this rule its application is more restricted.² If it is clear that the testator intended provisions of his will to refer to the date of its execution its subsequent republication by a codicil will not make them refer to the date of the codicil.³ If a former will or codicil is

⁹⁶ *Atwater v. Russell*, 49 Minn. 22, 53, 51 N. W. 624.

⁹⁷ *Atwater v. Russell*, 49 Minn. 22, 51 N. W. 624. See A. & E. Ency. of Law (2 ed.) 731.

⁹⁸ *Simpson v. Cook*, 24 Minn. 180, 187.

⁹⁹ *Carpenter's Estate v. Wiley*, 166 Iowa 48, 147 N. W. 175; 6 A. & E. Ency. of Law (2 ed.) 181; 18 Id. 730; 40 Cyc. 1525.

¹ *In re Campbell*, 170 N. Y. 84, 62 N. E. 1070; *In re Brann*, 219 N. Y. 263, 114 N. E. 404; *Walt v. Belding*, 24 Pick. (Mass.) 129; *Alsop's Appeal*, 9 Pa. 374; *In re*

Matthews' Estate, 176 Cal. 576, 582, 169 Pac. 233; *Manship v. Stewart*, 181 Ind. 299, 104 N. E. 505; *Hawke v. Enyart*, 30 Neb. 149, 46 N. W. 422; *In re Edward's Estate*, 254 Pa. St. 159, 98 Atl. 879; *Smith v. Runkle*, 86 N. J. Eq. 257, 97 Atl. 296; *Taft v. Stearns* (Mass.) 125 N. E. 570; 6 A. & E. Ency. of Law (2 ed.) 195-200; 40 Cyc. 1216-1223; 28 R. C. L. 198; *Woerner*, Am. Law of Adm. (2 ed.) §§ 47, 56.

² See *In re Matthews' Estate*, 176 Cal. 576, 169 Pac. 233, 235.

³ *In re Edward's Estate*, 254 Pa. St.

clearly inconsistent with a later codicil the latter does not revive and republish the former.⁴ The doctrine of republication applies though the codicil does not dispose of property but merely appoints an executor.⁵ Where a codicil republishes a will which had codicils added to it, the presumption is that the testator meant to ratify the will as amended by such codicils, and the codicils are republished.⁶ If a will is altered after execution and then republished and confirmed by a codicil it is thereby validated.⁷ A codicil duly executed will republish a prior will and make it operative though the will was not duly executed.⁸ If a testator executes a will under undue influence, and later, while not under such influence, executes a codicil thereto, the latter republishes and validates the will.⁹ If a testator executes a will while lacking testamentary capacity, and later with full testamentary capacity executes a codicil thereto, the latter republishes and validates the will.¹⁰ The republication of a will by a codicil does not revive legacies which have been revoked, adeemed or satisfied in the interval between the will and the codicil.¹¹ It does not revive legacies or devises that have lapsed by the death of the devisee or legatee in the lifetime of the testator.¹² A charitable gift is not republished by a codicil if it would thereby be rendered illegal.¹³ A codicil has been held such a republication of a will as to make a reference in the will to a deed apply to a new deed to the same land made after the will and before the codicil.¹⁴

REVOCATION

216. Statute—No will in writing, except in the cases hereinafter mentioned, shall be revoked or altered otherwise than by some other will in writing, or by some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which

159, 98 Atl. 879. See 6 A. & E. Ency. of Law (2 ed.) 199; 40 Cyc. 1221.

⁴ *Freeman v. Hart*, 61 Colo. 455, 158 Pac. 305.

⁵ *Manship v. Stewart*, 181 Ind. 299, 104 N. E. 505; *In re Kerr's Estate*, 255 Pa. 399, 100 Atl. 127.

⁶ *Manship v. Stewart*, 181 Ind. 299, 104 N. E. 505; *Skinner v. Am. Bible Soc.*, 92 Wis. 209, 65 N. W. 1037.

⁷ *Smith v. Runkle*, 86 N. J. Eq. 257, 97 Atl. 296. See 40 Cyc. 1219.

⁸ *In re Murfield*, 74 Iowa 479, 38 N. W. 170; *Smith v. Runkle*, 86 N. J. Eq. 257, 97 Atl. 296; 40 Cyc. 1217.

⁹ *In re Kerr's Estate*, 255 Pa. 399, 100 Atl. 127; *Stevens v. Myers*, 62 Or. 372, 121 Pac. 434, 126 Pac. 29; *Taft v. Stearns* (Mass.) 125 N. E. 570. See *In re*

Baird's Estate, 176 Cal. 381, 168 Pac. 561; 40 Cyc. 1217.

¹⁰ *Barnes v. Phillips*, 184 Ind. 415, 111 N. E. 419; *Smith v. Runkle*, 86 N. J. Eq. 257, 97 Atl. 296; *Stevens v. Myers*, 62 Or. 372, 121 Pac. 434, 126 Pac. 29; *Taft v. Stearns* (Mass.) 125 N. E. 570; 40 Cyc. 1217.

¹¹ *Palne v. Parsons*, 14 Pick. (Mass.) 318; 6 A. & E. Ency. of Law (2 ed.) 199; 40 Cyc. 1221; 95 Am. St. Rep. 370.

¹² *Gibbons v. Ward*, 115 Ark. 184, 171 S. W. 90; *Dunn v. Kearney*, 288 Ill. 49, 123 N. E. 105. See 40 Cyc. 1216.

¹³ *In re McCauley's Estate*, 138 Cal. 432, 71 Pac. 512; *Appeal of Carl*, 106 Pa. 635.

¹⁴ *Lawrence v. Burnett*, 109 S. C. 416, 96 S. E. 144.

the will itself was required by law to be executed; or unless such will be burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses; but nothing in this section shall prevent the revocation implied by law from subsequent change in the condition or circumstances of the testator.¹⁵

217. Statutory modes exclusive—The statutory modes of revocation are exclusive. The plainest intent to revoke will be ineffectual unless manifested as the statute requires.¹⁶

218. By burning, tearing, canceling, obliterating or destroying the will—The statute requires that the will itself should be destroyed, or bear some of the marks of defacement or spoliation, manifesting the intent to revoke. The act and intent must concur, and there must be proof of both, though the intent may be inferred from the facts and circumstances.¹⁷ Where a will was placed in a stove by the testator, with kindlings not yet ignited, with the intention that it should be burned when the fire should be lighted, and it was fraudulently withdrawn from the stove by the proponent, it was held that there was no revocation.¹⁸ While there must be an intention to revoke the motives of the testator are immaterial.¹⁹ The word "tearing" includes cutting. A slight tearing or cutting may revoke the whole will if done with that intent.²⁰ Though a seal is not essential to a will, yet, if one is affixed to it, tearing it off will work a revocation if so intended.²¹ The normal way to "cancel" a will is to draw lines across words with intent to nullify them.²² It is immaterial whether the canceling line is drawn by a pen or pencil.²³

¹⁵ G. S. 1913, § 7256.

¹⁶ *In re Penniman's Will*, 20 Minn. 245 (220); *Graham v. Burch*, 47 Minn. 171, 49 N. W. 697; *Lindesmith v. Lindesmith*, 96 Minn. 147, 104 N. W. 825; *In re McGill's Will*, 229 N. Y. 405, 128 N. E. 194. See Ann. Cas. 1913D, 309; 28 Am. St. Rep. 344; 28 R. C. L. 171.

¹⁷ *Graham v. Burch*, 47 Minn. 171, 49 N. W. 697; *Managle v. Parker*, 75 N. H. 139, 71 Atl. 637; *Strong's Appeal*, 79 Conn. 123, 63 Atl. 1089; *In re Allen's Will*, 88 N. J. Eq. 291, 102 Atl. 147 (accidental spoliation does not work a revocation). See 28 R. C. L. 177.

¹⁸ *Graham v. Burch*, 47 Minn. 171, 49 N. W. 697.

¹⁹ *In re Emernecker's Estate*, 218 Pa. 369, 67 Atl. 701.

²⁰ *Burton v. Wylde*, 261 Ill. 397, 103 N. E. 976.

²¹ *Avery v. Pixley*, 4 Mass. 460; *In re White's Will*, 25 N. J. Eq. 501.

²² *In re Olmstead's Estate*, 122 Cal. 224, 54 Pac. 745; *Glass v. Scott*, 14 Colo. App. 377, 60 Pac. 186; *Hubbard v. Hubbard*, 198 Ill. 621, 64 N. E. 1038; *Townshend v. Howard*, 86 Me. 285, 20 Atl. 1077; *In re Crawford's Will*, 142 N. Y. S. 1032; *In re Kirkpatrick*, 22 N. J. Eq. 463; *Warner v. Warner*, 37 Vt. 356; 30 A. & E. Ency. of Law (2 ed.) 641; 40 Cyc. 1194; 28 R. C. L. 180; 51 L. R. A. (N. S.) 176.

²³ *Michigan Trust Co. v. Fox*, 192 Mich. 699, 159 N. W. 332.

A will may be revoked by erasing or drawing a line through the signature of the testator or a witness.²⁴ It is generally held that it is not enough to write on the will in a clear space words indicating an intention to cancel the will.²⁵ Writing words of cancelation across the face of the will and across the original words thereof is sufficient.²⁶ Where a testator destroys a will with the intention of revoking it and preparing a new will at some future time, there is a revocation though he fails to make a new will.²⁷ A testator wrote across a will "Superseded by written one" and tore the will in two. He prepared a draft of a new will but did not sign or have it witnessed. He thought that this draft was valid as a substitute for the original will and left both in an envelop. It was held that the torn will should be admitted to probate.²⁸ Where a will is executed in duplicate a destruction of one copy by the testator raises a rebuttable presumption of an intent to revoke the will. There is no revocation if the testator thought the other copy remained in force.²⁹

219. Same—By third party—When the act of spoliation is done by another by the direction and consent of the testator it must be done in the presence of the testator.³⁰ The direction and consent of the testator, and the fact of the spoliation must be proved by at least two witnesses.³¹

220. Same—Partial revocation—Under our statute there may be a partial revocation by canceling, tearing, cutting, and the like.³² Prior to

²⁴ *In re Olmstead's Estate*, 122 Cal. 224, 54 Pac. 745; *Burton v. Wylde*, 261 Ill. 397, 103 N. E. 976; *Woodfill v. Patton*, 76 Ind. 575; *Gay v. Gay*, 60 Iowa 415; *Sellards v. Kirby*, 82 Kan. 291, 108 Pac. 73; *Townshend v. Howard*, 86 Me. 285, 29 Atl. 1077; *In re Francis' Will*, 132 N. Y. S. 695; 30 A. & E. Ency. of Law (2 ed.) 642; 40 Cyc. 1193; 51 L. R. A. (N. S.) 176.

²⁵ *Dowling v. Gilliland*, 286 Ill. 530, 122 N. E. 70; *In re Ladd's Will*, 60 Wis. 187, 18 N. W. 734; *In re Akers*, 77 N. Y. S. 643; *Oetjen v. Oetjen*, 115 Ga. 1004, 42 S. E. 387; *Howard v. Hunter*, 115 Ga. 357, 41 S. E. 638; *Lewis v. Lewis*, 2 Watts & S. (Pa.) 455. See *Semmes v. Semmes*, 7 Harr. & J. (Md.) 388; *Warner v. Warner*, 37 Vt. 356; *Evans' Appeal*, 58 Pa. St. 238; *Billington v. Jones*, 108 Tenn. 234, 66 S. W. 1127; 30 A. & E. Ency. of Law (2 ed.) 641; 40 Cyc. 1194; 28 R. C. L. 180.

²⁶ *Noesen v. Erkenswick*, 298 Ill. 231, 131 N. E. 622.

²⁷ *In re Emernecker's Estate*, 218 Pa.

369, 67 Atl. 701; 30 A. & E. Ency. of Law (2 ed.) 634. See § 223.

²⁸ *Strong's Appeal*, 79 Conn. 123, 63 Atl. 1089.

²⁹ *In re Walsh's Estate*, 198 Mich. 42, 163 N. W. 70; *Managle v. Parker*, 75 N. H. 139, 71 Atl. 637; *In re Scofield's Will*, 129 N. Y. S. 185; 40 Cyc. 1195; *Woerner*, Am. Law of Adm. (2 ed.) § 48; *Ann. Cas.* 1912A, 273.

³⁰ G. S. 1913, § 7256; *Miles' Appeal*, 68 Conn. 237, 36 Atl. 39; *Morey v. Sohler*, 63 N. H. 507, 3 Atl. 636; *Mundy v. Mundy*, 15 N. J. Eq. 290; *Gavitt v. Moulton*, 119 Wis. 35, 96 N. W. 395; 30 A. & E. Ency. of Law (2 ed.) 630; 40 Cyc. 1185.

³¹ G. S. 1913, § 7256; *Nelson v. Bostick*, 151 Ala. 536, 44 So. 389; 30 A. & E. Ency. of Law (2 ed.) 631; 40 Cyc. 1185.

³² *In re Penniman's Will*, 20 Minn. 245 (220); *Thomas v. Thomas*, 76 Minn. 237, 79 N. W. 104; *Bigelow v. Gillott*, 123 Mass. 103; *Miles' Appeal*, 68 Conn. 237, 36 Atl. 39; *Townshend v. Howard*, 86 Me. 285, 29 Atl. 1077; *Michigan Trust*

Revised Laws 1905 our statute expressly recognized a partial revocation.³³ An erasure by a testator of certain clauses in a will, with the intention of revoking them only, is a valid revocation of such clauses, but not of the whole will, and the property thereby covered, in the absence of a contrary intention, passes under a general residuary clause in the will.³⁴

221. Same—Presumption of spoliation by testator—Where a will is found among the effects of a testator at his death and it is obliterated, torn or canceled, the presumption is that it was obliterated, torn or canceled by him and with intent to revoke.³⁵ There is no such presumption where the will was not found in the effects of the decedent at the time of his death.³⁶

222. Same—Presumption that lost will was destroyed by testator—Where it is shown that the decedent at one time had a will in his possession the fact that it cannot be found after his death raises a presumption of fact, that he had destroyed it with an intention to revoke it.³⁷ If it is not shown that the will was in the actual possession of the testator there is no presumption of revocation.³⁸ To overcome the presumption it must be made to appear that the will was in existence at the time of the death of the testator and has since been lost or destroyed.³⁹ The burden of proof to overcome the presumption is on the proponent.⁴⁰ Whether the presumption has been overcome is a question of fact for the jury unless the evidence is conclusive.⁴¹

Co. v. Fox, 192 Mich. 699, 159 N. W. 332; 30 A. & E. Ency. of Law (2 ed.) 631; 40 Cyc. 1186; Woerner, Am. Law of Adm. (2 ed.) § 49; 28 Am. St. Rep. 344; 48 Id. 197; 38 L. R. A. (N. S.) 798; 23 Harv. L. Rev. 558; Ann. Cas. 1912D, 174; Ann. Cas. 1913D, 313.

³³ See *In re Penniman's Will*, 20 Minn. 245 (220); *Graham v. Burch*, 47 Minn. 171, 49 N. W. 697.

³⁴ *Bigelow v. Gillott*, 123 Mass. 102. See *Miles' Appeal*, 68 Conn. 237, 36 Atl. 39; *In re Knapen's Will*, 75 Vt. 146, 53 Atl. 1003; *In re Frothingham's Will*, 76 N. J. Eq. 331, 74 Atl. 471; 23 Harv. L. Rev. 558; 40 Cyc. 1186.

³⁵ *In re Olmstead's Estate*, 122 Cal. 224, 54 Pac. 745; *In re Hopkins' Will*, 172 N. Y. 360, 65 N. E. 173; *In re Kathan's Will*, 141 N. Y. S. 705; *Burton v. Wyde*, 261 Ill. 397, 103 N. E. 976; *Michigan Trust Co. v. Fox*, 192 Mich. 699, 159 N. W. 332; 30 A. & E. Ency. of Law (2 ed.) 635, 40 Cyc. 1280; Woerner, Am. Law of Adm. (2 ed.) § 48.

³⁶ *Throckmorton v. Holt*, 180 U. S. 552.

³⁷ *Aldrich v. Aldrich*, 215 Mass. 164, 102 N. E. 487; *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705; *Gavitt v. Moulton*, 119 Wis. 35, 96 N. W. 395; *In re Kennedy*, 167 N. Y. 163, 60 N. E. 442; *Griffith v. Higinbotom*, 262 Ill. 126, 104 N. E. 233; *In re Bennett*, 152 N. Y. S. 46; *Cole v. McClure*, 88 Oh. St. 1, 102 N. E. 264; *In re Cunnion*, 201 N. Y. 123, 94 N. E. 648; *In re Keene's Estate*, 189 Mich. 97, 155 N. W. 514; 30 A. & E. Ency. of Law (2 ed.) 635; 40 Cyc. 1280, 1281; Woerner, Am. Law of Adm. (2 ed.) § 48.

³⁸ *Lane v. Hill*, 68 N. H. 275, 44 Atl. 393; 30 A. & E. Ency. of Law (2 ed.) 636; 40 Cyc. 1281.

³⁹ *Griffith v. Higinbotom*, 262 Ill. 126, 104 N. E. 233.

⁴⁰ *Wendt v. Ziegenhagen*, 148 Wis. 382, 134 N. W. 905.

⁴¹ *Gumtow v. Janke*, 177 Mich. 574, 143 N. W. 616.

223. Same—Dependent relative revocation—Conditional revocation—

If a testator cancels or destroys a will with a present intention of immediately making a new will as a substitute, and the new will is not made, or if made fails of effect for any reason, it will be presumed that the testator preferred the old will to an intestacy and it may be allowed probate in the absence of evidence overcoming the presumption. The rule is not inflexible, but the question is as to the intention of the testator, depending upon the facts of the particular case. It is a question of fact for the jury, unless the evidence is conclusive.⁴² Where a portion of a will is canceled or erased by the testator with a view to a new disposition of the property, and the proposed disposition fails to be carried into effect, the presumption in favor of a revocation by the cancellation will be repelled, and the will will stand as originally framed, so far as it is practicable to ascertain what the former words were. Or, as sometimes stated, when words or clauses are canceled in order to substitute others, which fail for want of due authentication, the cancellation will be treated as relative and dependent upon the efficacy of the new disposition intended to be substituted; and hence, if the disposition intended to be substituted is inoperative, the revocation fails also, and the original will remains in force. This is based on the presumption that the testator made the cancellation with the view and for the purpose of putting some other disposition of his property in place of that which is canceled, and that there is therefore no reason to suppose that he would have made the change if he had been aware that it would have been wholly futile, but that his wishes with regard to his property, as expressed in his original will, would have remained unchanged in the absence of any known and sufficient reason for changing them.⁴³ The tendency of the modern cases is to restrict the doctrine.⁴⁴ In case of a conditional revocation, if the erased words cannot be ascertained from the instrument itself, parol evidence is admissible to prove what they were.⁴⁵ The doctrine of dependent relative revocation does not apply where the revocation is absolute and unconditional or where the testator intends to make a new will in the indefinite future.⁴⁶ A testator by the

⁴² *In re Penniman's Will*, 20 Minn. 245 (220); *Thomas v. Thomas*, 76 Minn. 237, 79 N. W. 104; *Rice County v. Scott*, 88 Minn. 386, 93 N. W. 109; *McIntyre v. McIntyre*, 120 Ga. 67, 47 S. E. 501; *In re Thompson*, 116 Me. 473, 102 Atl. 303; *In re Marvin's Will* (Wis.) 179 N. W. 508; 30 A. & E. Ency. of Law (2 ed.) 633; 40 Cyc. 1188; 28 R. C. L. 182; *Woerner*, Am. Law of Adm. (2 ed.) § 48; 38 L. R. A. (N. S.) 797; L. R. A. 1916C, 97; 48 Am. St. Rep. 197; 22 Harv. L. Rev. 374; 33 Id. 337.

⁴³ *In re Penniman's Will*, 20 Minn. 245

(220); *Thomas v. Thomas*, 76 Minn. 237, 79 N. W. 104.

⁴⁴ *In re Allen's Will*, 88 N. J. Eq. 291, 102 Atl. 147.

⁴⁵ *Thomas v. Thomas*, 76 Minn. 237, 79 N. W. 104.

⁴⁶ *Rice County v. Scott*, 88 Minn. 386, 93 N. W. 109; *McIntyre v. McIntyre*, 120 Ga. 67, 47 S. E. 501; *Semmes v. Semmes*, 7 H. & J. (Md.) 388; *In re Olmstead's Estate*, 122 Cal. 224, 54 Pac. 745; *Bank v. Banks*, 65 Mo. 432; *In re Frothingham's Will*, 76 N. J. Eq. 331; *In re Emernecker's Estate*, 218 Pa. 369, 67 Atl.

seventh clause of his will gave the residue of his estate to Rice county, in this state. He added a codicil thereto, the second clause of which was this: "I hereby revoke the seventh item of the above will, having made a different disposition of my money; and Rice county shall not be a legatee, nor have any interest in or to my estate, or any part thereof." In the third and last clause of the codicil the testator directed his executor to destroy the residue of money and evidence of credit belonging to his estate. Held, that the bequest to the county was expressly and unconditionally revoked by the codicil, though the new disposition of the subject thereof might be void.⁴⁷

224. By codicil—A part of a will may be revoked by a codicil thereto.⁴⁸ An express revocation in the codicil of one part of the will negatives by implication an intention to alter it in other respects.⁴⁹ A gift made by plain language of a will should not be held to be modified or revoked by an ambiguous codicil any further than is expressly required by the terms of the codicil.⁵⁰ A codicil which provided for an additional legacy to come out of the residuary estate has been held to have modified and revoked the will to that extent.⁵¹

225. By subsequent will—A subsequent will may revoke a prior will either by reason of an express clause of revocation or of an inconsistent disposition of the testator's property. The governing principle is the intention of the testator. It does not follow from the fact of a new will that full and entire revocation was intended; the purpose may have been to make supplemental provisions, consistent with the former will in whole or in part, or to dispose of other property, or to amend and alter the prior dispositions only. Hence a complete revocation by implication will not result unless the general tenor of the later will shows clearly that the testator so intended, or the two instruments are so plainly inconsistent as to be incapable of standing together. Courts do not favor revocation by implication, but incline to such a construction as will give effect to both instruments.⁵² A subsequent will with an express clause

701; Woerner, *Am. Law of Adm.* (2 ed.) § 48; 40 *Cyc.* 1189; 28 *R. C. L.* 182.

⁴⁷ *Rice County v. Scott*, 88 *Minn.* 386, 93 *N. W.* 109. See 33 *Harv. L. Rev.* 357.

⁴⁸ *Rice County v. Scott*, 88 *Minn.* 386, 93 *N. W.* 109. See § 223.

⁴⁹ *Bloodgood v. Lewis*, 209 *N. Y.* 95, 102 *N. E.* 610.

⁵⁰ *Lovering v. Balch*, 210 *Mass.* 105, 96 *N. E.* 142; *Howard v. Howard*, 227 *Mass.* 395, 116 *N. E.* 937; *In re Sigel's Estate*, 213 *Pa.* 14, 62 *Atl.* 175; *Alford v. Bennett*, 279 *Ill.* 375, 117 *N. E.* 89; *Eggleston v. Trust Co. (Ga.)* 93 *S. E.* 84; *Joinder v. Joinder (Miss.)* 78 *So.* 369; 6

A. & E. Ency. of Law (2 ed.) 185; 40 *Cyc.* 1179. See § 210.

⁵¹ *Osburn v. Rochester Trust & Safe Deposit Co.*, 209 *N. Y.* 54, 102 *N. E.* 571.

⁵² *Williams v. Miles*, 68 *Neb.* 463, 476, 94 *N. W.* 705; *In re Venable's Will*, 127 *N. C.* 344, 37 *S. E.* 465; *Lane v. Hill*, 68 *N. H.* 275, 44 *Atl.* 393; *In re Cunnion's Will*, 201 *N. Y.* 123, 94 *N. E.* 648; *Brant v. Willson*, 8 *Cow. (N. Y.)* 56; *Smith v. McChesney*, 15 *N. J. Eq.* 359; *In re Marx's Will*, 174 *Cal.* 762, 164 *Pac.* 640; 30 *A. & E. Ency. of Law* (2 ed.) 624; 40 *Cyc.* 1173; 28 *R. C. L.* 172. Woerner, *Am. Law of Adm.* (2 ed.) § 50; 37 *L. R. A.* 561; *Ann. Cas.* 1914A, 123.

of revocation revokes a former will though it does not dispose of all of testator's property.⁵³ A subsequent will purporting on its face to be the testator's last will revokes all former wills without words of express revocation. But the fact that the testator characterizes the will as "my last will and testament" is not conclusive of an intention to revoke prior wills.⁵⁴ A subsequent will disposing of all of testator's property is a revocation of a prior will, though it contains no express revocation.⁵⁵ A subsequent will containing an express revoking clause will revoke a prior will though the new disposition which it makes of the property is invalid.⁵⁶ A subsequent will, properly executed as such, and containing a clause revoking former wills, is effectual as a revocation, though, having been lost or destroyed, its contents, other than the revocatory clause, cannot be proved so that it can be allowed and executed as a will.⁵⁷ A subsequent will executed when the testator was lacking in testamentary capacity will not revoke a former will and it is immaterial whether it contained a revocatory clause or not.⁵⁸ A subsequent will wholly void because of undue influence will not revoke a prior will.⁵⁹ A subsequent instrument purporting to be a will will not revoke a prior will unless it is duly executed as a will so that it might be probated as such.⁶⁰ It is not necessary that a subsequent will, containing an express revoking clause, should be in fact probated in order to work a revocation of a former will, if it was so executed that it might be probated.⁶¹ Under a statute somewhat different from ours it has been held that a will may be revoked by a writing executed with the solemnity of a will, though the instrument is not a will in the technical sense of making a disposition of property.⁶² A subsequent will duly

⁵³ *In re Ely's Estate*, 74 Or. 561, 146 Pac. 89. See 40 Cyc. 1174.

⁵⁴ *Aldrich v. Aldrich*, 215 Mass. 164, 102 N. E. 487 (under statute similar to ours). See 40 Cyc. 1174; 32 Harv. L. Rev. 183.

⁵⁵ *In re Burke's Estate*, 66 Or. 252, 134 Pac. 11; *In re Sheldon*, 144 N. Y. S. 94; *Simmons v. Simmons*, 26 Barb. (N. Y.) 68; *In re Marx's Estate*, 174 Cal. 762, 164 Pac. 640; 40 Cyc. 1175.

⁵⁶ *Rice County v. Scott*, 88 Minn. 386, 93 N. W. 109. See 40 Cyc. 1177.

⁵⁷ *In re Cunningham's Will*, 38 Minn. 169, 36 N. W. 269. See *Rice County v. Scott*, 88 Minn. 386, 93 N. W. 109; *In re Cunnion's Will*, 201 N. Y. 123, 94 N. E. 648; *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705; *Melhase v. Melhase*, 87 Or. 590, 171 Pac. 216; 30 A. & E. Ency. of Law (2 ed.) 625; 40 Cyc. 1178; *Woerner, Am. Law of Adm.* (2 ed.) § 51; 35 Harv. L. Rev. 348.

⁵⁸ *In re Young's Will*, 153 Wis. 337, 141 N. W. 226. See *In re Ellis' Estate*, 55 Minn. 401, 56 N. W. 1056; L. R. A. 1916C, 92.

⁵⁹ *Appeal of O'Brien (Me.)* 115 Atl. 160.

⁶⁰ *In re Penniman's Will*, 20 Minn. 245 (220); *Stickney v. Hammond*, 138 Mass. 116; *Dudley v. Gates*, 124 Mich. 440, 83 N. W. 97, 86 N. W. 959; *Moore v. Rowlett*, 269 Ill. 88, 109 N. E. 682; *Lord's Appeal*, 106 Me. 51, 75 Atl. 286; *Strong's Appeal*, 79 Conn. 123, 63 Atl. 1089; L. R. A. 1916C, 92; Ann. Cas. 1912D, 235; 30 A. & E. Ency. of Law (2 ed.) 624; 40 Cyc. 1177, 1178; 28 R. C. L. 174.

⁶¹ *In re Cunningham's Will*, 38 Minn. 169, 36 N. W. 269; *Blackett v. Ziegler*, 153 Iowa 344, 133 N. W. 901. See Ann. Cas. 1914D, 130.

⁶² *In re Peirce's Estate*, 64 Wash. 437, 115 Pac. 835.

executed but inoperative because of the incapacity of the devisee or legatee to take will revoke prior wills if it contains an express revocatory clause.⁶³ A revocation of a will, implied from the execution of a subsequent inconsistent will, does not become effective if the second will is destroyed or revoked before its probate.⁶⁴ A will may be revoked by a subsequent will made in another state and in accordance with its laws though not in accordance with our laws.⁶⁵ Certain erasures and interlineations made by a testator in an executed will held ineffectual either as an alteration or revocation of the will because not properly attested as a will.⁶⁶ One claiming that a will offered for probate has been revoked by a later will subsequently destroyed has the burden of proving that the later will contained a revocatory clause.⁶⁷ Invalid dispositions in a subsequent will do not revoke valid dispositions in an earlier will, not expressly revoked, and are ineffective for any purpose.⁶⁸ While a general revocatory clause in a subsequent will ordinarily revokes all prior wills it will not be given that effect against the manifest intention of the testator.⁶⁹

226. By change in condition or circumstances of testator—Our statute expressly recognizes the common-law doctrine of implied revocation from a subsequent change in the condition or circumstances of the testator.⁷⁰ Implied revocations are founded on the reasonable presumption of an alteration of the testator's mind arising from circumstances since the making of the will, producing a change in his previous obligations and duties. An implied revocation may result from a change in the property of the testator, or from a change in his family, as by marriage, or in the beneficiaries named in his will. The doctrine is not to be extended.⁷¹ The presumption of law of a revocation is conclusive. Evidence is inadmissible to rebut it. In other words the intention of the testator is immaterial.⁷² The death of a wife during the lifetime of her husband is not a subsequent change "in the condition or circumstances of the testator."⁷³

⁶³ *Laughton v. Atkins*, 1 Pick. (Mass.) 535; *In re Peirce's Estate*, 63 Wash. 437, 115 Pac. 835; 30 A. & E. Ency. of Law (2 ed.) 624; 40 Cyc. 1178.

⁶⁴ *Blackett v. Ziegler*, 153 Iowa 344, 133 N. W. 901; *Connery v. Connery*, 175 Mich. 544, 141 N. W. 615. See *Hogan v. Vinje*, 88 Minn. 499, 93 N. W. 523.

⁶⁵ *Bayley v. Bailey*, 5 Cush. (Mass.) 245.

⁶⁶ *In re Penniman's Will*, 20 Minn. 245 (220).

⁶⁷ *Connery v. Connery*, 175 Mich. 544, 141 N. W. 615.

⁶⁸ *In re Marx's Estate*, 174 Cal. 762, 164 Pac. 640.

⁶⁹ *Owens v. Fahnestock* (S. C.) 96 S. E. 557. See 32 Harv. L. Rev. 183.

⁷⁰ G. S. 1913, § 7256; *Graham v. Burch*, 47 Minn. 171, 49 N. W. 697; *Donaldson v. Hall*, 106 Minn. 502, 119 N. W. 219; *In re Evans' Estate*, 145 Minn. 252, 177 N. W. 126.

⁷¹ *Donaldson v. Hall*, 106 Minn. 502, 119 N. W. 219; 30 A. & E. Ency. of Law (2 ed.) 643; 40 Cyc. 1198; 28 R. C. L. 186; 28 Am. St. Rep. 356; 130 Id. 628.

⁷² *Donaldson v. Hall*, 106 Minn. 502, 119 N. W. 219; *In re Battis*, 143 Wis. 234, 126 N. W. 9.

⁷³ *Bennett v. Brown*, 222 Mass. 283, 110 N. E. 266.

227. By marriage or divorce—Statute—If, after making a will, the testator marries the will is thereby revoked, and if the testator after making the will is divorced from the bonds of matrimony, all provisions in such will in favor of the testator's spouse, so divorced, are thereby revoked.⁷⁴ Prior to R. L. 1905, § 3666, the rule of the common law that the will of a man was not revoked by his subsequent marriage alone, without the birth of issue, prevailed in this state.⁷⁵ At common law the will of a woman was revoked by her subsequent marriage without reference to the birth of issue. This rule was abrogated in this state by Laws 1869, c. 61, conferring upon women testamentary capacity. It was revived by R. L. 1905, § 3666.⁷⁶ A will made by a woman during coverture is revoked by a marriage subsequently contracted.⁷⁷ A common-law marriage will revoke a prior will.⁷⁸ Where it appears on the face of a will that it is made in contemplation of marriage and makes provision for the contemplated spouse, it is not revoked by the subsequent marriage of the testator as contemplated.⁷⁹ Possibly a subsequent marriage will not revoke a will where an antenuptial agreement expressly provides that it shall not be revoked.⁸⁰ The statute possibly applies to the will of a non-resident so far as real estate in this state is concerned, even though the will has been admitted to probate at the domicil.⁸¹ A will revoked by a subsequent marriage may be revived by a codicil made after the marriage.⁸² Prior to Laws 1909, c. 53, it was the rule in this state that divorce alone did not revoke a will. It was held, however, that a settlement of property rights between husband and wife, in anticipation of a divorce, by which the husband made over to his wife one-third of all his property, coupled with the fact of divorce, revoked by implication of law a will theretofore executed by the husband whereby he devised and bequeathed to her the amount of property she so received on the settlement.⁸³

⁷⁴ G. S. 1913, § 7257.

⁷⁵ *Hulett v. Carey*, 66 Minn. 327, 69 N. W. 31; *Kelly v. Stevenson*, 85 Minn. 247, 88 N. W. 739; *Donaldson v. Hall*, 106 Minn. 502, 119 N. W. 219. See 30 A. & E. Ency. of Law (2 ed.) 650; 40 Cyc. 1200; 28 R. C. L. 187; *Woerner*, Am. Law of Adm. (2 ed.) 54; Ann. Cas. 1913D, 1316.

⁷⁶ *Kelly v. Stevenson*, 85 Minn. 247, 88 N. W. 739; *Donaldson v. Hall*, 106 Minn. 502, 119 N. W. 219. See Ann. Cas. 1913A, 218; 1917C, 1039.

⁷⁷ *Means v. Ury*, 141 N. C. 248, 53 S. E. 850; *In re Van Guelpen's Estate*, 87 Wash. 146, 151 Pac. 245.

⁷⁸ *In re Matteote's Estate*, 59 Colo. 566, 151 Pac. 448.

⁷⁹ *Ford v. Greenawalt*, 292 Ill. 121, 126 N. E. 555; *Wood v. Corbin*, 298 Ill. 129, 129 N. E. 553. See *Francis v. Marsh*, 54 W. Va. 545, 46 S. E. 573; 35 Harv. L. Rev. 95.

⁸⁰ See *Kelly v. Stevenson*, 85 Minn. 247, 252, 88 N. W. 739; *Osgood v. Bliss*, 141 Mass. 474, 6 N. E. 527; *In re Craft's Estate*, 164 Pa. St. 520, 30 Atl. 493.

⁸¹ *Cornell v. Burr*, 32 S. D. 1, 141 N. W. 1081. See *Galley v. Brown*, 169 Wis. 444, 171 N. W. 945.

⁸² *In re Seller's Estate* (Cal.) 170 Pac. 1138.

⁸³ *Donaldson v. Hall*, 106 Minn. 502, 119 N. W. 219. See *In re Battis*, 143 Wis. 234, 126 N. W. 9.

228. By subsequent conveyances—A valid conveyance of land devised will revoke a prior will pro tanto. Inoperative conveyances will amount to a revocation if there is evidence of an intention to convey, but in such cases, where the title does not in fact pass, the intention must be manifest.⁸⁴ It is an open question in this state whether a contract to convey will revoke a previous devise of the property.⁸⁵ There is no distinction between a voluntary and an involuntary alienation in this connection. If land devised is subsequently taken in condemnation proceedings the devise is thereby revoked and the devisee has no claim on the fund.⁸⁶ A contract to convey or a conveyance, executed by one who is mentally incapacitated, or adjudged void for fraud or undue influence, will not revoke a prior will.⁸⁷ A conveyance by the testator, after the execution of his will and before his death, of specific property therein devised to a certain person, the conveyance being to such devisee, is an ademption or satisfaction of the specific devise, and not a revocation of the will. As to all other matters such as the payment of debts and devises and bequests to other persons, the will remains in force and effect.⁸⁸ A testator devised a farm to each of his three children, two daughters and one son. He gave to each daughter a certain sum of money and provided that it should be paid by the son. The children were also residuary legatees. During his lifetime he conveyed to each child the farm which he had devised to each of them. Held, that the specific legacies were not revoked by the conveyances since they were not made specific charges on the land devised to the son.⁸⁹ A testator, after making his will whereby he devised the greater part of his property in trust, made an enforceable contract to lease for one hundred years a part of the property devised in trust, with an option in the lessee to purchase within ten years. Held, that the contract did not revoke the will by implication of law.⁹⁰ A deed by an insane person to another who knows of the grantor's incapacity, and gives no substantial consideration for the property, is a nullity and does not revoke a valid will previously made by the grantor.⁹¹ A sale of an incompetent's real estate for her support held not to revoke a prior devise thereof, and the proceeds not

⁸⁴ *Graham v. Burch*, 47 Minn. 171, 49 N. W. 697; *In re Sprague's Estate*, 125 Mich. 357, 84 N. W. 293; *Stender v. Stender*, 181 Mich. 648, 148 N. W. 255; *Moore v. Smith*, 191 Mich. 694, 158 N. W. 148; 30 A. & E. Ency. of Law (2 ed.) 652; 40 Cyc. 1205; 28 R. C. L. 193; *Woerner*, Am. Law of Adm. (2 ed.) § 53; 95 Am. St. Rep. 342; Ann. Cas. 1913B, 56.

⁸⁵ See *Graham v. Burch*, 47 Minn. 171, 175, 49 N. W. 697; *In re Evans' Estate*, 145 Minn. 252, 177 N. W. 126; *Hall v. Bray*, 1 N. J. L. 245; 30 A. & E. Ency.

of Law (2 ed.) 653; 40 Cyc. 1208; *Woerner*, Am. Law of Adm. (2 ed.) § 53.

⁸⁶ *Ametrano v. Downs*, 170 N. Y. 388, 63 N. E. 340.

⁸⁷ *Graham v. Burch*, 47 Minn. 171, 49 N. W. 697.

⁸⁸ *Gregory v. Lansing*, 115 Minn. 73, 131 N. W. 1010.

⁸⁹ *Miller v. Klossner*, 135 Minn. 377, 160 N. W. 1025.

⁹⁰ *In re Evans' Estate*, 145 Minn. 252, 177 N. W. 126. See 8 A. L. R. 1639.

⁹¹ *Bethany Hospital Co. v. Phillips*, 82 Kan. 64, 107 Pac. 530.

being all used the residue should be considered real estate and disposed of the same as though no sale had been made.⁹² The proceeds of the sale are deemed personal property and pass to the legatees, residuary or otherwise. The devisee has no claims thereon.⁹³ Where it will work an injustice a court of equity will not allow a testator's ignorance of the rule that a sale of real estate specifically devised works a revocation to defeat his manifest intention.⁹⁴

229. By contract—Parol evidence—Where a writing in the form of a contract, but claimed to be a revocation of an existing will, is complete, clear, and unambiguous, oral evidence of declarations made by decedent to show that he intended and understood that the writing was a revocation of an existing will is inadmissible.⁹⁵

230. Revocation of codicil does not necessarily revoke will—While a will and existing codicil are to be regarded as a single and entire instrument for the purpose of determining testamentary intention and disposition, the destruction and revocation of a codicil to a will does not necessarily or ordinarily operate as a revocation of the will.⁹⁶

231. Fraud in procuring revocation—A revocation procured by fraud or undue influence is void.⁹⁷

232. Fraud or force in preventing revocation—The failure to perform some one of the acts required by the statute to effect revocation is not excused by the fact that it is defeated or prevented by the fraud of another.⁹⁸ Where an attempted revocation of a will is thwarted by the fraudulent act of a beneficiary, and the testator is subsequently and seasonably informed of the fact, and acquiesces in the preservation of the will, no action will lie for the fraud.⁹⁹ A devisee who by fraud or force prevents the revocation of a will is chargeable as a trustee for those who would be entitled to the estate if the will had been revoked.¹

233. Mistake—Where a testator revokes a will or a portion thereof because of his mistaken belief in the existence of a fact the mistake defeats the revocation. A mistake has this effect though it is at bottom one of law. If the intent to revoke was clearly dependent on a reliance upon certain legal consequences attributed to certain circumstances, an

⁹² *World's Gospel Union v. Barnes' Estate*, 162 Mich. 79, 127 N. W. 37.

⁹³ *In re Sprague's Estate*, 125 Mich. 357, 84 N. W. 293; *Stender v. Stender*, 181 Mich. 648, 148 N. W. 255; *Ametrano v. Downs*, 170 N. Y. 388, 63 N. E. 340.

⁹⁴ *Kirsher v. Todd*, 195 Mich. 297, 162 N. W. 129.

⁹⁵ *Lindesmith v. Lindesmith*, 96 Minn. 147, 104 N. W. 825.

⁹⁶ *Osburn v. Rochester Trust & Safe Deposit Co.*, 209 N. Y. 54, 102 N. E. 571.

See 26 Harv. L. Rev. 382; Ann. Cas. 1915A, 102.

⁹⁷ *Graham v. Burch*, 47 Minn. 171, 49 N. W. 697; 30 A. & E. Ency. of Law (2 ed.) 629, 637; 40 Cyc. 1196.

⁹⁸ *Graham v. Burch*, 47 Minn. 171, 49 N. W. 697. See Ann. Cas. 1913D, 307.

⁹⁹ *Graham v. Burch*, 53 Minn. 17, 55 N. W. 64.

¹ *Wellner v. Eckstein*, 105 Minn. 444, 464, 117 N. W. 830.

error in attributing that effect to them is as effectual a bar to an actual revocation as if it were a pure error of fact.² To nullify a revocation on the ground that it was done under the mistaken belief that the property of the testator would be distributed under the statutes of descent and distribution the same as under the will the belief must be proved unequivocally and by evidence other than statements made to or by the testator disconnected with the physical act of revocation.³

234. Destruction of will by insane testator—Proof that a decedent executed a will, which he afterwards destroyed while not of sound mind, will not defeat an application for the appointment of an administrator, unless the contents of the will can be proved with such degree of certainty that it may be established as a will.⁴

235. Burden of proof—One contesting the probate of a will on the ground that it has been revoked has the burden of proving revocation; and where the jury are left in doubt on the evidence he has not sustained the burden.⁵

236. Evidence—Admissibility—Declarations of the testator made at the time of revoking a will are admissible when testified to by disinterested persons to show the intent with which the act was done.⁶ Subsequent declarations of a testator are admissible to show his intention to revoke or not, or to revive and select the will offered for probate, or to rebut the presumption of the revocation of a lost will. They are admissible to show the intention, state of mind, purpose or plan of the testator.⁷ Such evidence is admissible merely for the purpose of throwing light upon the state of mind of the testator at the time in question, and not as tending to establish the truth of any facts that may have been stated by him.⁸ Where a writing in the form of a contract, but claimed to be a revocation of an existing will, is complete, clear, and unambiguous, oral evidence of the declarations made by decedent to show that he intended and understood that the writing was a revocation of an existing will is inadmissible.⁹

² Strong's Appeal, 79 Conn. 123, 63 Atl. 1089; 30 A. & E. Ency. of Law (2 ed.) 629; 40 Cyc. 1196; 28 R. C. L. 177; Woerner, Am. Law of Adm. (2 ed.) § 48.

³ In re Allen's Will, 88 N. J. Eq. 291, 102 Atl. 147.

⁴ In re Ellis' Estate, 55 Minn. 401, 56 N. W. 1056. See L. R. A. 1916C, 92.

⁵ Aldrich v. Aldrich, 215 Mass. 164, 102 N. E. 487. See §§ 222, 225.

⁶ Blackett v. Ziegler, 153 Iowa 344, 133 N. W. 901; Pickens v. Davis, 134 Mass. 252; 30 A. & E. Ency. of Law (2 ed.) 637; 40 Cyc. 1316.

⁷ Pickens v. Davis, 134 Mass. 252; Aldrich v. Aldrich, 215 Mass. 164, 102 N.

E. 487; Burton v. Wyld, 261 Ill. 397, 103 N. E. 976; In re Keene's Estate, 189 Mich. 97, 155 N. W. 514; Jackson v. Hewlett, 114 Va. 573, 77 S. E. 518; In re Saunder's Will (N. C.) 98 S. E. 378; 30 A. & E. Ency. of Law (2 ed.) 637; 40 Cyc. 1316; Woerner, Am. Law of Adm. (2 ed.) § 48; 10 Ann. Cas. 535; Ann. Cas. 1914C, 909; Ann. Cas. 1918E, 370; 24 L. R. A. (N. S.) 180; 26 Harv. L. Rev. 159; 3 Wigmore, Ev. §§ 1736, 1737.

⁸ Lane v. Moore, 151 Mass. 87, 23 N. E. 828.

⁹ Lindesmith v. Lindesmith, 96 Minn. 147, 104 N. W. 825.

237. Revival—There is no statute in this state determining whether the revocation of a will which revoked a prior will revives the prior will. According to the better view there is no revival as a matter of law or of presumption, but it is a question of the testator's intention, to be inferred from all the circumstances of the case, including his declarations at or subsequent to the revocation, and it is immaterial whether the revocation is express or implied.¹⁰ Where a testator executed a will, and subsequently executed a second will revoking the first, and thereafter destroyed the second will for the express purpose of continuing the first in force, it was held that the first remained in force and was properly admitted to probate.¹¹ Where a subsequent will is invalid for any cause a prior unrevoked valid will may be probated.¹¹

PROBATE

IN GENERAL

238. Nature of proceeding—Parties—The probate of a will is a judicial act of a court of competent jurisdiction. It is a judicial determination of the validity of the will.¹² The proceeding is not strictly an action, but it is the nature of an action. It has the essential features of an action, in that it is a proceeding in a court, in which the question of the validity of the will is litigated between the executor, or other person propounding the will, as actor, or party plaintiff, and all persons interested in contesting the will as parties defendants. The order admitting the will to probate is substantially a judgment.¹³ The adverse parties in a proceeding to probate a will are, on the one side, those who prefer to take under the law of descent or some will other than the one offered for probate, and, on the other side, those who deem their best interests subserved by having the will offered allowed. The proponent may or may not be a real party in interest, or an adverse party in the ordinary sense of the term. If he is a devisee or legatee he is a real party in interest. If his only interest is in the fact that he is named executor in the will he is only a nominal party and not an adverse party.¹⁴

¹⁰ *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151; *Pickens v. Davis*, 134 Mass. 252; *Blackett v. Ziegler*, 153 Iowa 114, 133 N. W. 901; 30 Ency. of Law (2 ed.) 657; 40 Cyc. 1215; 28 R. C. L. 195; *Woerner*, Am. Law of Adm. (2 ed.) 52; 15 Harv. L. Rev. 142; Ann. Cas. 1913E, 120; 37 L. R. A. 575; 14 L. R. A. (N. S.) 937; 13 Probate Reports Ann. 28; 28 Am. St. Rep. 354. See *In re Tibbetts' Estate* (Minn.) 189 N. W. —.

¹¹ *In re Tibbetts' Estate* (Minn.) 189 N. W. —.

¹² *In re Penniman's Will*, 20 Minn. 245

(220); *Thomas v. Thomas*, 76 Minn. 237, 79 N. W. 104; *Crowley v. Farley*, 129 Minn. 460, 152 N. W. 872; *In re Crisick's Will*, 174 Iowa 397, 156 N. W. 415.

¹³ *In re Connell's Will*, 221 N. Y. 190, 116 N. E. 986; 23 A. & E. Ency. of Law (2 ed.) 111; 40 Cyc. 1223, 1343; *Woerner*, Am. Law of Adm. (2 ed.) § 228; 28 R. C. L. 367. See § 242.

¹⁴ *In re Penniman's Will*, 20 Minn. 245 (220).

¹⁵ *Bowler v. Fahey*, 136 Minn. 408, 162 N. W. 515.

All persons interested in the estate are parties to the proceeding, in the sense that they are bound thereby, whether they have notice or not, or whether they appear or not, and though they are minors and do not appear by a guardian.¹⁵

239. One form—Distinction between common forms and solemn forms abolished—In some states there are two forms of probate. The common or non-contentious form, granted by a registrar or clerk *ex parte*, upon the affidavit of the applicant, and a solemn, or contentious form, granted upon notice to interested parties and a trial by the judge. In this state there is only one form of probate.¹⁶

240. Proceeding in rem—The proceeding for the probate of a will is in rem.¹⁷ The proceeding being in rem, constructive notice is sufficient, and the decree admitting the will to probate is binding on every one interested in the estate, whether they appear at the hearing or not, and whether they had actual notice or not.¹⁸

241. First step in administration—Jurisdiction continues to end of administration—When a probate court legally probates a will it thereby acquires jurisdiction to direct and control the administration of the estate and such jurisdiction, unless previously legally terminated, continues over the administration, as one proceeding, until its close.¹⁹

242. Scope and effect—Issues involved—Statute—The statute provides that the probate of a will is conclusive as to its due execution.²⁰ In some jurisdictions the probate of a will devising real estate is only *prima facie* evidence of its validity. In this state no distinction is made between a will disposing of realty and one disposing of personalty. In all cases the probate of a will is conclusive of its validity.²¹ Aside from questions relating to the jurisdiction of the court, the only questions involved in the probate of a will are (1) whether the testator had legal capacity to make the will, that is, whether he was of age and of sound mind, free from undue influence or fraud; (2) whether the will was executed in the manner provided by law, and (3) whether it is his last subsisting will. The decree admitting the will to probate is conclusive

¹⁵ See §§ 240, 242, 252, 259.

¹⁶ See 16 Ency. Pl. & Pr. 993; 40 Cyc. 1232; 28 R. C. L. 367, 375; Woerner, *Am. Law of Adm.* (2 ed.) § 215.

¹⁷ *Geraghty v. Kilroy*, 103 Minn. 286, 289, 114 N. W. 838; *In re Barlow's Estate* (Minn.) 188 N. W. 282; *In re Davis' Estate*, 136 Cal. 590, 69 Pac. 412; *Old Colony Trust Co. v. Bailey*, 202 Mass. 283, 88 N. E. 898; *In re Horton's Will*, 217 N. Y. 363, 111 N. E. 1066; 23 A. & E. Ency. of Law (2 ed.) 112; 40 Cyc. 1224; 28 R. C. L. 375; Woerner, *Am. Law of Adm.* (2 ed.) § 227.

¹⁸ *In re Sicker's Estate*, 89 Neb. 216, 131 N. W. 204; *In re Horton's Will*, 217 N. Y. 363, 111 N. E. 1066; *In re Allen's Estate* (Cal.) 169 Pac. 364.

¹⁹ *Culver v. Hardenbergh*, 37 Minn. 225, 33 N. W. 792; *In re Barlow's Estate* (Minn.) 188 N. W. 282. See § 617.

²⁰ § 243; *In re Langevin's Will*, 45 Minn. 429, 47 N. W. 1133; *In re Ford's Estate*, 144 Minn. 454, 175 N. W. 913.

²¹ *Schmidt v. Schmidt*, 47 Minn. 451, 455, 50 N. W. 598. See 23 A. & E. Ency. of Law (2 ed.) 133; 40 Cyc. 1371; Woerner, *Am. Law of Adm.* (2 ed.) § 228.

only that the testator had legal capacity to make the will and that it was duly executed—in other words, that it is the valid last will of the testator and entitled to legal effect as such. The legal effect of the will or of its various provisions, its construction and operation, are not involved and cannot be determined. The decree does not determine the validity of a devise though there is but a single disposition of property made by the will.²² Whether the proposed will has been wholly revoked is a proper issue for determination.²³ Whether it has been partially revoked is sometimes a proper issue for determination.²⁴ The fact that the will is inoperative by reason of a condition may be an issue.²⁵ The capacity of the beneficiaries to take under the will is not involved.²⁶ The question whether the will is so indefinite and uncertain that it cannot be given effect cannot be raised.²⁷ The validity of a trust created by the will is not involved.²⁸ The rights of a pretermitted child are not involved and cannot be determined.²⁹ While the proper construction of the will is not in issue, the court may examine the will incidentally to see if its contents throw any light on the validity of its execution.³⁰ It is no objection to the probate of a will that the testator had made a valid contract to dispose of his property in a different manner than that provided in the will, or that the will offered for probate revokes a will drawn in accordance with the terms of the contract.³¹ Two wills having been made by a testator, the second to take effect in case certain bequests in the first were declared void, both wills being admitted to probate together as a will and codicil, it was held that the probate was conclusive as to the due execution of both, and that together they consti-

²² *Greenwood v. Murray*, 26 Minn. 259, 2 N. W. 945; *Christian v. Colbert*, 33 Minn. 509, 24 N. W. 301; *Graham v. Burch*, 47 Minn. 171, 49 N. W. 697; *In re Ford's Estate*, 144 Minn. 454, 175 N. W. 913; *Bailey v. Buffalo Loan etc. Co.*, 213 N. Y. 525, 107 N. E. 1043; *In re Wiese's Estate*, 98 Neb. 463, 153 N. W. 556; *In re John's Will*, 30 Or. 494, 47 Pac. 341; *Bethony Hospital Co. v. Hale*, 69 Kan. 616, 77 Pac. 537; *In re D'Avignon's Will*, 12 Colo. App. 489, 55 Pac. 936; *In re Cook's Estate*, 173 Cal. 465, 160 Pac. 553; *In re Rice's Will*, 150 Wis. 401, 136 N. W. 956; *Irwin v. Lattin*, 29 S. D. 1, 135 N. W. 759; *In re Tinsley's Will*, 187 Iowa 23, 174 N. W. 4; 23 A. & E. Ency. of Law (2 ed.) 134; 40 Cyc. 1231, 1372; 28 R. C. L. 377; *Woerner, Am. Law of Adm. (2 ed.)* § 228. See 3 L. R. A. (N. S.) 963.

²³ *In re Penniman's Will*, 20 Minn. 245 (220); *In re Cunningham's Will*, 38 Minn. 169, 36 N. W. 269; *Graham v. Burch*,

47 Minn. 171, 49 N. W. 697; *Kelly v. Stevenson*, 85 Minn. 247, 88 N. W. 739; *Lindesmith v. Lindesmith*, 96 Minn. 147, 104 N. W. 825.

²⁴ *Thomas v. Thomas*, 76 Minn. 237, 79 N. W. 104; *Donaldson v. Hall*, 106 Minn. 502, 119 N. W. 219. See §§ 309, 1071.

²⁵ *Eaton v. Brown*, 193 U. S. 197. See *In re Tinsley's Will*, 187 Iowa 23, 174 N. W. 4.

²⁶ *Irwin v. Lattin*, 29 S. D. 1, 135 N. W. 759.

²⁷ *In re Young's Will*, 153 Wis. 337, 141 N. W. 226.

²⁸ *Bailey v. Buffalo Loan etc. Co.*, 213 N. Y. 525, 107 N. E. 1043.

²⁹ *Lowery v. Hawker*, 22 N. D. 318, 133 N. W. 918. See *Odenbreit v. Uthelm*, 131 Minn. 56, 154 N. W. 741.

³⁰ *In re Byford's Will (Okla.)* 165 Pac. 194.

³¹ *Sumner v. Crane*, 155 Mass. 483, 29 N. E. 1151; *Morgan v. Sanborn*, 225 N. Y. 454, 122 N. E. 696. See § 152.

tuted the last will.³² A construction of a will at the time of its probate is not conclusive.³³

243. Necessary to give will legal effect—Conclusiveness—Statute— No will shall be effectual to pass either real or personal estate unless duly proved and allowed in the probate court or on appeal. Such probate shall be conclusive as to the due execution of a will.³⁴ The probate is conclusive of the due execution of the will.³⁵ An unprobated will is inadmissible to prove title to either real or personal property.³⁶ An action to declare a trust and to require the devisees and legatees, named in a will to convey the property devised to the plaintiff, is premature if brought before the will is proved and allowed by the probate court in proper proceedings for that purpose. The title to real estate at the death of the owner descends eo instanti to his heirs, subject to administration, and the contingency of the probate of a will disposing of the same, in which event the title of the devisees relates back to the time of death. Until probate of such a will, the title is prima facie in the heirs at law, and they are necessary parties to an action to enforce a contract made by the deceased by declaring a trust in the property inherited or devised.³⁷

244. Death of testator jurisdictional—In the absence of statute the death of the testator is essential to the jurisdiction of the court to grant probate. A grant of probate in the case of a living testator is not merely irregular but absolutely void and subject to collateral attack.³⁸

245. Existence of property not necessary—It is no objection to the probate of a will of a resident that he left no property. Whether he left property which may pass under the will is a matter for subsequent inquiry.³⁹

246. Time of applying for probate—There is no statute in this state limiting the time for probating a will and the probate court cannot refuse probate because the proponent has been guilty of misconduct in withholding the will.⁴⁰

³² Dicke v. Wagner, 95 Wis. 260, 70 N. W. 159.

³³ Jones v. Roberts, 84 Wis. 465, 54 N. W. 917.

³⁴ G. S. 1913, § 7255. See 23 A. & E. Ency. of Law (2 ed.) 117; 40 Cyc. 1225.

³⁵ See § 242.

³⁶ Shumway v. Holbrook, 1 Pick. (Mass.) 114; Collum v. Price, 185 Ala. 556, 64 So. 88; 23 A. & E. Ency. of Law (2 ed.) 117; 40 Cyc. 1225.

³⁷ Brown v. Webster, 87 Neb. 788, 128 N. W. 635.

³⁸ Scott v. McNeal, 154 U. S. 34; Jochumsen v. Suffolk Savings Bank, 3 Allen (Mass.) 87. See §§ 616, 662.

³⁹ Thomas v. Timonds, 179 Iowa 509, 159 N. W. 881; In re Hickman's Estate, 101 Cal. 609, 36 Pac. 118. See Will v. Sisters of St. Benedict, 67 Minn. 335, 339, 69 N. W. 1090 (value of estate immaterial); §§ 615, 662.

⁴⁰ Haddock v. Boston etc. R. Co., 146 Mass. 155, 15 N. E. 495; In re Brandon's Estate, 164 Wis. 387, 160 N. W. 177; Hanley v. Kraftczyk, 119 Wis. 352, 96 N. W. 820; In re Barney's Will, 187 Mich. 145, 153 N. W. 730; 23 A. & E. Ency. of Law (2 ed.) 123; 40 Cyc. 1255; 28 R. C. L. 361; 2 Ann. Cas. 773; 57 L. R. A. 253. See § 302.

247. Relates back to cure defects—The probate of a will relates back and gives effect to a deed made by a devisee before the probate.⁴¹ At common law an executor could do nearly all acts under the will before it was proved that he could do afterwards, and, when the will was proved, it related back and cured his acts.⁴²

248. Exclusive original jurisdiction in probate court—The probate court is invested by the constitution with exclusive original jurisdiction over the probate of wills.⁴³ The district court has no authority in an original action to determine whether an instrument proposed for probate is the last will of a deceased person.⁴⁴

249. Agreements not to probate—If a valid will is presented for probate it is the duty of the court to admit it to probate regardless of any agreement of the interested parties to the contrary.⁴⁵

DOMESTIC WILLS

250. Delivery of will to probate court—Duty of custodian—Statute—A person who has the custody of a will shall forthwith, after notice or information of the death of the testator, deliver such will into the probate court which has jurisdiction thereof, or to the executor named in the will; and if a person, without reasonable cause, neglects so to deliver a will after being duly cited for that purpose by such court, he shall be deemed guilty of contempt of court.⁴⁶ While this statute requires an executor named in a will in his custody to deliver it to the probate court it does not require him to petition for its probate or to defend it when its probate is contested.⁴⁷ It is immaterial who delivers a will to the probate court.⁴⁸ It is only the last will that must be delivered. A prior will need not be delivered, at least until the last will is refused probate.⁴⁹ The probate court cannot refuse probate of a will because of delay in presenting it for probate.⁵⁰ Any person interested in the estate, such as a legatee, devisee, or creditor of the testator, may apply to the probate court to have a will exhibited. The statute is not

⁴¹ *Babcock v. Collins*, 60 Minn. 73, 76, 61 N. W. 1020.

⁴² *Babcock v. Collins*, 60 Minn. 73, 61 N. W. 1020. See § 725.

⁴³ *In re Penniman's Will*, 20 Minn. 245 (220); *Culver v. Hardenbergh*, 37 Minn. 225, 233, 33 N. W. 792. See, as to the ancient jurisdiction of ecclesiastical and chancery courts in England, *Schmidt v. Schmidt*, 47 Minn. 451, 50 N. W. 598.

⁴⁴ *Brown v. Webster*, 87 Neb. 788, 128 N. W. 635.

⁴⁵ *In re Dardis' Will*, 135 Wis. 457, 115 N. W. 332; *In re Rice's Will*, 150 Wis. 401, 136 N. W. 956; *In re Staab's*

Will, 166 Wis. 537, 166 N. W. 326; *Stimpson v. Stimpson*, 168 Wis. 146, 169 N. W. 295. See 14 Ann. Cas. 303, 742; Ann. Cas. 1918E, 1218; 28 R. C. L. 357.

⁴⁶ G. S. 1913, § 7258. See 40 Cyc. 1226; *Woerner*, Am. Law of Adm. (2 ed.) 214.

⁴⁷ *Kelly v. Kennedy*, 133 Minn. 278, 158 N. W. 395; *Doan v. Herod*, 56 Ind. App. 663, 104 N. E. 385.

⁴⁸ *In re Livingston's Estate*, 179 Iowa 183, 153 N. W. 200.

⁴⁹ *Rodisch v. Koethe*, 178 Ill. App. 286.

⁵⁰ *In re Barney's Will*, 187 Mich. 145, 153 N. W. 730. See § 246.

exclusive. The court may act under its general jurisdiction.⁵¹ The statute has only a local application. It does not authorize the court to compel a foreign executor to produce a will which has been disallowed in the jurisdiction of his appointment.⁵² It has never been decided whether a private action will lie under this statute. Under similar statutes in many states a private action is authorized.⁵³ In a private action under a similar statute it has been held that the statute did not apply to one coming into possession of the will casually after the death of the testator.⁵⁴

251. In what county—The proceedings must be had in the county wherein the decedent resided at the time of his death.⁵⁵

252. Minors—Guardians ad litem—Guardians ad litem need not be appointed for minors interested in the estate.⁵⁶

253. Who may petition for probate—Statute—Any executor, devisee, or legatee named in a will, or any other person interested in the estate, at any time after the death of the testator, may petition the probate court of the proper county to have the will proved, whether the same be in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the state, or a nuncupative will.⁵⁷ It is not essential that the petitioner have the will in his possession.⁵⁸ An executor named in a will may petition for its probate, but it is not his duty to do so.⁵⁹ A creditor of the testator or of a legatee is interested in the estate and may petition for the probate of a will.⁶⁰ An assignee of a beneficiary under the will may petition for its probate.⁶¹ Parties may be estopped by their conduct from seeking the probate of a will.⁶²

254. Petition for probate—Contents—Statute—Every petition for the probate of a will shall show:

1. The jurisdictional facts.
2. The name and residence of the person named as executor, if known, and the name of the person for whom letters are prayed.

⁵¹ *Stebbins v. Lathrop*, 4 Pick. (Mass.) 33; *Woerner*, Am. Law of Adm. (2 ed.) § 214.

⁵² *Loring v. Oakey*, 98 Mass. 267.

⁵³ *Thayer v. Kitchen*, 200 Mass. 382, 86 N. E. 952 (remedy under statute held exclusive). See 40 Cyc. 1226.

⁵⁴ *Barney v. Barney*, 192 Mich. 45, 158 N. W. 101.

⁵⁵ G. S. 1913, § 7205. See §§ 622, 647.

⁵⁶ *In re Mousseau's Will*, 30 Minn. 202, 14 N. W. 887. See *Balch v. Hooper*, 32 Minn. 158, 20 N. W. 124; *Ladd v. Welskopf*, 62 Minn. 29, 36, 64 N. W. 99.

⁵⁷ G. S. 1913, § 7266. See 16 Ency. Pl.

& Pr. 997; 23 A. & E. Ency. of Law (2 ed.) 122; 40 Cyc. 1229; 28 R. C. L. 360; *Woerner*, Am. Law of Adm. (2 ed.) § 214.

⁵⁸ G. S. 1913, § 7266; *Putnam v. Pitney*, 45 Minn. 242, 244, 47 N. W. 790; *Pederson v. Christofferson*, 97 Minn. 491, 106 N. W. 958.

⁵⁹ *Burmeister v. Gust*, 117 Minn. 247, 135 N. W. 980; *Kelly v. Kennedy*, 133 Minn. 278, 158 N. W. 395.

⁶⁰ *Stebbins v. Lathrop*, 4 Pick. (Mass.) 33.

⁶¹ *In re Rankin's Estate*, 164 Cal. 138, 127 Pac. 1034.

⁶² Ann. Cas. 1918A, 1200.

3. The names, ages, and places of residence of the heirs and devisees of the decedent, so far as known to the petitioner.

4. The probable value and character of the property of the estate, real and personal.

No defect of form or in the statement of facts contained in the petition shall invalidate the probate of a will.⁶³ The filing of the petition gives the court jurisdiction.⁶⁴ The jurisdictional facts are the death of the testator and his domicil in the county at the time of his death.⁶⁵ The failure of a petition to name the heirs is not jurisdictional. The statute is directory as to everything but the jurisdictional facts.⁶⁶ It is discretionary with the court to allow a petition to be withdrawn. A petitioner cannot withdraw a petition as of right.⁶⁷

255. Filing petition—Notice—Proof and allowance of will—Such petition shall be filed in the probate court, and thereupon the court shall appoint a time and place for proving the will, and cause notice thereof to be given as provided by law. At the time appointed, the court shall hear proof and allow or disallow the will. If the probate is not contested, the court may admit the same to probate on the testimony of one of the subscribing witnesses only, if such witness testifies that the will was executed in all respects as required by law, and that the testator was of full age and sound mind at the time of its execution.⁶⁸ There must be three weeks' published notice.⁶⁹ The notice is not jurisdictional even as to residents of the state. The jurisdiction is acquired by the filing of the petition and not by the notice.⁷⁰ The want of notice is not a ground for collateral attack.⁷¹ No notice is necessary for the probate of a will as against non-residents. The proceeding is in rem.⁷² The published notice provided by statute gives the probate court jurisdiction of the entire proceeding for the probate of the will. No other notice or service of process is necessary.⁷³ Personal service of notice is not required even though all the interested parties reside in the county.⁷⁴ A

⁶³ G. S. 1913, § 7267. See 16 Ency. Pl. & Pr. 999; 40 Cyc. 1265; Woerner, Am. Law of Adm. (2 ed.) § 261.

⁶⁴ *Bombolis v. Minneapolis & St. Louis R. Co.*, 128 Minn. 112, 150 N. W. 385; *In re Edward's Estate*, 154 Cal. 91, 97 Pac. 23.

⁶⁵ 23 A. & E. Ency. of Law (2 ed.) 114; 40 Cyc. 1266. See §§ 616, 622, 647.

⁶⁶ *Nicholson v. Leatham*, 28 Cal. App. 597, 153 Pac. 965.

⁶⁷ *In re Binney's Will* (Mass.) 135 N. E. 168.

⁶⁸ G. S. 1913, § 7268. See 16 Ency. Pl. & Pr. 1003; 40 Cyc. 1263.

⁶⁹ See §§ 41, 42.

⁷⁰ *In re Barlow's Estate* (Minn.) 188 N. W. 282. See §§ 31, 40.

⁷¹ *In re Barlow's Estate* (Minn.) 188 N. W. 282; *Dickey v. Vann*, 81 Ala. 425, 8 So. 195; *Wetmore v. Parker*, 52 N. Y. 450; 16 Ency. Pl. & Pr. 1004; 40 Cyc. 1378.

⁷² *In re Horton's Will*, 217 N. Y. 363, 111 N. E. 1066.

⁷³ *In re Mousseau's Will*, 30 Minn. 202, 14 N. W. 887; *Larson v. How*, 71 Minn. 250, 253, 73 N. W. 966; *In re Sleker's Estate*, 89 Neb. 216, 131 N. W. 204. See 35 L. R. A. (N. S.) 1058.

⁷⁴ *In re Sleker's Estate*, 89 Neb. 216, 131 N. W. 204.

hearing on a petition before the expiration of the three weeks' statutory notice is premature and an order thereon is voidable on direct attack.⁷⁵

256. Order allowing or disallowing will—There should be a formal order allowing or disallowing the will. The fact of the order being made should be noted in the register and the order entered in the record of orders.⁷⁶ A formal order, however, is not essential to the validity of the proceedings. It is sufficient if the allowance or disallowance of the will by the court may be inferred from the records. It is sufficient if the will and proof thereof are recorded and letters testamentary thereon are issued.⁷⁷ The order of the probate court admitting a will to probate is in effect a judgment or decree determining the validity of the will.⁷⁸

257. Allowance in part—A will may be allowed in part and rejected as to a part on account of fraud, undue influence, or partial revocation.⁷⁹

258. Certificate of proof of will—Evidence—Statute—Every will, when proved as provided in this chapter, shall have a certificate of such proof indorsed thereon or annexed thereto, signed by the judge of the probate court and attested by its seal; and every will so certified, and the record thereof, or a transcript of such record, certified by the judge of the probate court and attested by its seal, may be read in evidence in all the courts within this state, without further proof.⁸⁰ The requirement of a certificate is merely directory. The failure of the court to comply with the statute does not affect the validity of the order or judgment allowing a will.⁸¹

259. Decree of probate in rem and binding on all—The decree of a court having jurisdiction admitting a will to probate is in the nature of a judgment in rem and establishes the will against all the world. Any person interested in the estate of the decedent may make himself a party to the proceedings and he is forever bound by the decree whether he is in fact a party or not.⁸² A foreign decree of probate may be attacked for want of jurisdiction. It may be shown that the decedent was

⁷⁵ *In re Johnson's Estate*, 98 Neb. 799, 154 N. W. 550.

⁷⁶ See §§ 10, 255.

⁷⁷ *Wilt v. Cutler*, 38 Mich. 189; *In re Warfield's Estate*, 22 Cal. 51; 16 Ency. Pl. & Pr. 1043; 40 Cyc. 1343.

⁷⁸ *In re Penniman's Will*, 20 Minn. 245 (220).

⁷⁹ §§ 173, 220; 16 Ency. Pl. & Pr. 1046; 23 A. & E. Ency. of Law (2 ed.) 139; 40 Cyc. 1233; 28 R. C. L. 358; *Woerner, Am. Law of Adm.* (2 ed.) 222; 18 Ann. Cas. 388; 34 L. R. A. (N. S.) 971; 41 L. R. A. (N. S.) 1126.

⁸⁰ G. S. 1913, § 7272.

⁸¹ *In re Warfield's Estate*, 22 Cal. 51; *Reese v. Nolan*, 99 Ala. 203, 13 So. 677; *Roberts v. Flanagan*, 21 Neb. 503, 32 N. W. 563; 16 Ency. Pl. & Pr. 1044; 40 Cyc. 1344.

⁸² *In re Penniman's Will*, 20 Minn. 245 (220); *Bonnemort v. Gill*, 167 Mass. 338, 45 N. E. 768; *Johnes v. Jackson*, 67 Conn. 81, 34 Atl. 709; *In re Horton's Will*, 217 N. Y. 363, 111 N. W. 1066; 23 A. & E. Ency. of Law (2 ed.) 132; 40 Cyc. 1370; 28 R. C. L. 375; 21 L. R. A. 680.

not domiciled within the jurisdiction of the court. A finding of fact as to domicile by the foreign court is not conclusive.⁸³

260. Collateral attack—An order, judgment or decree allowing or disallowing a will is not subject to collateral attack for error, irregularity or fraud. According to the better view this is true though a fatal defect appears on the face of the will.⁸⁴ If made by a domestic court it is not subject to collateral attack by any one for want of jurisdiction not affirmatively appearing on the face of the record.⁸⁵

261. Practice when subsequent will, codicil, or revocation of will is presented—Statute—If, upon the hearing on the petition for proof of will, another instrument in writing, purporting to be a subsequent will, or codicil or revocation of said will, or any part thereof, shall be presented in opposition thereto, said instrument shall be filed, and thereupon said hearing shall be adjourned to a day to be appointed by the court, and notice shall be given to all persons interested, which notice shall set forth the reason of said adjournment and the grounds of opposition to said will, and shall be served personally or by publication, or both, as the court may direct; at which time proof shall be taken upon all of said wills, codicils, or revocations, and all matters pertaining thereto, and the court shall determine which of said instruments, if either, should be allowed as the last will and testament of the deceased. If, upon said hearing, it shall appear that neither of said instruments should be allowed as the last will and testament of the deceased, and that said estate should be administered, the probate court shall thereupon issue letters of administration to the person or persons entitled thereto by law.⁸⁶

CONTESTS

262. Who may contest probate—All persons interested in the estate may contest the probate. A general creditor of an heir cannot contest it, but a judgment creditor of an heir of one dying seized of real estate, which, in the absence of a will, would pass to the heir, may contest the probate of a will that would defeat his lien.⁸⁷ The only persons who may contest the probate of a will are those who, but for the will, would succeed, in some degree, to the decedent's estate, or be financially benefited by its disallowance.⁸⁸ A widow of the testator may contest a will

⁸³ *In re Hoxton's Will*, 217 N. Y. 363, 111 N. E. 1066. See § 647.

⁸⁴ *Wheaton v. Pope*, 91 Minn. 299, 307, 97 N. W. 1046. See §§ 244, 255, 259, 260, 274, 309, 615, 616; *Starnes v. Thompson*, 173 N. C. 466, 92 S. E. 259; *In re Ryan's Estate*, 177 Cal. 598, 171 Pac. 297; 16 Ency. Pl. & Pr. 1018; 23 A. & E. Ency. of Law (2 ed.) 132; 40 Cyc. 1377; 28 R.

C. L. 375; *Woerner*, Am. Law of Adm. (2 ed.) § 227; 42 L. R. A. (N. S.) 454.

⁸⁵ See § 34.

⁸⁶ G. S. 1913, § 7273. See § 319.

⁸⁷ *In re Langevin's Will*, 45 Minn. 429, 47 N. W. 1133. See L. R. A. 1918A, 459; 14 Ann. Cas. 334.

⁸⁸ *In re Pepin's Estate*, 53 Mont. 240, 163 Pac. 104; *Gruender v. Frank*, 267

regardless of whether she might receive more under the will than under the statute.⁸⁹ A legatee or devisee who is not an heir of the testator cannot contest a will unless he has a special interest other than being a beneficiary under the will.⁹⁰ A mere creditor of a testator cannot contest a will.⁹¹ An illegitimate child, duly acknowledged by his father as provided by statute, may contest a will of his father.⁹² One who has acquired an interest in the share of an heir which will be divested or impaired by the will may contest the probate.⁹³ A purchaser under administration proceedings upon the estate of a decedent supposed to have died intestate may contest the probate of a subsequently discovered will of the decedent.⁹⁴ A pretermitted child cannot contest the probate of a will on the ground of his omission.⁹⁵ The state, claiming escheat, may contest the probate of a will of one who died without heirs.⁹⁶ The personal representative of an heir of the decedent may contest a will of the latter.⁹⁷ One cannot contest the probate of a will because the testator promised to make a different will in his favor or because the offered will revokes a prior will made in accordance with such promise.⁹⁸ Parties may be estopped by their conduct from contesting the probate of a will.⁹⁹ A daughter of a testator filed a petition for the probate of a will not in her possession. She was not then acquainted with the circumstances of its execution. Subsequently she filed objections to its probate and the contest was heard in the probate court without objection. Held, that objection that she was estopped from contesting the probate could not be raised for the first time in the district court.¹ A beneficiary under a prior will of a testator has the right to contest the probate of a subse-

Mo. 713, 186 S. W. 1004; *Halde v. Schultz*, 17 S. D. 405, 97 N. W. 369. See 40 Cyc. 1230; 130 Am. St. Rep. 186; Ann. Cas. 1918B, 536; L. R. A. 1918A, 448.

⁸⁹ See *Mitchell v. Mitchell*, 43 Minn. 73, 44 N. W. 885; *Schmidt v. Schmidt*, 47 Minn. 451, 50 N. W. 598; *In re Benton's Estate*, 131 Cal. 472, 63 Pac. 775; Note, L. R. A. 1918A, 462; 11 Ann. Cas. 1015.

⁹⁰ *Braasch v. Worthington*, 191 Ala. 210, 67 So. 1003; *Selden v. Illinois T. & S. Bank*, 239 Ill. 67, 87 N. E. 800; L. R. A. 1918A, 473; Ann. Cas. 1917C, 905.

⁹¹ *Hooks v. Brown*, 125 Ga. 122, 53 S. E. 583; L. R. A. 1918A, 457.

⁹² *Pederson v. Christofferson*, 97 Minn. 491, 106 N. W. 958.

⁹³ *Starkey v. Sweeney*, 71 Minn. 241, 73 N. W. 859. See *Komoroski v. Jackowski*, 164 Wis. 254, 159 N. W. 912 (purchaser at execution sale of interest of heir); *In re Vanden Bosch's Estate*, 207

Mich. 89, 173 N. W. 332 (held that assignee of heir could not contest probate); L. R. A. 1918A, 455.

⁹⁴ *Stackhouse v. Berryhill*, 47 Minn. 20, 49 N. W. 392.

⁹⁵ *McIntire v. McIntire*, 64 N. H. 609, 15 Atl. 218; *Lowery v. Hawker*, 22 N. D. 318, 133 N. W. 918.

⁹⁶ *State v. Lancaster*, 119 Tenn. 638, 105 S. W. 858; *State v. Nieuwenhuis* (S. D.) 178 N. W. 976. See L. R. A. 1918A, 475; 14 Ann. Cas. 959.

⁹⁷ *Chilcote v. Hoffman*, 97 Ohio 98, 119 N. E. 364.

⁹⁸ *Morgan v. Sanborn*, 225 N. Y. 454, 122 N. E. 696.

⁹⁹ See *Hawkinson v. Oleson*, 140 Minn. 298, 168 N. W. 13; 40 Cyc. 1245, 1893; 130 Am. St. Rep. 208; 3 Ann. Cas. 525; Ann. Cas. 1913E, 1182; 9 Prob. Rep. Ann. 462.

¹ *Pederson v. Christofferson*, 97 Minn. 491, 106 N. W. 958.

quent will which, if allowed, would take away or lessen the interest of such beneficiary, providing there is sufficient proof of the due execution and validity of the prior will. The burden of the proof in this respect is upon the contestant, but it is not necessary to probate the prior will or offer it for probate, or in all cases to make the formal proof necessary for the admission of a will to probate. Where the prior will, apparently executed and attested according to law, is received in evidence without objection and the signature and mental capacity of the testator is proved, this is sufficient proof, in the absence of evidence to the contrary, to warrant a finding that the prior will was legally executed and attested, and that a beneficiary thereunder has the right to contest the subsequent will. It is not necessary for the court in a will contest to make a specific finding of the facts upon which the right of the objector to contest the will depends.²

263. Grounds of objection to be filed—Statute—No one shall be heard to contest the validity of a will unless the grounds of objection thereto are stated in writing and filed in court before the time appointed for proving the will.³ Objections filed before the time to which a hearing has been continued are probably in time.⁴ A general allegation of undue influence by a named person is sufficient without specifying the mode in which it was exerted.⁵ A general allegation that at the time of making the will the testator was not of sound and disposing mind is sufficient.⁶ A general allegation that the will was not duly and legally executed is sufficient.⁷ A contestant is limited to the grounds specified.⁸ No answer or reply is necessary to raise an issue on the objections filed.⁹ Any party to the proceedings ought to be permitted to examine witnesses though he has not filed objections. It is so provided by statute in New York.¹⁰

264. Agreements not to contest probate—Family settlements—Compromise—An agreement not to contest the probate of a will is a good consideration for a conveyance by a devisee under the will.¹¹ A conveyance made by a devisee under a will to avoid a threatened contest

² *Crowley v. Farley*, 129 Minn. 460, 152 N. W. 872; *Crowell v. Davis*, 233 Mass. 136, 123 N. E. 611. See *In re Wynn's Estate*, 193 Mich. 223, 159 N. W. 492; *L. R. A.* 1918A, 470.

³ *G. S.* 1913, § 7270. See 40 Cyc. 1267.

⁴ See *Pederson v. Christofferson*, 97 Minn. 491, 106 N. W. 958; *In re Mollenkopf's Estate*, 164 Cal. 576, 129 Pac. 997.

⁵ *Cunninghame v. Herring*, 195 Ala. 469, 70 So. 148. See *Pederson v. Christofferson*, 97 Minn. 491, 106 N. W. 958; 40 Cyc. 1267.

⁶ *In re Kilborn*, 158 Cal. 593, 112 Pac. 52. See 40 Cyc. 1267.

⁷ *Thompson v. Rainer*, 117 Ala. 318, 23 So. 782. See *Pederson v. Christofferson*, 97 Minn. 491, 106 N. W. 958.

⁸ *In re Kille's Estate*, 72 Cal. 131, 13 Pac. 320.

⁹ *Deslonde v. Darrington*, 29 Ala. 92; *In re Jones*, 130 Iowa 177, 106 N. W. 610.

¹⁰ *In re Woerz's Will*, 161 N. Y. S. 209.

¹¹ *Copley v. Hyland*, 46 Minn. 205, 48 N. W. 777; *Rector v. Teed*, 120 N. Y. 583, 24 N. E. 1014; *Blount v. Wheeler*, 199 Mass. 330, 85 N. E. 477; *Korte v. O'Neill*, 34 S. D. 241, 148 N. W. 12.

over the validity of the will held valid against a charge of fraud and want of consideration.¹² An agreement on the part of a brother of a deceased person with another brother and sister to refrain from contesting the will of decedent in consideration of the promise of the latter, beneficiaries named in the will, to pay to him a certain sum of money, held, not a "family settlement," within the meaning of the law upon that subject. There was no basis, legal or otherwise, for the proposed contest, nor did the facts furnish reasonable cause for the belief that grounds therefor existed, and plaintiff's threat of contest was not made in good faith. Held, that the agreement to refrain from contesting the will was not a legal or valid consideration for the promissory notes given by defendants in consideration of the agreement.¹³ A testator in his lifetime had a homestead right in part of a hotel building and in the leasehold interest in the land on which it stood to the extent of one-third of an acre. The rental value of this building was less than the annual charges upon the land and building. He had other valuable property and large debts. He made a will devising his property to executors, giving to his widow an annual allowance, and half the estate on division, in the event she should be alive at that time, her provision to be in lieu of her statutory portion. The widow and the other beneficiaries under the will entered into a contract largely increasing the provision for the widow and providing that in the event of her death her half of the estate should go to her heirs. By the contract she gave up her statutory rights. She sues to set this contract aside and to be restored to her statutory rights alleging fraud, overreaching, and that the contract was an improvident one and made without proper understanding of her rights. Beneficiaries under a will cannot modify the terms of the will of a deceased person, but they may by contract among themselves make disposition of the property rights acquired under the will. The executors and the direct beneficiaries under the will were parties to the contract; one of the executors was the confidential friend of plaintiff's husband, and the attorney for the executors was her husband's attorney. These parties were under obligation to make full disclosure to plaintiff of her rights and to deal with her with the utmost fairness. The court found that these parties fully, fairly and accurately stated to plaintiff her rights and all facts and information within their knowledge, and acted with entire fairness and good faith toward her, and that the property rights secured to her under the contract afforded her better protection than her rights under the law. These findings are sustained by the evidence. On this state of facts the

¹² *Copley v. Hyland*, 46 Minn. 205, 48 N. W. 777.

¹³ *Montgomery v. Grenier*, 117 Minn. 416, 136 N. W. 9. See *Thayer v. Estate of Pray*, 111 Minn. 449, 127 N. W. 392;

Conklin v. Conklin, 165 Mich. 571, 131 N. W. 154 (contract held void as against public policy); 13 L. R. A. (N. S.) 484; 15 Ann. Cas. 300; Ann. Cas. 1914D, 512.

contract is held valid.¹⁴ Various conveyances, transfers and leases, forming one transaction in the nature of a family settlement, held to have a sufficient consideration.¹⁵ The parties in interest may, as between themselves, waive the probate of a will and bind themselves to abide by its provisions. By doing so they are estopped from denying the probate or from objecting to the will for want of probate.¹⁶

BURDEN OF PROOF

265. Burden of proof on proponent—In general—The burden of proving the due execution of the will in conformity with the statute is on the proponent.¹⁷ The proponent must prove: (1) That testator was of age; (2) that he was of sound mind; (3) that he signed the will in the presence of the subscribing witnesses or acknowledged his signature to them; (4) that the subscribing witnesses signed the will as witnesses at the request and in the presence of the testator and after he had signed it; (5) that the testator knew the contents of the will when he signed it; (6) that the testator signed the instrument intending it for his last will. If there is any controversy as to the jurisdictional facts the proponent must prove them. Thus he must prove the death of the testator and that he died domiciled within the jurisdiction of the court or left property therein, if these facts are controverted. If they are not controverted they are probably sufficiently shown by allegations in the petition for probate.¹⁸

266. As to death of testator—While the burden of proving the death of the testator is on the proponent it is unnecessary for him to offer affirmative proof thereof in the absence of a contest thereon. The allegation of death in the verified petition for probate makes out a *prima facie* case sufficient to give the court jurisdiction.¹⁹

267. As to domicil of testator—The burden of proving the domicil of the testator is on the proponent.²⁰ The recital of residence in a will is *prima facie* evidence thereof.²¹ While the burden of proving the domicil of the testator is on the proponent it is unnecessary for him to offer affirmative proof thereof in the absence of a contest thereon. The

¹⁴ *Rogers v. Benz*, 136 Minn. 83, 161 N. W. 395, 1056. See *Benz v. Rogers*, 141 Minn. 93, 169 N. W. 477; and § 1061.

¹⁵ *State v. Probate Court*, 102 Minn. 268, 113 N. W. 888.

¹⁶ *Farwell v. Carpenter*, 161 Iowa 257, 142 N. W. 227. See 15 Ann. Cas. 742.

¹⁷ *In re Layman's Will*, 40 Minn. 371, 42 N. W. 286; *Tobin v. Haack*, 79 Minn. 101, 106, 81 N. W. 758; *Kennedy v. Kelly*, 123 Minn. 259, 143 N. W. 726; *Bush v. Hetherington*, 132 Minn. 379, 157 N.

W. 505; 23 A. & E. Ency. of Law (2 ed.) 131; 40 Cyc. 1272.

¹⁸ See §§ 266-270.

¹⁹ See *Bolton v. Schriever*, 135 N. Y. 65, 31 N. E. 1001; 40 Cyc. 1272; *Woerner*, Am. Law of Adm. (2 ed.) § 207.

²⁰ *In re Gould*, 131 N. Y. 630, 30 N. E. 865.

²¹ *Seccomb v. Bovey*, 135 Minn. 353, 160 N. W. 1018; *Corrigan v. Jones*, 14 Colo. 311. See § 647.

allegation of domicile in the verified petition for probate makes out a prima facie case sufficient to give the court jurisdiction.²²

268. As to testator's knowledge of contents of will—The proponent has the burden of proving that testator knew the contents of the will, but where it appears that the testator signed the will there is a presumption that he knew its contents and the contestant must introduce evidence to the contrary.²³ This presumption of knowledge applies though the will is signed by another for the testator.²⁴ It has been held that this presumption of knowledge applies where the testator is illiterate and unable to read the will, in the absence of evidence of fraud or undue influence.²⁵ It need not be proved that the testator read over the will before signing it, or was informed of its contents.²⁶ If it appears from the evidence that the testator was illiterate or from physical infirmity was unable to read or hear read the will, and there is some evidence that he may have been imposed upon, the proponent has the burden of proving that in some way knowledge of the contents of the will was brought home to him.²⁷ This burden is sustained by satisfactory proof that the testator was made acquainted with and understood the contents of the will to the same extent that he would have done if the disability had not existed and he had read the will himself. The extent of the burden is measured by the effect of the disability.²⁸ The mere fact that a beneficiary assisted in the preparation of the will does not defeat the usual presumption that the testator knew the contents of the will.²⁹ It is not necessary that proof of the testator's

²² *Bolton v. Schriever*, 135 N. Y. 65, 31 N. E. 1001.

²³ *McConnell v. Keir*, 76 Kan. 527, 92 Pac. 540; *Dunham v. Holmes*, 225 Mass. 68, 113 N. E. 845; *Richardson v. Richards*, 226 Mass. 240, 115 N. E. 307; *Holbrook v. Seagrave*, 228 Mass. 26, 116 N. E. 889; *In re Shapter*, 35 Colo. 578, 85 Pac. 688; *Rollwagen v. Rollwagen*, 63 N. Y. 504; *Ross v. Ross*, 140 Iowa 51, 117 N. W. 1105; *In re Dobal's Estate*, 176 Iowa 479, 157 N. W. 169; *Lippard v. Humphrey*, 209 U. S. 264; *Ex parte McKie*, 107 S. C. 57, 91 S. E. 978; 40 Cyc. 1277; *L. R. A.* 1918D, 747.

²⁴ *Doe v. Halloway*, 2 Houst. (Del.) 527; *Harding v. Harding*, 18 Pa. St. 340.

²⁵ *Lippard v. Humphrey*, 209 U. S. 264 (testator signed by his mark).

²⁶ *In re Rybee's Estate*, 179 Iowa 1089, 160 N. W. 900.

²⁷ *Day v. Day*, 3 N. J. Eq. 549 (blindness); *Davis v. Rogers*, 1 Houst. (Del.) 44 (id.); *In re Smith*, 61 Hun (N. Y.)

101, 15 N. Y. S. 425 (illiteracy); *Lyons v. Van Ripper*, 26 N. J. Eq. 337 (id.); *Rollwagen v. Rollwagen*, 63 N. Y. 504 (id.); *Brown v. Brown*, 3 Conn. 299 (deaf and dumb); *Lyons v. Van Ripper*, 26 N. J. Eq. 337 (old and decrepit); *Rothrock v. Rothrock*, 22 Or. 551, 30 Pac. 453 (paralyzed and unable to communicate except by signs); *Day v. Day*, 3 N. J. Eq. 549 (weakness of last sickness); *Beck's Estate*, 79 Wash. 331, 140 Pac. 340 (ignorance of English); *McCommon v. McCommon*, 151 Ill. 428, 38 N. E. 145 (will not read to illiterate testator); *Blume v. Hartman*, 115 Pa. St. 32, 8 Atl. 219 (id.); *In re Gluckman's Will*, 87 N. J. Eq. 638, 101 Atl. 295 (physical or educational disability). See *L. R. A.* 1918D, 763; *Ann. Cas.* 1916D, 792 (blindness).

²⁸ *In re Gluckman's Will*, 87 N. J. Eq. 638, 101 Atl. 295.

²⁹ *McConnell v. Keir*, 76 Kan. 527, 92 Pac. 540. See *McCommon v. McCommon*, 151 Ill. 428, 38 N. E. 145.

knowledge of the contents of the will shall come from any particular source or witnesses; it may be established by ordinary means of proof, including circumstantial evidence.³⁰ If it is clearly established that the will in question is a true copy of a prior will, with the contents of which the testator was acquainted, it may be admitted to probate though it was not read by him or in his hearing.³¹ The burden of proof which rests on the contestant in this connection is the burden of going on with the evidence. The burden of establishing the fact that the testator knew the contents of the will remains throughout the trial on the proponent.³²

269. As to sanity of testator—The burden of proving that the testator was of sound mind when he executed the will is on the proponent. While there is a general presumption at common law that every one is presumed sane until the contrary is proved, this presumption does not make out a *prima facie* case for the proponent. By reason of G. S. 1913, §§ 7268, 7269, 7271, the proponent must call one or all the subscribing witnesses and question them as to the sanity of the testator. After the proponent has made out a *prima facie* case in this manner the contestant may introduce evidence of the insanity of the testator, after which the proponent may introduce further evidence of the sanity of the testator. The burden of proof, in the sense of establishing the sanity of the testator does not shift, but remains on the proponent throughout the trial.³³ The proponent is probably entitled to the benefit of the presumption of sanity upon all the evidence, but the question is not definitely settled in this state.³⁴ If, upon the whole evidence, including the presumption of sanity, the scales are in even balance, the finding must be for the contestant, on the ground that the proponent has failed to sustain the burden of proof. The contestant is not bound to furnish evidence that will outweigh that of the proponent.³⁵ While the statute requires the proponent to call and examine the subscribing witnesses as to the sanity of the testator, a failure on his part to examine such a witness as to the sanity of the testator will not defeat the probate of the will if such sanity is otherwise satisfactorily proved.³⁶

³⁰ *Lyons v. Van Riper*, 26 N. J. Eq. 337; *Bailey v. Bee*, 73 W. Va. 286, 80 S. E. 454.

³¹ *Day v. Day*, 3 N. J. Eq. 549; *Lyons v. Van Riper*, 26 N. J. Eq. 337.

³² See *L. R. A.* 1918D, 751.

³³ *In re Layman's Will*, 40 Minn. 371, 42 N. W. 286; *Kennedy v. Kelly*, 123 Minn. 259, 143 N. W. 726; *Bush v. Hetherington*, 132 Minn. 379, 157 N. W. 505; 40 Cyc. 1020.

³⁴ See *In re Layman's Will*, 40 Minn. 371, 42 N. W. 286 (expressly leaving the question open); *Clifford v. Taylor*, 204

Mass. 358, 90 N. E. 862; *Barber's Appeal*, 63 Conn. 303, 27 Atl. 973; *Sturdevant's Appeal*, 71 Conn. 392, 42 Atl. 70; *Wood v. Wood* (Wyo.) 164 Pac. 844; 28 A. & E. Ency. of Law (2 ed.) 93; 40 Cyc. 1021.

³⁵ *Clifford v. Taylor*, 204 Mass. 358, 90 N. E. 862; *Sturdevant's Appeal*, 71 Conn. 392, 42 Atl. 70; *In re Gedney's Will*, 142 N. Y. S. 157; *In re Moyer's Will*, 163 N. Y. S. 296.

³⁶ *Madson v. Christenson*, 128 Minn. 17, 150 N. W. 213.

270. As to signature of testator—The burden is on the proponent to prove the signature of the testator.³⁷ The proponent must prove the authority of one who signed the name of the testator at his request.³⁸

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271. Proof required in case of no contest—Statute—If the probate is not contested, the court may admit the will to probate on the testimony of one of the subscribing witnesses only, if such witness testifies that the will was executed in all respects as required by law, and that the testator was of full age and sound mind at the time of its execution.³⁹

272. Proof required in case of contest—Statute—Whenever the probate of a will is contested, all the subscribing witnesses thereto who are within the state, and are competent and able to testify, shall be produced and examined. The death, absence from the state, or disability of any such witness shall be shown to the court by affidavit.⁴⁰

273. Order of proof—The order of proof is in the discretion of the court. The court may require the proponent to make formal proof of the execution of the will before proceeding with the contest.⁴¹

274. Proof must be in accordance with statute—Affidavits—The proof must be in accordance with the statute. Proof by means of an affidavit of one of the subscribing witnesses, the handwriting of the other witness not being proved or the fact that he signed the instrument as a witness, has been held insufficient.⁴² A will cannot be proved by a stipulation of the interested parties as to the facts.⁴³ The fact that the court allows a will on insufficient or incompetent evidence does not go to the jurisdiction of the court.⁴⁴

275. As to date of will—The date of a will as written therein is prima facie evidence of the date of its execution.⁴⁵

276. As to testamentary intent—A duly executed instrument purporting to be a will is conclusively presumed to have been executed with testamentary intent. Parol evidence is inadmissible to show the contrary.⁴⁶ It has been held that if the legal effect of an instrument is

³⁷ *Wendl v. Fuerst*, 68 Or. 283, 136 Pac. 1; *In re Falabella's Will*, 139 N. Y. S. 1003; *Morrell v. Morrell*, 157 Ind. 179, 60 N. E. 1092.

³⁸ *McCoy v. Conrad*, 64 Neb. 150, 89 N. W. 665.

³⁹ § 255; *Jones v. Roberts*, 96 Wis. 427, 70 N. W. 685, 71 N. W. 883 (statute does not prevent probate in case of contest on testimony of one subscribing witness). See 40 Cyc. 1306.

⁴⁰ G. S. 1913, § 7271. See 40 Cyc. 1272-1318.

⁴¹ *In re Smith's Estate* (Cal.) 171 Pac. 280.

⁴² *Larson v. How*, 71 Minn. 250, 254, 73 N. W. 966.

⁴³ *In re Rice's Will*, 150 Wis. 401, 136 N. W. 956. See *In re Kane's Estate*, 168 Wis. 1, 168 N. W. 402.

⁴⁴ *Larson v. How*, 71 Minn. 250, 254, 73 N. W. 966. See *In re Kane's Estate*, 168 Wis. 1, 168 N. W. 402.

⁴⁵ *In re Kohn's Estate*, 172 Mich. 342, 137 N. W. 735.

⁴⁶ *Barnewall v. Murrell*, 108 Ala. 366,

that of a will it is immaterial that the testator did not know that it had that effect.⁴⁷ If a testator, being of sufficient mental capacity, and free from insane delusions or undue influence, executes an instrument with knowledge of its nature and contents, intending that it should be his last will, its admission to probate cannot be opposed by parol evidence that he did not understand the legal effect of all its provisions, or truly appreciate the proportions in which his property would be thereby distributed.⁴⁸

277. Presumption of regularity—Where a will appears on its face to be duly executed and the attestation is established by proof of the handwriting of the subscribing witnesses or otherwise, but their testimony is not obtainable, or they do not remember the essential facts of the execution of the will, it will be presumed that the will was executed in compliance with all the requirements of law.⁴⁹ Though a will bears no clause of attestation and the subscribing witnesses are dead, on proof of the handwriting of the testator and the subscribing witnesses, there is a presumption of due execution.⁵⁰

278. Attestation clause as evidence—A recital in the attestation clause showing the due execution of a will must prevail unless overcome by clear and satisfactory evidence. There is a strong presumption in favor of the truth of such recitals.⁵¹ An attestation clause is prima facie evidence of the facts recited, upon proof of the signatures of the testator and attesting witnesses, and is alone sufficient to make out a prima facie case of due execution of the will, if it recites all the essential facts.⁵² The oral evidence of those present at the execution of a will is

18 So. 831; In re Kennedy's Will, 159 Mich. 548, 124 N. W. 516; Heaston v. Krieg, 167 Ind. 101, 77 N. E. 805; 40 Cyc. 1277. See contra, Barker v. Comins, 110 Mass. 477; Fleming v. Morrison, 187 Mass. 120, 72 N. E. 499; Thomson v. Carruth, 218 Mass. 524, 106 N. E. 159; 23 Harv. L. Rev. 573; 28 L. R. A. (N. S.) 417; 18 Ann. Cas. 897.

⁴⁷ In re Byhee's Estate, 179 Iowa 1089, 160 N. W. 900.

⁴⁸ Barker v. Comins, 110 Mass. 477. See § 141.

⁴⁹ Baxter v. Baxter, 136 Minn. 59, 161 N. W. 261 (inability of the witnesses to remember all the essential facts); Wells v. Thompson, 140 Ga. 119, 78 S. E. 823 (witnesses out of jurisdiction); In re Kent's Estate, 161 Cal. 142, 118 Pac. 523 (witness forgot whether testator requested him and other witness to sign as witnesses); In re O'Hagan's Will, 73 Wis. 78, 40 N. W. 649 (witness recognized his

signature but forgot attesting the will); Newell v. White, 29 R. I. 343, 73 Atl. 798 (presumption that witnesses signed in presence of testator); In re Baldwin, 142 N. C. 25, 59 S. E. 163 (presumption that testator signed prior to witnesses); Newell v. White, 29 R. I. 343, 73 Atl. 798 (id.); Allen v. Griffin, 69 Wis. 529, 35 N. W. 21 (id.); Nixon v. Snellbaker, 155 Iowa 390, 136 N. W. 223 (id.); In re Robertson's Estate, 77 Neb. 394, 109 N. W. 506 (forgetfulness of facts of execution); Flynn v. Flynn, 283 Ill. 206, 119 N. E. 304 (id.); 23 A. & E. Ency. of Law (2 ed.) 130; 40 Cyc. 1273.

⁵⁰ In re Rosenthal's Will, 164 N. Y. S. 1060.

⁵¹ In re Grant's Will, 149 Wis. 330, 135 N. W. 833. See Hennes v. Huston, 81 Minn. 30, 83 N. W. 439; Baxter v. Baxter, 136 Minn. 59, 161 N. W. 261.

⁵² Baxter v. Baxter, 136 Minn. 59, 161 N. W. 261; In re Sizer's Will, 113 N. Y.

not the only evidence of its due execution. When it is proved that the testator signed the will and that the attesting witnesses signed a certificate reciting all the essentials of due execution, there arises a strong presumption of due execution, and such presumption need not be supported by the affirmative testimony of the attesting witnesses. This presumption of due execution is not overcome by forgetfulness or indefinite recollection of the essential facts on the part of the attesting witnesses.⁵³ It is not overcome by evidence that the testator's eyesight was so dim that he did not actually see the act of the witnesses in signing.⁵⁴ An attestation clause to the effect that the witnesses signed in the presence of the testator raises a strong presumption of that fact which can be overcome only by clear and satisfactory evidence to the contrary.⁵⁵ If the attestation clause is perfect, and shows on its face that all the forms required by the statute have been complied with, and the subscribing witnesses, when called, admit their signatures, but through defect of memory, or for any other reason, fail to testify to the due execution of the will, it may be established on the presumption arising from the attesting clause, unless there be affirmative evidence given to disprove its statements.⁵⁶ The force of an attestation clause as evidence of the due execution of the will is the same, whether the testator signed his full name personally, or by mark, or by another.⁵⁷ Testimony of a subscribing witness that he never read the attestation clause, or knew its contents, overcomes any presumption of law that he knew what he was doing.⁵⁸

279. Contradiction of recitals in will—It has been held not error to allow a proponent to deny the existence of a certain fact recited by way of inducement in the will.⁵⁹

280. Testimony of subscribing witnesses—While the proponent is bound to call the subscribing witnesses, his failure to question them as to all the essential facts of due execution is not fatal to the probate of the will, such facts being otherwise proved. Where a proponent called a subscribing witness and examined him as to the manner in which

S. 210, 195 N. Y. 928, 88 N. E. 1132; *In re Reynold's Estate*, 151 N. Y. S. 380; 40 Cyc. 1304; 114 Am. St. Rep. 238; 11 Ann. Cas. 428.

⁵³ *Hennes v. Huston*, 81 Minn. 30, 83 N. W. 439; *Baxter v. Baxter*, 136 Minn. 59, 161 N. W. 261; *In re Gillmore's Will*, 117 Wis. 309, 94 N. W. 32; *In re Arneson's Will*, 128 Wis. 112, 107 N. W. 21; *In re Maresh's Will (Wis.)* 187 N. W. 1009; 40 Cyc. 1304; 28 R. C. L. 369; 11 Ann. Cas. 428.

⁵⁴ *In re Arneson's Will*, 128 Wis. 112, 107 N. W. 21.

⁵⁵ *In re O'Hagan's Will*, 73 Wis. 78, 40 N. W. 649.

⁵⁶ *Baxter v. Baxter*, 136 Minn. 59, 161 N. W. 261; *Flynn v. Flynn*, 283 Ill. 206, 119 N. E. 304; 11 Ann. Cas. 428.

⁵⁷ *Hawkinson v. Oatway*, 143 Wis. 136, 126 N. W. 683; *Flynn v. Flynn*, 283 Ill. 206, 119 N. E. 304.

⁵⁸ *Connery v. Connery*, 166 Mich. 601, 132 N. W. 448.

⁵⁹ *Will v. Sisters, Order of St. Benedict*, 67 Minn. 335, 69 N. W. 1090.

the will was executed, his failure to examine him as to the sanity of the testator was held not to defeat the probate of the will, such sanity being otherwise proved. By calling him as a witness his testimony was made available, and, if the contestants desired his testimony upon matters omitted by the proponent, it was incumbent upon them to examine him in respect thereto.⁶⁰ Where the execution of a will is proved by a subscribing witness, who knows that such instrument was declared by testator to be his will, but, from haste and inattention to details, cannot state whether he saw him sign the same or acknowledge his signature thereto, the proper statutory formalities of execution may be presumed, in the absence of any evidence to the contrary, or that would show fraud and concealment.⁶¹ The testimony of the attesting witnesses may supplement each other. In other words it is not essential that all the essential facts be proved by the testimony of each attesting witness.⁶² Due execution of a will may be sufficiently proved by one of the attesting witnesses, the other attesting witness not recollecting the essential facts or denying them.⁶³ The contestants may rely wholly on the testimony of the subscribing witnesses submitted by the proponent.⁶⁴ Though a third witness is unnecessary his testimony is entitled to the same weight as that of the other witnesses.⁶⁵ The testimony of a subscribing witness impeaching the due execution of the will should be received with caution and viewed with suspicion.⁶⁶

281. When one of the attesting witnesses is dead or does not remember—Where one of the witnesses does not remember having signed the will, but testifies that his signature thereto is genuine, the testimony of the other subscribing witness that the former did in fact subscribe the will in the presence of the testator, is sufficient proof of that fact.⁶⁷ If a subscribing witness is dead proof of his handwriting is prima facie evidence that he duly attested the will.⁶⁸ Where an attesting witness, because of failing eyesight, is unable to identify a will, the will may be identified and his attestation thereof proved by other witnesses who were present at the execution of the will.⁶⁹

⁶⁰ *Madson v. Christenson*, 128 Minn. 17, 150 N. W. 213. See *In re Normand's Estate*, 88 Neb. 767, 130 N. W. 571.

⁶¹ *Hennes v. Huston*, 81 Minn. 30, 83 N. W. 439. See *Baxter v. Baxter*, 136 Minn. 59, 161 N. W. 261.

⁶² *Baxter v. Baxter*, 136 Minn. 59, 161 N. W. 261; *Hogan v. Grosvenor*, 10 Met. (Mass.) 54; *In re Silva's Estate*, 169 Cal. 116, 145 Pac. 1015; 40 Cyc. 1307; 77 Am. St. Rep. 473; Ann. Cas. 1916D, 1108.

⁶³ *Dewey v. Dewey*, 1 Met. (Mass.) 349; *In re Johnson*, 152 Cal. 778, 93 Pac. 1015; *Craig v. Craig*, 156 Mo. 358,

56 S. W. 109; *In re Bernsee*, 141 N. Y. 389, 36 N. E. 314; 40 Cyc. 1306, 1307; 77 Am. St. Rep. 473; 11 Ann. Cas. 428.

⁶⁴ *Mordecai v. Canty*, 86 S. C. 470, 68 S. E. 1049.

⁶⁵ *In re Sizer's Will*, 113 N. Y. S. 210, 195 N. Y. 928, 88 N. E. 1132.

⁶⁶ *Kuehne v. Malach*, 286 Ill. 120, 121 N. E. 391.

⁶⁷ *Dewey v. Dewey*, 1 Met. (Mass.) 349. See § 282; 51 L. R. A. (N. S.) 927; 11 Ann. Cas. 426.

⁶⁸ See § 282.

⁶⁹ *Reynolds v. Sevier*, 165 Ky. 158, 176 S. W. 961.

282. Proof of handwriting of dead, insane, or absent witnesses—If a subscribing witness is dead or insane at the time of the hearing his signature may be proved and such proof is prima facie evidence of due attestation on his part.⁷⁰ The signature of a subscribing witness who is absent from the state may be proved and such proof is prima facie evidence of due attestation on his part.⁷¹ The signature of a subscribing witness may be proved when he cannot be found and such proof is prima facie evidence of due attestation on his part.⁷² The signature of a subscribing witness may be proved by other witnesses when he denies it or does not remember.⁷³ It is not necessary to take or to endeavor to take the deposition of a subscribing witness who is out of the state.⁷⁴ The signature of an absent subscribing witness may be proved though his deposition has been taken and is in court.⁷⁵ When all the subscribing witnesses are dead, or beyond the jurisdiction, or otherwise unavailable, proof of the genuineness of the signatures of the testator and of the subscribing witnesses is prima facie evidence of the due execution of the will, including the testamentary capacity of the testator, his testamentary intent, and his knowledge of the contents of the instrument.⁷⁶ In Wisconsin it is held that when all the subscribing witnesses are dead or beyond the jurisdiction proof of the genuineness of the signatures of the subscribing witnesses, without other proof of the genuineness of the signature of the testator, is prima facie evidence of all the facts essential to the due execution of the will to which such witnesses might testify if present, including the genuineness of the testator's signature, whether autographic, by mark, or in the handwriting of another, and his volition in signing and his mental capacity and understanding of his act.⁷⁷

283. Testimony by others than the subscribing witnesses—Statute—If none of the subscribing witnesses reside in the state at the time ap-

⁷⁰ Nickerson v. Buck, 12 Cush. (Mass.) 332; Bailey v. Stiles, 2 N. J. Eq. 220 (insane witness); Woodroof v. Hundley, 133 Ala. 395, 32 So. 570; Kelly v. Moore, 22 D. C. App. 9, 196 U. S. 38; 23 A. & E. Ency. of Law (2 ed.) 127; 40 Cyc. 1308; Ann. Cas. 1914C, 902.

⁷¹ Bailey v. Stiles, 2 N. J. Eq. 221; McKeen v. Frost, 46 Me. 239; In re Estate of Allison, 104 Iowa 130, 73 N. W. 489; Ela v. Edwards, 16 Gray 91; Denny v. Pinney, 60 Vt. 524, 12 Atl. 108; 23 A. & E. Ency. of Law (2 ed.) 127; 40 Cyc. 1307.

⁷² Hennes v. Huston, 81 Minn. 30, 83 N. W. 439; 40 Cyc. 1307; Ann. Cas. 1914C, 905.

⁷³ In re Estate of Allison, 104 Iowa

130, 73 N. W. 489; Nixon v. Snellbaker, 155 Iowa 390, 136 N. W. 223.

⁷⁴ McKeen v. Frost, 46 Me. 239; Wells v. Thompson, 140 Ga. 119, 78 S. E. 823; Winding Gulf Colliery Co. v. Campbell, 72 W. Va. 449, 78 S. E. 384. See Lipman v. Bechhoefer, 141 Minn. 131, 169 N. W. 536; 47 L. R. A. (N. S.) 722; 40 Cyc. 1307; Ann. Cas. 1914C, 905.

⁷⁵ In re Estate of Allison, 104 Iowa 130, 73 N. W. 489; Nixon v. Snellbaker, 155 Iowa 390, 136 N. W. 223.

⁷⁶ Deake, Appellant, 80 Me. 50, 12 Atl. 790; In re Kent's Estate, 161 Cal. 142, 118 Pac. 523; In re Abel's Will, 118 N. Y. S. 429; Hawkinson v. Oatway, 143 Wis. 136, 126 N. W. 683; 40 Cyc. 1310.

⁷⁷ Hawkinson v. Oatway, 143 Wis. 136, 126 N. W. 683.

pointed for proving the will, the court, in its discretion, may admit the testimony of other witnesses to prove the sanity of the testator and the due execution of the will, and as evidence of such execution may admit proof of the handwriting of the testator and of the subscribing witnesses.⁷⁸ Where a will is contested, neither party is limited to the testimony of the subscribing witnesses, and either party may present other evidence to overcome the adverse testimony of such witnesses. The questions in controversy are to be determined from all the evidence bearing thereon, and not from the testimony of the subscribing witnesses only.⁷⁹ The proponent of a will is not concluded by the testimony of subscribing witnesses called by him, but may contradict their testimony. The proponent is required to call them though he knows that they will testify against him. They are not his witnesses in the ordinary sense of that term. They are witnesses provided by the law.⁸⁰ The probate of a will does not depend upon the recollection or veracity of the subscribing witnesses. Their testimony is not conclusive either way.⁸¹ A will may be upheld against the positive testimony of one or both of the subscribing witnesses.⁸² It is not fatal to the probate of a will that the subscribing witnesses have forgotten some or all of the essential facts of due execution.⁸³ Where one of the subscribing witnesses is dead and the other subscribing witness testifies to facts tending to show a due execution of the will, but fails to testify as to the testamentary capacity of the testator, other witnesses may testify as to such capacity.⁸⁴ A will may be upheld though the attesting witnesses disagree as to the essential facts of execution.⁸⁵ If an instrument purporting to be the will of a deceased person is offered for probate, and

⁷⁸ G. S. 1913, § 7269.

⁷⁹ *Baxter v. Baxter*, 136 Minn. 59, 161 N. W. 261; *Madson v. Christenson*, 128 Minn. 17, 150 N. W. 213; *Allen v. Scruggs*, 190 Ala. 654, 67 So. 301; *Freeman v. Freeman*, 71 W. Va. 303, 76 S. E. 657; *In re Kohn's Estate*, 172 Mich. 342, 137 N. W. 735. See 77 Am. St. Rep. 474; 114 Am. St. Rep. 238; Ann. Cas. 1916D, 1104.

⁸⁰ *Madson v. Christenson*, 128 Minn. 17, 150 N. W. 213; *Newell v. White*, 29 R. I. 343, 73 Atl. 798; 40 Cyc. 1303; Ann. Cas. 1916D, 1104.

⁸¹ *Madson v. Christenson*, 128 Minn. 17, 150 N. W. 213; *Baxter v. Baxter*, 136 Minn. 59, 161 N. W. 261; *In re Sullivan's Will*, 114 Mich. 189, 72 N. W. 135. See L. R. A. 1916C, 1218; 77 Am. St. Rep. 473; Ann. Cas. 1916D, 1104; 28 R. C. L. 372.

⁸² *Madson v. Christenson*, 128 Minn. 17, 150 N. W. 213; *Newell v. White*, 29 R. I. 343, 73 Atl. 798; *In re Sizer's Will*, 113 N. Y. S. 210, 195 N. Y. 928, 88 N. E. 1132. See 40 Cyc. 1303; L. R. A. 1916C, 1218; Ann. Cas. 1916D, 1104; 77 Am. St. Rep. 473.

⁸³ *Britton v. Davis*, 273 Ill. 31, 112 N. E. 283; *Craig v. Craig*, 156 Mo. 358, 56 S. W. 1007. See § 280; *Baxter v. Baxter*, 136 Minn. 59, 161 N. W. 261; 51 L. R. A. (N. S.) 927; 77 Am. St. Rep. 473; 11 Ann. Cas. 426.

⁸⁴ *In re Normand's Estate*, 88 Neb. 767, 130 N. W. 571. See *Madson v. Christenson*, 128 Minn. 17, 150 N. W. 213.

⁸⁵ *Tilden v. Tilden*, 13 Gray (Mass.) 110; *In re Silva's Estate*, 169 Cal. 116, 145 Pac. 1015; *In re Bernsee*, 141 N. Y. 389, 36 N. E. 314; 40 Cyc. 1307; Ann. Cas. 1916D, 1104, 77 Am. St. Rep. 473.

is signed by the decedent and by two or more persons as witnesses, oral evidence is admissible to prove the circumstances surrounding the execution of the instrument, and that it was in fact executed by the decedent as his will, and that the provisions of the statute in regard to the formal execution of a will were complied with. A writing in existence at the time of executing a will, or made at the same time and as part of the same transaction, may, by reference, be made a part of the will, if it is described and fully identified by the terms of the will itself. Oral evidence is competent to prove the signatures of witnesses who signed such writing referred to in the will and made a part thereof, and to prove that the writing offered is the same instrument so identified by the signatures of such witnesses.⁸⁶

284. Testimony of person named as executor—The mere fact that a person is named executor in the will does not render him incompetent to testify as to the execution of the will, including what the testator said at the time relevant thereto.⁸⁷

285. Testimony of proponent—A proponent of a will for probate is a mere nominal party to the proceeding, though named as executor in the will, and he is not interested in the event by reason of being so named, nor by reason of being the husband of one of the devisees, so as to constitute him an adverse party to the contestants within the meaning of G. S. 1913, § 8377, giving an adversary in a litigation the right to examine an opponent as if under cross-examination.⁸⁸ One who propounds a will is not disqualified by that fact alone from testifying as to conversations of the testator regarding the will.⁸⁹

286. Testimony of devisees and legatees—A devisee or legatee may testify as to the acts of the testator and the circumstances of the execution of the will, as, for example, that the testator signed the will in the presence of the subscribing witnesses. But, by reason of G. S. 1913, § 8378, he cannot testify as to what was said by the testator at the time of the execution of the will, or at any other time, concerning his testamentary intentions, even though he did not take part in the conversation.⁹⁰ But when the testamentary capacity of the testator is in issue, a contesting devisee or legatee, for the purpose of laying a foundation for his opinion evidence, may testify as to the declarations or conver-

⁸⁶ *In re Hopper's Estate*, 90 Neb. 622, 134 N. W. 237. See § 183.

⁸⁷ *Geraghty v. Kilroy*, 103 Minn. 286, 114 N. W. 838; *Burmeister v. Gust*, 117 Minn. 247, 135 N. W. 980; *Bowler v. Fahey*, 136 Minn. 408, 162 N. W. 515.

⁸⁸ *Bowler v. Fahey*, 136 Minn. 408, 162 N. W. 515.

⁸⁹ *Burmeister v. Gust*, 117 Minn. 247, 135 N. W. 980. See *Ann. Cas. 1914A*, 982.

⁹⁰ *In re Brown's Will*, 38 Minn. 112, 35 N. W. 726; *Cady v. Cady*, 91 Minn. 137, 97 N. W. 580; *Pederson v. Christoffer-son*, 97 Minn. 491, 106 N. W. 958; *Mad-son v. Christenson*, 128 Minn. 17, 150 N. W. 213; *Bowler v. Fahey*, 136 Minn. 408, 162 N. W. 515. See *Pabst v. Ferch*, 126 Minn. 58, 147 N. W. 714; *Anderson v. Oleson*, 143 Minn. 328, 173 N. W. 665; *Ann. Cas. 1914A*, 982.

sations of the testator, not directly expressive of his testamentary intentions, tending to show his testamentary capacity or the reverse.⁹¹ Where the mental capacity of the testator is in issue a contesting devisee or legatee may testify as to the verbal acts of the testator prior to the date of the will and as to what the testator said when angry and violent.⁹² An adverse party who cross-examines a devisee or legatee as to a part of a conversation of the decedent waives the statute as to the remainder of the conversation.⁹³ Where the validity of the will is conclusively proved by other evidence error in admitting the testimony of a devisee or legatee as to conversations of the decedent is harmless.⁹⁴ Since section 7254, G. S. 1913, annuls the interest of a devisee or legatee in a will where he is an attesting witness thereto and there is but one other attesting witness, such devisee or legatee is a competent witness to prove the will.⁹⁵

287. Declarations or admissions of legatees or devisees—Declarations or admissions of one of two or more legatees or devisees are inadmissible against the others.⁹⁶ Where there are several legatees in a will, declarations or admissions by one of them, tending to cast doubt on the instrument presented for probate are not admissible, where such legatee has not taken the stand to sustain the will, and such declarations are not part of the *res gestæ* of its execution. The contestants may not call the legatee, who has made such admissions, for cross-examination under the statute, to lay the foundation for impeachment, and thus indirectly introduce that which is inadmissible directly.⁹⁷ Admissions of a sole beneficiary under a will are admissible as they affect him only.⁹⁸

288. Testimony of attorney—An attorney at law who is employed by a testator to draft a will and attend at its execution may testify as to the facts connected with the execution, including the instructions which the testator gave him in relation thereto, when they are not inadmissible on other grounds. He may testify as to the declarations of the testator indicating his mental state on an issue of testamentary capacity or undue influence.⁹⁹ He may testify as to conversations between the testator and

⁹¹ *In re Brown's Will*, 38 Minn. 112, 35 N. W. 726; *Wheeler v. McKeon*, 137 Minn. 92, 162 N. W. 1070; *Chapel v. Chapel*, 137 Minn. 420, 163 N. W. 771. See *Collins v. Dowlan*, 118 Minn. 214, 136 N. W. 854.

⁹² *In re Brown's Will*, 38 Minn. 112, 35 N. W. 726.

⁹³ *Moe v. Paulson*, 128 Minn. 277, 150 N. W. 914.

⁹⁴ *Madson v. Christenson*, 128 Minn. 17, 150 N. W. 213.

⁹⁵ *In re Knutson's Estate*, 144 Minn. 111, 174 N. W. 617.

⁹⁶ *McAllister v. Rowland*, 124 Minn. 27, 144 N. W. 412; *In re Knutson's Estate*, 144 Minn. 111, 174 N. W. 617. See *Ann. Cas.* 1918A, 1086; 40 *Cyc.* 1290.

⁹⁷ *In re Knutson's Estate*, 144 Minn. 111, 174 N. W. 617.

⁹⁸ *Ramseyer v. Dennis* (Ind.) 119 N. E. 716.

⁹⁹ *In re Layman's Will*, 40 Minn. 371, 42 N. W. 286; *Coates v. Semper*, 82 Minn. 460, 85 N. W. 217; *Thill v. Freiermuth*, 132 Minn. 242, 156 N. W. 260; *Doherty v. O'Callaghan*, 157 Mass. 90, 31 N. E. 726; *Panell v. Rosa*, 228 Mass.

himself in relation to business matters, for the purpose of laying a foundation for his testimony as to the testamentary capacity of the testator.¹ He may testify as to what he did to make the contents of the will known to the testator.² If an attorney of the testator signs the will as a subscribing witness the testator is deemed to have waived all objection to his testifying as to conversations between them on the ground of privilege, and the attorney stands on the same footing as any other subscribing witness.³

289. Testimony of physician—The physician of the decedent may testify as to the mental condition of the latter from knowledge acquired while attending him professionally. He may testify as to statements of the decedent made to him in his professional capacity showing the mental condition of the decedent. The statute forbidding a physician from disclosing communications made to him in his professional capacity may be waived by the executor of the decedent, or by an heir, devisee or legatee, and it is waived by calling the physician as a witness. The physician may testify either for or against the probate of the will. The court has discretionary power to exclude objectionable disclosures.⁴

290. Declarations of testator subsequent to will—The declarations of a testator made after the execution of the will, to the effect that he signed it before the subscribing witnesses, are admissible, the signatures of the testator and witnesses not being disputed.⁵ In a contest over the genuineness of a will, where there is independent evidence tending to show that the will is a forgery, declarations of the alleged testator, showing knowledge or lack of knowledge of the existence of such will, are admissible to corroborate or rebut the other evidence.⁶ Declarations of the testator subsequent to the will are admissible on an issue of testamentary capacity, or undue influence, or revocation.⁶¹

291. Revoked will revived by codicil—Proof of the due execution of a codicil reviving a revoked will is sufficient. It is not necessary to prove the due execution of the revoked will.⁷

594, 118 N. E. 225; 23 A. & E. Ency. of Law (2 ed.) 76; 40 Cyc. 1314; 14 Ann. Cas. 601; Ann. Cas. 1912A, 839. See § 355.

¹ In re Layman's Will, 40 Minn. 371, 42 N. W. 286.

² Coates v. Semper, 82 Minn. 460, 85 N. W. 217.

³ Denning v. Butcher, 91 Iowa 425; McMaster v. Scriven, 85 Wis. 162; 23 A. & E. Ency. of Law (2 ed.) 77; 40 Cyc. 2381; 14 Ann. Cas. 601. See § 355.

⁴ Olson v. Court of Honor, 100 Minn. 117, 110 N. W. 374; In re Gray's Estate, 88 Neb. 835, 130 N. W. 746. See 48 L. R.

A. (N. S.) 394, 418; Ann. Cas. 1912B, 1037; 1918A, 1050; 7 Col. Law Rev. 287; Buck v. Buck, 126 Minn. 275, 148 N. W. 117.

⁵ Nixon v. Snellbaker, 155 Iowa 390, 136 N. W. 223.

⁶ Samuel v. Hunter's Executor (Va.) 95 S. E. 399. See 107 Am. St. Rep. 460.

⁶¹ See §§ 164, 171, 236; 107 Am. St. Rep. 459; 40 Cyc. 1311-1318.

⁷ Hobart v. Hobart, 154 Ill. 610, 39 N. E. 581; Hawke v. Euyart, 30 Neb. 149, 46 N. W. 422; Rush v. Brannon (W. Va.) 95 S. E. 521. See § 215.

292. Degree of proof—The statutes governing the descent and distribution of property of decedents are founded in public policy and justice and should govern the transmission of an estate unless a valid will is clearly proved. It is not the duty of a court to strain after probate.⁸ It is generally held, however, that a fair preponderance of the evidence is sufficient.⁹¹

FOREIGN WILLS—IN GENERAL

293. Statute—A will made out of the state and valid according to the laws of the state or country in which it was made, or of the testator's domicile, if in writing and signed by the testator, may be proved and allowed in this state, and shall thereupon have the same effect as if it had been executed according to the laws of this state.⁹ This statute modifies the common-law rule that a will devising real property must be executed according to the laws of the state or country wherein the property is situated.¹⁰ It also modifies the common-law rule that a will of personal property must be executed in conformity with the law of the last domicile of the testator, even though he changes his domicile after making his will.¹¹

294. Necessity of probate here—A foreign will has no effect on land in this state until probated here.¹² For the purposes of administration and legal execution wills probated in other states or countries cannot be taken notice of here until they are probated here.¹³ The admission to probate in the foreign domicile of the testator does not vest title to land in this state in the devisee.¹⁴ A trust in real property arising under a foreign will cannot be enforced here without a probate of the will here.¹⁵ A probate in one state does not affect a bona fide purchaser of land in another state from an heir before the probate of the will in the state where the land lies.¹⁶ A local probate of a foreign will is not necessary where the only object is to show an interest under the

⁸ *Rollwagen v. Rollwagen*, 63 N. Y. 504.

⁹¹ 23 A. & E. Ency. of Law (2 ed.) 131; 40 Cyc. 1285.

⁹ G. S. 1913, § 7253. See *Putnam v. Pitney*, 45 Minn. 242, 47 N. W. 790; *Boeing v. Owsley*, 122 Minn. 190, 142 N. W. 129.

¹⁰ *Putnam v. Pitney*, 45 Minn. 242, 47 N. W. 790. See 22 A. & E. Ency. of Law (2 ed.) 1365; 40 Cyc. 1074; 2 L. R. A. (N. S.) 408; 12 Prob. Rep. Ann. 672.

¹¹ *Irwin's Appeal*, 33 Conn. 128; *Moultrie v. Hunt*, 23 N. Y. 394; 22 A. & E. Ency. of Law (2 ed.) 1364; 40 Cyc. 1074; 2 L. R. A. (N. S.) 408; 12 Prob. Rep. Ann. 672.

¹² *Pott v. Pennington*, 16 Minn. 509

(460); *Barnes v. Gunter*, 111 Minn. 383, 395, 127 N. W. 398; *McCormick v. Sullivan*, 10 Wheat. 192; *Robertson v. Pickrell*, 109 U. S. 608; 23 A. & E. Ency. of Law (2 ed.) 116, 141; 40 Cyc. 1239; *Woerner*, Am. Law of Adm. (2 ed.) § 226; 48 L. R. A. 133; 113 Am. St. Rep. 213; Ann. Cas. 1918A, 617.

¹³ *Appeal of Mower*, 48 Mich. 441, 12 N. W. 646.

¹⁴ *Solis v. Williams*, 205 Mass. 350, 91 N. E. 148.

¹⁵ *Campbell v. Sheldon*, 13 Pick. (Mass.) 8; *Campbell v. Wallace*, 10 Gray (Mass.) 162; *Wells, Fargo & Co. v. Walsh*, 87 Wis. 67, 57 N. W. 969.

¹⁶ *Barnes v. Gunter*, 111 Minn. 383, 395, 127 N. W. 398.

will for some merely incidental or collateral purpose.¹⁷ The probate of a will in another state is sufficient to entitle a devisee thereunder to be heard here in any administration proceedings which are essentially in rem and without parties. A residuary legatee under a will probated elsewhere need not have it probated here to entitle him to appeal from an administrator's account by a local probate court.¹⁸ Where a foreign will devising real estate is not probated under the laws of the state where the property is situated, an action based thereon cannot be maintained by the devisee to recover such property.¹⁹ An action brought by a foreign executor before the will is probated here is made good by a subsequent probate here before hearing.²⁰

FOREIGN WILLS—ORIGINAL PROBATE IN THIS STATE

295. Jurisdiction—A will executed according to the laws of this state or the laws of his domicile by a non-resident may be probated here, whether previously probated in another state or not, if the testator left any property in this state which is the subject of administration.²¹ The jurisdictional facts are the death of the testator and the existence of property of the decedent upon which the will may operate within the county where probate is sought.²² The exercise of original jurisdiction over the estates of non-residents, affects only property within the state. A decree admitting a will to probate in such case has no extraterritorial effect and does not dispense with the necessity of probate in other states.²³

296. In what county—The proceedings may be had in any county wherein the decedent left property.²⁴

297. Will should ordinarily be first probated at domicile—While a probate court of this state, if the testator left property here, has the power, and in that sense, the jurisdiction, to admit a will to probate before it

¹⁷ Appeal of Mower, 48 Mich. 441, 12 N. W. 646.

¹⁸ Appeal of Mower, 48 Mich. 441, 12 N. W. 646.

¹⁹ De Roux v. Girard, 105 Fed. 798; De Roux v. Girard's Executor, 112 Fed. 89.

²⁰ Gray v. Ferguson, 86 Mich. 382, 49 N. W. 130.

²¹ G. S. 1913, §§ 7205 (2), 7253; Putnam v. Pitney, 45 Minn. 242, 47 N. W. 790; Gregory v. Lansing, 115 Minn. 73, 131 N. W. 1010; Seccomb v. Bovey, 135 Minn. 353, 160 N. W. 1018; Lipman v. Bechhoefer, 141 Minn. 131, 169 N. W. 536; Parnell v. Thompson, 81 Kan. 119, 105 Pac. 502; Clayson v. Clayson, 26 Wash. 253, 66 Pac. 410; In re

Edelman's Estate, 148 Cal. 233, 82 Pac. 962; In re Clark's Estate, 148 Cal. 108, 82 Pac. 760; Morrison v. Hass, 229 Mass. 514, 118 N. E. 893; Thomas Kay Woolen Mill Co. v. Sprague, 259 Fed. 338; 40 Cyc. 1247; 23 A. & E. Ency. of Law (2 ed.) 116; 33 I. R. A. (N. S.) 658; 113 Am. St. Rep. 211.

²² In re Southard's Will, 48 Minn. 37, 50 N. W. 932; 23 A. & E. Ency. of Law (2 ed.) 114, 116; 40 Cyc. 1246.

²³ In re Clark's Estate, 148 Cal. 108, 82 Pac. 760.

²⁴ G. S. 1913, § 7205; In re Southard's Will, 48 Minn. 37, 50 N. W. 932; Gregory v. Lansing, 115 Minn. 73, 131 N. W. 1010; Lipman v. Bechhoefer, 141 Minn. 131, 169 N. W. 536. See §§ 622, 647.

is proved in the state where the testator had his domicil, it should not do so unless there is sufficient ground for departing from the general rule, based on practical reasons and comity, that the primary proof of a will must be where the testator had his domicil at the time of his death.²⁵ Special considerations of practical convenience or justice may make it proper to grant original probate elsewhere than at the domicil.²⁶ If a will is first probated elsewhere than at the domicil of the decedent it will be assumed by the courts of the domicil that the court granting the probate proceeded regularly and with jurisdiction in the absence of evidence to the contrary.²⁷ If original probate is granted elsewhere than at the domicil the proceedings are ancillary and the court at the domicil will require the production of the original will for probate. The ancillary probate is conclusive only as to property within the ancillary jurisdiction.²⁸

298. Disallowance in other state—A judgment of another state refusing probate to a will because not executed in accordance with the laws of that state has been held not binding on a probate court of this state admitting the same will to probate, for the reason that the foreign judgment was entered after the domestic judgment.²⁹

FOREIGN WILLS—ANCILLARY PROBATE

299. Statute—To what wills applicable—Every will duly proved and allowed outside of this state, in accordance with the laws in force in the place where proved, may be allowed, filed, and recorded in any county in which the testator left property upon which such will may operate.³⁰ The statute applies only to wills which have been duly proved and allowed out of this state in a judicial proceeding. It probably does not apply to a notarial will not duly proved and allowed in a court of com-

²⁵ Putnam v. Pitney, 45 Minn. 242, 47 N. W. 790; Rackemann v. Taylor, 204 Mass. 394, 90 N. E. 552; Morrison v. Hass, 229 Mass. 514, 118 N. E. 893. See *In re Corning's Estate*, 159 Mich. 474, 124 N. W. 513; 23 Harv. L. Rev. 467; 40 Cyc. 1245.

²⁶ Seccomb v. Bovey, 135 Minn. 353, 160 N. W. 1018 (bulk of property here—testatrix without any settled home); Bowdoin v. Holland, 10 Cush. (Mass.) 17 (executor withholding will from proper court); Varner v. Bevil, 17 Ala. 286 (bulk of property foreign realty); Pepper's Estate, 148 Pa. St. 5 (id.); Thompson v. Parnell, 81 Kan. 119, 105 Pac. 502 (testator died in England leaving two wills, one disposing of his property in England

and the other his property in Kansas). See 23 Harv. L. Rev. 467.

²⁷ Morrison v. Hass, 229 Mass. 514, 118 N. E. 893.

²⁸ Prescott v. Durfee, 131 Mass. 477; Walton v. Hall's Estate, 66 Vt. 455, 29 Atl. 803; Scripps v. Wayne Probate Judge, 131 Mich. 265, 90 N. W. 1061; *In re Clark's Estate*, 148 Cal. 108, 82 Pac. 760; *In re Cameron's Estate*, 166 N. Y. 610, 59 N. E. 1120; 40 Cyc. 1247. See 23 Harv. L. Rev. 467; and § 1195.

²⁹ Seccomb v. Bovey, 135 Minn. 353, 160 N. W. 1018.

³⁰ G. S. 1913, § 7274. See 16 Ency. Pl. & Pr. 1066; 23 A. & E. Ency. of Law (2 ed.) 142; 40 Cyc. 1237; 28 R. C. L. 366; Woerner, Am. Law of Adm. (2 ed.) § 226.

petent jurisdiction.³¹ It applies to all cases where the testator left property in this state, whether real or personal.³² It applies to lost or destroyed wills;³³ to wills probated in a foreign country;³⁴ and to nuncupative wills.³⁵ It probably applies only to foreign wills probated at the domicil of the decedent.³⁶ Under the statute the will of a resident of this state cannot be probated elsewhere and then brought here for ancillary administration. The duty of a state to give full faith and credit to the judgments of other states does not require it to permit the will of one of its residents to be probated first in another state, and then to grant ancillary administration within the state on the foreign record.³⁷ As regards foreign wills executed according to the laws of this state the statute is merely cumulative as to the mode of proving it, making the certified copy of it after probate in another state sufficient evidence to establish the will.³⁸ By virtue of this statute a foreign will executed according to the laws of another state, and admitted to probate there, may dispose of real property here, though not executed according to our laws. In this respect the statute modifies the common-law rule that the *lex loci rei sitæ* governs the testamentary disposition of real property.³⁹

300. An ancillary administration—Where a foreign will is probated under this statute the administration is strictly ancillary. The principal administration is at the domicil of the decedent.⁴⁰

301. Who may petition for probate—A devisee or legatee is a person interested in the will within the meaning of the statute and may petition for its probate.⁴¹ A foreign or domestic creditor of the testator is a person interested in the will within the meaning of the statute and may

³¹ *In re Connell's Will*, 221 N. Y. 190, 116 N. E. 986.

³² *Putnam v. Pitney*, 45 Minn. 242, 47 N. W. 790; *In re Southard's Will*, 48 Minn. 37, 50 N. W. 932.

³³ *Barnes v. Brownlee*, 97 Kan. 517, 155 Pac. 962.

³⁴ *Gaven v. Allen*, 100 Mo. 293, 13 S. W. 501.

³⁵ *Slocorab v. Slocomb*, 95 Mass. 38.

³⁶ See *Wallace v. Wallace*, 2 Green Ch. 616; *Manuel v. Manuel*, 13 Ohio St. 458; *Rackemann v. Taylor*, 204 Mass. 394, 90 N. E. 552; *Sullivan v. Kenney*, 148 Iowa 361, 126 N. W. 349; 40 Cyc. 1239.

³⁷ *In re Clark's Estate*, 148 Cal. 108, 82 Pac. 760; *Scripps v. Wayne Probate Judge*, 131 Mich. 265, 90 N. W. 1061; *Stark v. Parker*, 56 N. H. 481; *Tarbell v. Walton*, 71 Vt. 406, 45 Atl. 748; *Bate v. Incisa*, 59 Miss. 513; *In re Longshore's Will (Iowa)* 170 N. W. 902; *Selfert v.*

Selfert (Okl.) 200 Pac. 243. See 40 Cyc. 1239; 23 Harv. L. Rev. 467; 1 L. R. A. (N. S.) 996; 113 Am. St. Rep. 212; 7 Ann. Cas. 313.

³⁸ *Putnam v. Pitney*, 45 Minn. 242, 47 N. W. 790; *Bloor v. Myerscaugh*, 45 Minn. 29, 47 N. W. 311.

³⁹ *Putnam v. Pitney*, 45 Minn. 242, 244, 47 N. W. 790; *Babcock v. Collins*, 60 Minn. 73, 77, 61 N. W. 1020. In most states similar statutes do not have this effect. See 23 A. & E. Ency. of Law (2 ed.) 143; 40 Cyc. 1074; 9 Ann. Cas. 422; 2 L. R. A. (N. S.) 408.

⁴⁰ *Rackemann v. Taylor*, 204 Mass. 394, 90 N. E. 552; *Cheney v. Cheney*, 214 Mass. 580, 101 N. E. 1091. See § 299.

⁴¹ *Stackhouse v. Berryhill*, 47 Minn. 20, 49 N. W. 392; *In re Richardson's Estate*, 120 Cal. 344, 52 Pac. 832; *In re Rankin's Estate*, 164 Cal. 138, 127 Pac. 1034.

petition for its probate.⁴² An assignee of a non-resident legatee or devisee under a foreign will is within the statute.⁴³ A non-resident executor may, through an attorney, apply for and receive letters testamentary in this state.⁴⁴ One may petition for probate through an agent or attorney.⁴⁵

302. Time of petition—Laches—There is no statutory time within which proceedings must be had. A devisee delaying more than twenty years after the death of the testator has been held not guilty of laches.⁴⁶

303. In what county—The proceedings must be had in some county where there is property of the estate subject to administration, or upon which the will may operate. It is error to allow the will and to proceed to administration without any showing that there is such property.⁴⁷ The fact that proceedings are had in the wrong county is not a ground for collateral attack.⁴⁸

304. Petition—Notice—When a copy of such will, and of the probate thereof, duly authenticated, shall be presented to the court by the executor or other person interested in the will, with a petition for its allowance and for letters, the court shall appoint a time and place of hearing, notice of which shall be given as in the case of an original petition for the probate of a will.⁴⁹ The petition gives the court jurisdiction.⁵⁰ It should be alleged that the testator left property in the county where the ancillary probate is sought.⁵¹ It is not necessary to set out the statutes of the state in which the will was originally probated to show that the court had jurisdiction or that the proceedings therein were in accordance with such statutes.⁵² A petition which sets forth that the petitioner is interested "as a subsequent purchaser of the estate of the deceased" is sufficient, without setting forth the proofs of the petitioner's interest.⁵³ A petition by a foreign creditor should perhaps name any other creditors or distributees in this state and give the reasons why it is not possible or practicable for him to present and collect his claim in the domiciliary administration.⁵⁴ There must be three weeks' published notice.⁵⁵ The

⁴² Putnam v. Pitney, 45 Minn. 242, 47 N. W. 790; Wells, Fargo & Co. v. Walsh, 87 Wis. 67, 57 N. W. 989.

⁴³ In re Rankin's Estate, 164 Cal. 138, 127 Pac. 1034.

⁴⁴ In re Brown's Estate, 80 Cal. 381, 22 Pac. 233.

⁴⁵ Clow v. Plummer, 85 Mich. 550, 48 N. W. 795; Evansville Ice Co. v. Windsor, 148 Ind. 682, 48 N. E. 592.

⁴⁶ Stackhouse v. Berryhill, 47 Minn. 20, 49 N. W. 392. See § 246.

⁴⁷ In re Southard's Will, 48 Minn. 37, 50 N. W. 932. See §§ 622, 647.

⁴⁸ In re Shoenberger's Estate, 139 Pa. St. 132, 20 Atl. 1050. See § 647.

⁴⁹ G. S. 1913, § 7275. See 16 Ency. Pl. & Pr. 1070.

⁵⁰ See Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385.

⁵¹ In re Southard's Will, 48 Minn. 37, 50 N. W. 932.

⁵² Martin v. Martin, 70 Neb. 207, 97 N. W. 289; Otto v. Doty, 61 Iowa 23, 15 N. W. 578; Puryear v. Beard, 14 Ala. 121.

⁵³ Mower v. Verplanke, 105 Mich. 398, 63 N. W. 302.

⁵⁴ Putnam v. Pitney, 45 Minn. 242, 47 N. W. 790.

⁵⁵ See §§ 41, 42.

want of a notice is not a ground for collateral attack on the grant of administration.⁵⁶

305. Hearing on petition—Proof—Questions for local court—Statute—If on the hearing the court shall find from the copies before it that the probate of such will was granted by a court of competent jurisdiction, and it does not appear that the order or decree so granting it is not still in force, the copy and the probate thereof shall be filed and recorded, and the will shall have the same force and effect as if originally proved and allowed in such court.⁵⁷ If the foreign court had jurisdiction the probate of the will therein is conclusive as to its allowance in this state. The validity of the will is not open to question here. The foreign probate is conclusive here that the testator had testamentary capacity, that he was not subject to undue influence or fraud, and that the will was duly executed in accordance with the laws of the state wherein it was originally probated. No distinction is made between a will disposing of personalty and one disposing of realty. The proceeding in this state resembles an action on a foreign judgment.⁵⁸ While the foreign probate is conclusive here as to the due execution of the will, including the testamentary capacity of the testator and his freedom from undue influence, it is not conclusive as to the validity and effect of the various provisions of the will. Questions concerning the validity and effect of the provisions of the will are not before the probate court here when a foreign will is presented for probate under the statute. Such questions are for future determination, either in the probate court or the district court, in accordance with the law of this state as respects real property and the law of the domicil of the testator as respects personal property.⁵⁹ It seems that the foreign probate is conclusive that the will has not been revoked, even as to realty in this state, at least if the question of revocation was raised and determined in the foreign court.⁶⁰ The statutory procedure dispenses with the necessity of the production and proof of the original will, and substitutes therefor the authentication of the same and of the probate thereof in the court of the foreign state.⁶¹ There must be proof that the testator left property in the county. In the ab-

⁵⁶ *Dickey v. Vann*, 81 Ala. 425.

⁵⁷ G. S. 1913, § 7276. See 16 Ency. Pl. & Pr. 1071.

⁵⁸ *Babcock v. Collins*, 60 Minn. 73, 78, 61 N. W. 1020; *Hardin v. Jamison*, 60 Minn. 112, 114, 61 N. W. 1018; *In re Clark's Estate*, 148 Cal. 108, 82 Pac. 760; *Patterson v. Dickinson*, 193 Fed. 328; *Crippen v. Dexter*, 13 Gray (Mass.) 330; *Shannon v. Shannon*, 111 Mass. 331; *State v. District Court*, 34 Mont. 96, 85 Pac. 866; 16 Ency. Pl. & Pr. 1071; 23 A. & E. Ency. of Law (2 ed.) 143; 40 Cyc. 1239; *Woerner*, Am. Law of Adm. (2

ed.) § 226; 48 L. R. A. 130; 9 Ann. Cas. 422; 14 Ann. Cas. 977; Ann. Cas. 1918A, 614.

⁵⁹ *Cornell v. Burr*, 32 S. D. 1, 141 N. W. 1081. See *Washburn v. Van Steenwyk*, 32 Minn. 336, 20 N. W. 324; 22 A. & E. Ency. of Law (2 ed.) 1366; 40 Cyc. 1374; 113 Am. St. Rep. 215.

⁶⁰ See *Galley v. Brown* (Wis.) 171 N. W. 945; *Cornell v. Burr*, 32 S. D. 1, 141 N. W. 1081.

⁶¹ *Bloor v. Myerscaugh*, 45 Minn. 29, 47 N. W. 311; *Putnam v. Pitney*, 45 Minn. 242, 47 N. W. 790.

sence of a contest an allegation in the petition that the testator left property in the county is probably sufficient to make out a prima facie case.⁶² While the local court must be satisfied that the foreign court granting the original probate had jurisdiction, no affirmative evidence of that fact need be submitted if the fact is not contested. The due authentication of the foreign records makes out a prima facie case. Our statute expressly provides for the court finding this fact "from the copies before it."⁶³ The jurisdiction of the foreign court may be attacked even though such court expressly found that it had jurisdiction. It may be shown that the testator was not domiciled in the state where the original probate was had. The burden of proving want of jurisdiction is on the contestant.⁶⁴ The probate judge must decide whether the record presented is duly authenticated; whether the court in which the will purports to have been allowed had jurisdiction; and whether there is any estate, real or personal, in his county, on which such will may operate. Perhaps some other questions are open on this inquiry, as, for example, actual fraud in obtaining probate of the will.⁶⁵ It is open to the local court to determine whether the proceedings in the foreign court amounted to a probate of the will within the meaning of the statute.⁶⁶ A decree of a probate court of another state, admitting to probate a will within its jurisdiction, is conclusive evidence, if duly authenticated, of the validity of the will, upon an application to prove it in this state, even when no notice was given, if by the law of that state no such notice was required.⁶⁷ Where it appears that a foreign will was admitted to probate in a court of competent jurisdiction, a court in this state has no power to refuse probate here under the statute on account of irregularities in the probate proceedings in the court of original jurisdiction.⁶⁸ The proof and allowance of a will in another state, where the testator had his domicil at the time of his death, if duly authenticated, will be presumed to be in accordance with the law of that state. In the petition for probate here it is not necessary to set out the foreign statute or on the hearing here to prove that the proof and allowance of the foreign will was in accordance with the foreign statute. The presumption of regularity follows from the due authentication.⁶⁹ The foreign

⁶² *In re Southard's Will*, 48 Minn. 37, 50 N. W. 932.

⁶³ G. S. 1913, § 7276; *Martin v. Martin*, 70 Neb. 207, 97 N. W. 289; *Otto v. Doty*, 61 Iowa 23, 15 N. W. 578; *Puryear v. Beard*, 14 Ala. 121.

⁶⁴ *Sullivan v. Kenney*, 148 Iowa 361, 126 N. W. 349; *In re Horton's Will*, 217 N. Y. 363, 111 N. E. 1066; *Holyoke v. Holyoke's Estate*, 110 Me. 469, 87 Atl. 40; *Burbank v. Ernst*, 232 U. S. 162. See Ann. Cas. 1918A, 616.

⁶⁵ *Crippen v. Dexter*, 13 Gray (Mass.)

330; *In re Connell's Will*, 221 N. Y. 190, 116 N. E. 986. See *In re Clark's Estate*, 148 Cal. 108, 82 Pac. 760.

⁶⁶ *In re Connell's Will*, 221 N. Y. 190, 116 N. E. 986.

⁶⁷ *In re Horton's Will*, 217 N. Y. 363, 111 N. E. 1066; *Crippen v. Dexter*, 13 Gray (Mass.) 330; *Shannon v. Shannon*, 111 Mass. 331. See *Babcock v. Collins*, 60 Minn. 73, 78, 61 N. W. 1020.

⁶⁸ *In re Gertsens Will*, 127 Wis. 602, 106 N. W. 1096.

⁶⁹ *Martin v. Martin*, 70 Neb. 207, 97

probate is conclusive as to the testamentary capacity of the testator and the want of undue influence, but his soundness of mind may be considered on the question of a change of domicil as affecting the jurisdiction of the court.⁷⁰ The probate of a will in another state is entitled to full faith and credit in this state under the provision of the federal constitution. It cannot be attacked collaterally on the ground of there being a later will.⁷¹ It has been said in one of our cases, somewhat loosely, that the proceedings under the statute are mostly a matter of form.⁷²

306. Letters testamentary or of administration—Disposition of residue of estate—Statute—When any will is allowed as provided in §§ 7275, 7276 (304, 305, *supra*), the court shall grant letters testamentary, or of administration with the will annexed, which shall extend to all the estate of the testator in this state. Such estate, after payment of debts and expenses of administration, shall be disposed of according to such will, so far as it may operate upon it, and the residue as is provided by law in cases of estates in this state belonging to persons who are residents of any other state or country.⁷³ Under the statute it is the duty of the court to issue letters testamentary to a resident executor named in the will, if duly qualified, though such letters were not issued to him by the court where the will was originally proved.⁷⁴ A foreign executor petitioning for probate of the will here is entitled to letters unless there are special reasons to the contrary.⁷⁵ The person named in the will as executor has no power to nominate an administrator with the will annexed.⁷⁶ A non-resident executor to whom letters have been granted in another state, is entitled to have letters issued to him here, as against a resident heir.⁷⁷ It is for the courts of the domicil to construe the testator's will so far as respects any matters subject to their jurisdiction. Whether a will designates an executor is one of such questions. But the courts of this state are not bound to appoint the person designated.⁷⁸

307. Authentication—A copy of the will and of the probate thereof, duly authenticated, must be presented.⁷⁹ An authentication in accordance with the act of Congress is sufficient,⁸⁰ but not exclusive.⁸¹ The act of Congress regulating the authentication of foreign records reads as follows: The records and judicial proceedings of the courts of any

N. W. 289; *Otto v. Doty*, 61 Iowa 23, 15 N. W. 578.

⁷⁰ *Sullivan v. Kenney*, 148 Iowa 361, 126 N. W. 349.

⁷¹ *Grignon v. Shope (Or.)* 197 Pac. 317.

⁷² *Babcock v. Collins*, 60 Minn. 73, 77, 61 N. W. 1020.

⁷³ G. S. 1913, § 7277.

⁷⁴ *Bloor v. Myerscaugh*, 45 Minn. 29, 47 N. W. 311.

⁷⁵ *Babcock v. Collins*, 60 Minn. 73, 61 N. W. 1020; *Hardin v. Jamison*, 60 Minn. 112, 61 N. W. 1018.

⁷⁶ *In re Meier's Estate*, 165 Cal. 456, 125 Pac. 1050.

⁷⁷ *In re Brundage's Estate*, 141 Cal. 538, 75 Pac. 175.

⁷⁸ *Murdoch v. Murdoch*, 86 Conn. 698, 86 Atl. 569.

⁷⁹ *Pope v. Cutler*, 34 Mich. 150.

⁸⁰ *First Nat. Bank v. Kidd*, 20 Minn. 234 (212); *Purveyor v. Beard*, 14 Ala. 121.

⁸¹ *Thrasher v. Ballard*, 33 W. Va. 285, 10 S. E. 411; *Sullivan v. Kenney*, 148 Iowa 361, 126 N. W. 349.

state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."⁸² No doubt an authentication in accordance with G. S. 1913, § 8412, is sufficient.⁸³ A certificate of the presiding judge may be in general terms, to the effect that the "foregoing exemplification of the last will and testament of A. B., deceased, is authenticated in due form and by the proper officer."⁸⁴ The foreign record may be certified by the local probate judge as "judge and ex officio clerk," and the signature of such person as clerk may be authenticated by the same person as judge "sole and presiding judge."⁸⁵ The due authentication of the foreign probate of the will belongs to that class of jurisdictional facts which the local court must find.⁸⁶ Where, under a statute requiring an exemplified copy, the certificate of authentication did not show that the papers had been compared by the clerk attesting them, the probate court had no power to admit the will.⁸⁷ A copy of a record in another state contained a copy of the will, the affidavit of the subscribing witnesses to its execution and a certificate of the clerk of the court that the will was duly admitted to probate. It appeared that the record was in the usual form of recording such proceedings in that state. Held, that it was proper to allow the will to be filed under the statute.⁸⁸

308. Filing and recording—The failure of the probate judge to record the authenticated copy of a foreign will, which has been proved and admitted to probate under the statute, is a mere omission of clerical duty on the part of the court and not fatal to the proceedings.⁸⁹

309. Effect of probate here—Collateral attack—A will allowed and filed as provided by the statute has the same force and effect as if it had been originally proved and admitted to probate in one of our courts. We dispense with the original proof of the will, but proceed in the course of administration as though the original probate proceedings had been instituted here. The administration under the statute extends to all the

⁸² U. S. Compiled Statutes, 1916, § 1519. See notes p. 2450.

⁸³ *First Nat. Bank v. Kidd*, 20 Minn. 234 (212); *In re Ellis' Estate*, 55 Minn. 401, 56 N. W. 1056; *Sullivan v. Kenney*, 148 Iowa 301, 126 N. W. 349. See *General Conference v. Michigan S. & B. Assn.*, 166 Mich. 504, 132 N. W. 94.

⁸⁴ *Wilt v. Cutler*, 38 Mich. 189.

⁸⁵ *Stevens v. Oliver*, 200 Mo. 492, 98 S. W. 492.

⁸⁶ *Goldtree v. McAllister*, 86 Cal. 93, 23 Pac. 207, 24 Pac. 801.

⁸⁷ *Burden v. Blakey*, 127 Wis. 264, 106 N. W. 1063.

⁸⁸ *Shannon v. Shannon*, 111 Mass. 331.

⁸⁹ *Clow v. Plummer*, 85 Mich. 550, 48 N. W. 795.

property of the testator in this state.⁹⁰ An allowance of a foreign will under this statute has been held to relate back to the death of the testator and validate a deed executed by the executor under a power in the will prior to the probate of the will in this state.⁹¹ It is evidence of the death of the testator and of a devise in the will.⁹² A foreign will, valid so far as it disposes of personalty in the state, but revoked so far as it disposes of real estate in the state, must be admitted to probate under the statute, though a contest may be made on the ground of revocation. The admission to probate of a foreign will, valid so far as it disposes of personalty in the state, and revoked by the laws of the state so far as it disposes of realty in the state, is not an adjudication of the question of the validity of the will so far as it disposes of the realty, and the question of validity may be raised on final distribution.⁹³ The admission to probate here of a foreign will is not subject to collateral attack in this state except for want of jurisdiction.⁹⁴ It is subject to collateral attack for want of jurisdiction.⁹⁵ An allowance of a will in substantial compliance with the statute, but without the granting of letters testamentary thereon, has been held to give the will the same effect as if it had been duly probated and to pass title to devised land.⁹⁶

310. Disposition of proceeds—Payment of debts—Residue—The disposition of the local estate is regulated by statute.⁹⁷

311. Prior administration of estate as intestate—A foreign will may be allowed under this statute after the estate of the testator has been fully administered as intestate without first vacating such administration.⁹⁸

312. Bond—Our statutes make no express provision for a bond from an ancillary representative but doubtless the local court may require one either under G. S. 1913, § 7416, or by virtue of its general powers.⁹⁹

313. Control of local court over foreign representatives taking out letters here—Where, upon the petition of non-residents, they have been appointed executors or administrators by a probate court of this state,

⁹⁰ G. S. 1913, § 7276; *In re Southard's Will*, 48 Minn. 37, 50 N. W. 932.

⁹¹ *Babcock v. Collins*, 60 Minn. 73, 61 N. W. 1020. See *Tillson v. Holloway*, 90 Neb. 481, 134 N. W. 232.

⁹² *Lyon v. Gleason*, 40 Minn. 434, 42 N. W. 286.

⁹³ *Cornell v. Burr*, 32 S. D. 1, 141 N. W. 1081. See *Galley v. Brown* (Wis.) 171 N. W. 945.

⁹⁴ *Goldtree v. McAllister*, 86 Cal. 92, 23 Pac. 207, 24 Pac. 801; *In re Clark's Estate*, 148 Cal. 108, 82 Pac. 760; *Calloway v. Cooley*, 50 Kan. 743, 32 Pac. 372; *Tillson v. Holloway*, 90 Neb. 481, 134 N.

W. 232; *State v. District Court*, 34 Mont. 96, 85 Pac. 866 (cannot be collaterally attacked on the ground that the testator had not testamentary capacity or acted under duress, fraud or undue influence); 16 Ency. Pl. & Pr. 1077; 48 L. R. A. 141.

⁹⁵ *In re Connell's Will*, 221 N. Y. 190, 116 N. E. 986.

⁹⁶ *Markwell v. Thorn*, 28 Wis. 548.

⁹⁷ See §§ 306, 1207.

⁹⁸ *Stackhouse v. Berryhill*, 47 Minn. 20, 49 N. W. 392.

⁹⁹ See *Babcock v. Collins*, 60 Minn. 73, 61 N. W. 1020; *Gray v. Ferguson*, 86 Mich. 382 (no statute).

such court has the power to order that they submit to the service of a summons in a civil action brought in this state for the purpose of determining the liability of the estate they represent on a claim or demand not provable in the probate court in the due course of administration. Whether the remedy in case of a refusal to obey the order is by proceedings as for contempt, or by removal from office, is not decided.¹

LOST AND DESTROYED WILLS

314. Petition—Proof—Statute—The petition for the probate of a lost or destroyed will, or one which is without the state and cannot be produced in court, shall set forth the provisions of the will, and such provisions shall be embodied in the notice of hearing thereon. The probate court shall take testimony as to the execution and validity of such will, and the same may be established by parol or other evidence. All testimony taken shall be reduced to writing, signed by the witnesses, and filed in said court.² A petition for the proof of a will alleged to have been fraudulently destroyed during the lifetime of the testator must state specifically the facts and circumstances constituting the fraud.³

315. Proof of existence and provisions—Statute—No such will shall be established unless the same is proved to have been in existence at the time of the testator's death, or to have been fraudulently destroyed in his lifetime, nor unless its provisions are clearly and distinctly proved by clear and satisfactory evidence.⁴ Since the amendment of 1917 the will may be proved by a copy or draft and by one witness.⁵ It is not essential that a witness should be able to testify to the exact words used. What is required is the substance of the material provisions, their true tenor and effect.⁶ Any substantial provision of a lost will, which is complete in itself and independent of the others, may, when proved, be admitted to probate, though other provisions cannot be proved, if the validity and operation of the part which is proved are not affected by those parts which cannot be proved.⁶ There must be reasonable search

¹ State v. Probate Court, 66 Minn. 246, 68 N. W. 1063. See §§ 250, 1175.

² G. S. 1913, §§ 7279. See § 253; 23 A. & E. Ency. of Law (2 ed.) 144; 40 Cyc. 1295; 28 R. C. L. 380; Woerner, Am. Law of Adm. (2 ed.) 221; 11 Prob. Rep. Ann. 324; Laws 1921, c. 360 (validating act).

³ In re Klidder's Estate, 66 Cal. 487, 6 Pac. 326.

⁴ G. S. 1913, § 7280, as amended by Laws 1917, c. 334. See 23 A. & E. Ency. of Law (2 ed.) 144; 40 Cyc. 1299; 28 R. C. L. 382; Woerner, Am. Law of Adm. (2

ed.) § 221; Wigmore, Ev. § 2052; Church, Probate Law, 1721; 84 Am. Dec. 628; 77 Am. St. Rep. 471; 110 Id. 445; 38 L. R. A. 443; 50 L. R. A. (N. S.) 861; 30 Harv. L. Rev. 773; 35 Id. 95; 11 Prob. Rep. Ann. 319.

⁵ See 23 A. & E. Ency. of Law (2 ed.) 152; 40 Cyc. 1299; Wigmore, Ev. § 2052; Tarbell v. Forbes, 177 Mass. 238, 58 N. E. 873.

⁶ Tarbell v. Forbes, 177 Mass. 238, 58 N. E. 873; In re Camp's Estate, 134 Cal. 233, 66 Pac. 227.

⁶ Tarbell v. Forbes, 177 Mass. 238, 58

for a lost will before secondary evidence of its contents is admissible.⁷ Due execution and attestation of the lost will must be proved and it must also be proved that the will was in existence at the time of the death of the testator unrevoked, the presumption being that a will once shown to exist and not found after the death of the decedent was revoked.⁸ To justify the probate of a fraudulently destroyed will there must be very clear proof of the fraud.⁹ Where the existence and genuineness of a will are in issue, the prior and after declarations of decedent are relevant and admissible, not as evidence for the purpose of proving the execution of the will, but for the purpose of corroborating the testimony of others who have testified to its execution.¹⁰ The contents of a lost will cannot be proved by the declarations of the testator alone. Such declarations are admissible only in corroboration of other evidence.¹¹

316. Certificate of probate—Letters testamentary or of administration—Statute—When such will is established, the provisions thereof must be distinctly stated and certified by the judge, which certificate shall be filed and recorded, and letters testamentary or of administration with the will annexed shall be issued thereon, in the same manner as upon wills produced and duly proved.¹²

NUNCUPATIVE WILLS

317. Petition—Proof—Witnesses—Statute—Nuncupative wills, at any time within six months after the testamentary words are spoken by the decedent, may be admitted to probate on petition and notice, as provided for in case of other wills. The petition shall allege that the testamentary words, or the substance thereof, were reduced to writing within thirty days after they were spoken, which writing shall accompany the petition. No such will shall be admitted to probate except upon the evidence of at least two credible and disinterested witnesses.¹³

VACATION

318. Vacation by action unauthorized—An order, judgment or decree of the probate court admitting a will to probate cannot be vacated or set aside by an action in the district court on the ground of fraud, mistake

N. E. 873; *In re Patterson's Estate*, 155 Cal. 626, 102 Pac. 941. See 26 L. R. A. (N. S.) 654.

⁷ *McConnell v. Wildes*, 153 Mass. 487, 26 N. E. 1114; 40 Cyc. 1295; 50 L. R. A. (N. S.) 861.

⁸ *Newell v. Homer*, 120 Mass. 277.

⁹ *In re Kidder's Estate*, 66 Cal. 487, 6 Pac. 326; *In re Johnson's Estate*, 134 Cal. 662, 66 Pac. 847.

¹⁰ *State v. Nieuwenhuis* (S. D.) 178 N. W. 976.

¹¹ Ann. Cas. 1915B, 253.

¹² G. S. 1913, § 7281.

¹³ G. S. 1913, § 7282. See § 253; 23 A. & E. Ency. of Law (2 ed.) 154; 40 Cyc. 1132; *Woerner*, Am. Law of Adm. (2 ed.) §§ 44, 45, 224; 67 Am. St. Rep. 572; 11 Prob. Rep. Ann. 13.

or any other ground.¹⁴ It seems clear that the legislature could not authorize an action in the district court to set aside the probate of a will.¹⁵

319. Vacation on motion—Opening default—An order admitting a will to probate may be vacated on motion by the probate court on the same grounds that its other orders may be so vacated.¹⁶ A party in interest who failed to appear and oppose the admission of a will to probate may apply to the probate court to vacate its order admitting the will to probate and for leave to appear and oppose its admission.¹⁷ Where an application to open a default is denied by the trial court, its action will not be disturbed on appeal unless the record discloses an abuse of discretion in passing upon the excuse for the default and upon the good faith and merit of the claim sought to be asserted by the applicant.¹⁸ An order admitting a will to probate cannot be vacated on the ground that a guardian ad litem was not appointed in the proceedings for an infant interested in the estate.¹⁹ It may be vacated because of the discovery of a later will.²⁰ Where a will has been admitted to probate a subsequent will of the same testator cannot be admitted without first vacating the order admitting the first will.²¹ An order admitting a will to probate may be vacated on the ground that the court acted without jurisdiction.²² The only persons who may move for the vacation of the probate of a will are those who, but for the will, would succeed in some degree to the decedent's estate.²³ It is the duty of the court to set aside the probate of a will on its own motion when the fact that the testator was insane at the time he executed the will is brought to its attention. It is immaterial that the time to appeal from the order admitting the will to probate has expired, if the court still has jurisdiction of the estate.²⁴

¹⁴ *Tracy v. Muir*, 151 Cal. 363, 90 Pac. 832; *Broderick's Will Case*, 21 Wall. (U. S.) 503; *O'Callaghan v. O'Brien*, 199 U. S. 89; *McCormack v. Burns*, 89 N. J. Eq. 274, 105 Atl. 70; *Stead v. Curtis*, 205 Fed. 439; *Sutton v. English*, 246 U. S. 199; 23 A. & E. Ency. of Law (2 ed.) 138; 40 Cyc. 1252; 28 R. C. L. 396; *Woerner*, Am. Law of Adm. (2 ed.) § 227; 33 Harv. L. Rev. 568; G. S. 1913, § 7910, is probably not applicable.

¹⁵ See *Stead v. Curtis*, 205 Fed. 439.

¹⁶ G. S. 1913, §§ 7211, 7490 (8) (see §§ 52, 904, 1081); *In re Mousseau's Will*, 30 Minn. 202, 206, 14 N. W. 887; *Larson v. How*, 71 Minn. 250, 73 N. W. 966. See 28 R. C. L. 395.

¹⁷ *Larson v. How*, 71 Minn. 250, 73 N. W. 966.

¹⁸ *Southern Minn. Invest. & Loan Co. v. Livingston*, 117 Minn. 421, 136 N. W. 8.

¹⁹ *In re Mousseau's Will*, 30 Minn. 202, 14 N. W. 887.

²⁰ *Waters v. Stickney*, 12 Allen (Mass.) 1.

²¹ *In re Butt's Estate*, 173 Mich. 504, 139 N. W. 244.

²² *In re Warfield*, 22 Cal. 51.

²³ *In re Pepin's Estate*, 53 Mont. 240, 163 Pac. 104.

²⁴ *In re Staab's Estate*, 166 Wis. 587, 166 N. W. 326.

CONSTRUCTION

320. In general—Intention of testator controlling—Force of rules of construction—The cardinal rule of construction, to which all others must bend, is that the intention of the testator, as expressed in the language used in the will, shall prevail, if it is not inconsistent with the rules of law. Such intention is to be gathered from everything contained within the four corners of the will, read in the light of the surrounding circumstances.²⁵ One of the highest duties resting upon a court is to carry out the intentions of a testator as expressed in valid provisions not repugnant to well settled principles of public policy.²⁶ What is sought in interpretation—the meaning of the words or the meaning of the writer? Neither. What is sought is not the meaning of the words alone, or the meaning of the writer alone, but the meaning of the words as used by the writer. It is not the meaning of the words in the abstract, for the meaning of the words varies according to the circumstances under which they were used; and not the meaning of the writer apart from his words, for the question is one of interpretation, and what he meant to say, but did not, is foreign to the inquiry. We must seek the meaning of the writer, but we must find it in his words; and we must seek the meaning of the words, but they must be his words, the words as he used them, the meaning which they have in his mouth.²⁷ In the construction of a will the inquiry is not what the testator meant to say, but rather what he meant by what he did say.²⁸ Whatever conjecture may be entertained as to what the testator either intended or would have desired to do, the will must be construed in accordance with what it says and not in accordance with what the testator intended or

²⁵ In re Oertle's Estate, 34 Minn. 173, 177, 24 N. W. 924; Whiting v. Whiting, 42 Minn. 548, 44 N. W. 1030; In re Tower's Estate, 49 Minn. 371, 376, 52 N. W. 27; In re Swenson's Estate, 55 Minn. 300, 308, 56 N. W. 1115; State v. Willrich, 72 Minn. 165, 168, 75 N. W. 123; Yates v. Shern, 84 Minn. 161, 86 N. W. 1004; Brookhouse v. Pray, 92 Minn. 448, 100 N. W. 235; Davis v. Hancock, 95 Minn. 340, 104 N. W. 299; Rong v. Hal-ler, 109 Minn. 191, 198, 123 N. W. 471; Lohker v. Lohker, 112 Minn. 273, 277, 127 N. W. 1122; Johrden v. Pond, 126 Minn. 247, 148 N. W. 112; Elberg v. El-berg, 132 Minn. 15, 155 N. W. 751; Long v. Willsey, 132 Minn. 316, 156 N. W. 349; Hutchins v. Wenger, 133 Minn. 188, 158 N. W. 52; Barney v. May, 135 Minn.

299, 160 N. W. 790; In re Bell's Will, 147 Minn. 62, 179 N. W. 650; In re An-derson's Estate, 148 Minn. 44, 180 N. W. 1019; In re Freeman's Estate (Minn.) 187 N. W. 411; 30 A. & E. Ency. of Law (2 ed.) 661; 40 Cyc. 1386; 28 R. C. L. 211; Woerner, Am. Law of Adm. (2 ed.) § 414.

²⁶ Shelton v. King, 229 U. S. 90.

²⁷ Prof. Graves, 28 Am. L. Rev. 323; Phipson, Ev. (4 ed.) 559; Justice Holmes, 12 Harv. L. Rev. 417.

²⁸ Bragaw v. Bolles, 51 N. J. Eq. 84, 95, 25 Atl. 947; Clement v. Whittaker, 231 Fed. 940; Menard v. Campbell, 180 Mich. 583, 147 N. W. 556; Comb's Guard-ian v. Swigert's Executor (Ky.) 200 S. W. 38; In re Mizener's Estate (Pa.) 105 Atl. 46; Birge v. Nucomb, 93 Conn. 69, 105 Atl. 335.

would have wished to say.²⁹ It is true that the testator is a despot, within limits, over his property, but he is required by statute to express his commands in writing, and that means that his words must be sufficient for the purpose when taken in the sense in which they would be used by the normal speaker of English under his circumstances.³⁰ A court cannot give effect to an unexpressed intention of the testator, or add a term to the will or modify its language in order to make what seems to the court a more reasonable or proper disposition of the property.³¹ No violence can be done to the language used. The construction adopted must be such as the language used will reasonably bear.³² The general intention of the testator overrides all mere technical and grammatical rules of construction.³³ While the language used in the will controls it must express the intention of the testator beyond mere surmise, conjecture or supposition.³⁴ There is always danger in going beyond the literal and grammatical meaning of words. Courts should be careful not to substitute a lively imagination of what a testator would have said if his attention had been directed to a particular point for what he has in fact said. On the other hand, to an extent not capable of exact definition, but depending on judgment and tact, the primary import of isolated words may be held to be modified and controlled by the dominant intention to be gathered from the instrument as a whole. These two opposing considerations must be borne in mind.³⁵ The court can give effect to any intention of a testator, not contrary to law, which he has shown by the words that he has used, even though it has not been articulated in formal language, but such intention must appear from the will itself. It cannot be inferred from mere silence; much less can such an inference be founded upon bare conjecture as to what the testator would have said if he had foreseen the events which have happened since his death. The court cannot speculate as to his intentions and make for him such a will as it thinks that he would have made if he had foreseen existing conditions.³⁶ Where it is clear that the testator has made no provision for a contingency which has arisen since he executed his will, it is not for the court to speculate as to what the testator might have done if the exact situation which has arisen had in truth been in his mind when making his will, but to determine the meaning of the words actually used and apply that meaning to the facts

²⁹ *Birge v. Nucomb*, 93 Conn. 69, 105 Atl. 335.

³⁰ *Justice Holmes*, 12 Harv. L. Rev. 420.

³¹ *Empenger v. Fairley*, 119 Minn. 186, 137 N. W. 1110.

³² *Case v. Young*, 3 Minn. 209 (140); *Yates v. Shern*, 84 Minn. 161, 165, 86 N. W. 1004; *Wheaton v. Pope*, 91 Minn. 299, 306, 97 N. W. 1046.

³³ *Whiting v. Whiting*, 42 Minn. 548, 44 N. W. 1030; *Manning v. Manning*, 229 Mass. 527, 118 N. E. 676. See § 321.

³⁴ *In re Shumway's Estate*, 194 Mich. 245, 160 N. W. 595.

³⁵ *Eaton v. Brown*, 193 U. S. 197.

³⁶ *Springfield Safe Deposit & Trust Co. v. Dwelly*, 219 Mass. 65, 106 N. E. 554. See § 323.

presented.³⁷ A reasonable and sensible construction is to be given to the language used.³⁸ Wills are construed more liberally than deeds.³⁹ As wills always vary, subtle rules of construction, often resorted to, obstruct rather than assist in determining the intention of the testator.⁴⁰ Certain general rules have been adopted for the construction of wills and it is important that such rules, especially so far as they have become rules of property or have declared substantive rules of law, should not be lightly departed from.⁴¹ A few words and phrases have become so fixed in their meaning by long and unvarying use as to have become rules of property. But canons of construction are only aids for ascertaining testamentary intent and are to be followed only so far as they accomplish that end, and not when the result would be to defeat it.⁴² Formerly there was a tendency to formulate general rules of construction and to apply them rigidly, giving to a particular word or phrase the same meaning in one will as in another. The present tendency in this country is against absolute rules of construction, and in favor of a careful consideration of the particular language of each will, as well as of its general scope and purpose, in order to determine, in view of the circumstances known to the testator when the will was made, his intention as expressed in it.⁴³ Aside from the general principles to be recognized in the construction of all wills precedents are of little value in construing the language of particular wills.⁴⁴ Rules of construction, excepting when they embody substantive rules of law, are mere aids to the court—a servant and not a master.⁴⁵ A will should not be approached with the mind fixed on the canons of construction. They are merely aids to the court in resolving doubts arising from obscurity in the language of the will.⁴⁶ Recognized rules of construction are not to be overlooked; but they are not technical guides to be followed to a result contrary to the intention of the testator clearly manifested by the will, read as a whole in the light of the surrounding circumstances.⁴⁷ The application of settled rules of construction ought to depend on whether the testator had an intention which he has sought to express in

³⁷ Crocker v. Crocker, 230 Mass. 478, 120 N. E. 110. See § 323.

³⁸ Davis v. Hancock, 95 Minn. 340, 104 N. W. 299.

³⁹ Ann. Cas. 1913E, 1286.

⁴⁰ Brookhouse v. Pray, 92 Minn. 448, 451, 100 N. W. 235; Johrden v. Pond, 126 Minn. 247, 148 N. W. 112. See State v. Willrich, 72 Minn. 165, 168, 75 N. W. 123; Davis v. Hancock, 95 Minn. 340, 104 N. W. 299.

⁴¹ Upham v. Parker, 220 Mass. 454, 107 N. E. 994; Yates v. Shern, 84 Minn. 161, 165, 86 N. W. 1004.

⁴² Ware v. Minot, 202 Mass. 512, 88 N.

E. 1091; Tibbetts v. Tomkinson, 217 Mass. 244, 104 N. W. 562. See § 326.

⁴³ Crapo v. Price, 190 Mass. 317, 76 N. E. 1043; Ware v. Minot, 202 Mass. 512, 88 N. E. 1091. See 30 Harv. L. Rev. 372.

⁴⁴ In re Freeman's Estate (Minn.) 187 N. W. 411; McTigue v. Ettienne. 155 Iowa 450, 136 N. W. 229.

⁴⁵ Brookhouse v. Pray, 92 Minn. 448, 100 N. W. 235.

⁴⁶ In re Bell's Will, 147 Minn. 62, 68, 179 N. W. 650.

⁴⁷ In re Freeman's Estate (Minn.) 187 N. W. 411.

the language used. If it is obvious that he had an intention which he has expressed imperfectly such intention should be sought from the will and the surrounding circumstances and rules of construction should have little weight. On the other hand, if it is obvious, as often happens, that the testator did not have the particular point or contingency in view, in other words, where he had no intention, the settled rules of construction should be applied rigidly.⁴⁸

321. To be construed as a whole—A will is to be construed as a whole and not by giving an arbitrary effect to the presence or absence of particular words or phrases.⁴⁹ The meaning of isolated clauses and paragraphs may be modified by the evident intention deduced from a consideration of the whole document.⁵⁰ Inapt or inaccurate language is to be subordinated to the clear intention of the testator manifested by the will as a whole.⁵¹ A will should be so construed as to give effect to every part of it, when it can be done reasonably and in harmony with the general intention of the testator as disclosed by the will as a whole.⁵² It must be assumed that the testator meant something by each clause.⁵³

322. Will sustained if possible—The provisions of a will should be sustained if it can be done by any reasonable construction of the language used. If a provision is reasonably susceptible of two constructions, one of which will render it valid and the other invalid, the former should be adopted.⁵⁴

323. Unforeseen events—The happening of an event unknown or unforeseen by a testator and unprovided for by him in his will cannot affect the construction of the will.⁵⁵

⁴⁸ Gray, *Nature and Sources of Law*, §§ 700-705; 30 Harv. L. Rev. 372; Robinson v. Martin, 200 N. Y. 159, 93 N. E. 488.

⁴⁹ Johrden v. Pond, 126 Minn. 247, 148 N. W. 112; Long v. Willsey, 132 Minn. 316, 156 N. W. 349; Hutchins v. Wenger, 133 Minn. 188, 158 N. W. 52; In re Bell's Will, 147 Minn. 62, 179 N. W. 650; 30 A. & E. Ency. of Law (2 ed.) 663; 40 Cyc. 1413; 28 R. C. L. 215. See cases under § 320.

⁵⁰ Long v. Willsey, 132 Minn. 316, 156 N. W. 349; Elberg v. Elberg, 132 Minn. 15, 155 N. W. 751; In re Bell's Will, 147 Minn. 62, 179 N. W. 650.

⁵¹ Phillips v. Davies, 92 N. Y. 199; In re Miner, 146 N. Y. 121, 40 N. E. 788; In re Peters' Estate (Wash.) 172 Pac. 870; 30 A. & E. Ency. of Law (2 ed.) 687; 40 Cyc. 1400.

⁵² Landis v. Olds, 9 Minn. 90 (79, 83); Redford v. Redford, 45 Minn. 48, 47 N.

W. 308; Wheaton v. Pope, 91 Minn. 299, 306, 97 N. W. 1046; Hutchins v. Wenger, 133 Minn. 188, 158 N. W. 52. See In re Oertle's Estate, 34 Minn. 173, 24 N. W. 924; Bedell v. Fradenburgh, 65 Minn. 361, 68 N. W. 41; 30 A. & E. Ency. of Law (2 ed.) 664; 40 Cyc. 1413; Woerner, Am. Law of Adm. (2 ed.) § 415.

⁵³ Redford v. Redford, 45 Minn. 48, 47 N. W. 308; Johnson v. Linstrom, 92 Minn. 8, 99 N. W. 212.

⁵⁴ Simpson v. Cook, 24 Minn. 180, 186; Atwater v. Russell, 49 Minn. 22, 52, 51 N. W. 624; Rong v. Haller, 109 Minn. 191, 198, 123 N. W. 471; Hause v. O'Leary, 136 Minn. 126, 161 N. W. 392; Little v. Universalist Convention, 143 Minn. 298, 173 N. W. 659; Clark v. Mack, 161 Mich. 545, 126 N. W. 632; In re Peters' Estate (Wash.) 172 Pac. 870; 30 A. & E. Ency. of Law (2 ed.) 667; 40 Cyc. 1407.

⁵⁵ Sanger v. Bourke, 209 Mass. 481,

324. Mistaken belief as to estate owned—The mistaken belief of a testator as to the nature of the estate which he owned cannot affect the construction. The fact that he supposed that he had only a life estate cannot be shown to affect the validity of a gift of the remainder.⁵⁶

325. Against intestacy—A will should be so construed as to avoid a partial intestacy if the language used will reasonably bear such a construction. The fact of making a will raises a strong presumption against a partial intestacy.⁵⁷ There may be a partial intestacy in spite of the clearly manifested intention of the testator to dispose of all his property, as, for example, where a devisee or legatee is incompetent or a gift is in violation of some rule of law and there is no residuary clause.⁵⁸ A construction against intestacy cannot be adopted if the language used will not reasonably bear such a construction. The presumption against intestacy must yield to the clearly expressed intention of the testator.⁵⁹ In case of conflict between the presumption against partial intestacy and the presumption against disinheritance the former must yield to the latter.⁶⁰

326. Technical words—Technical words will be construed in their usual technical sense unless they were clearly used by the testator in a different or popular sense. Especially is this true where the will was drafted by one familiar with legal terminology.⁶¹ A word having a settled legal meaning should be given that meaning in a will though the testator has not used it with skill and judgment.⁶² A few words and phrases have become so fixed in their meaning by long and unvarying use as to become rules of property and they should be given that meaning in a will unless it would manifestly defeat the intention of the testator.⁶³ There is no inflexible rule for the determination of the

95 N. E. 894; *Springfield Safe Deposit & Trust Co. v. Dwelly*, 219 Mass. 65, 106 N. E. 554; *Anderson v. Bean*, 220 Mass. 360, 363, 107 N. E. 964; *Manke v. Miller*, 220 N. Y. 225, 115 N. E. 462; *Moeller v. Moeller*, 281 Ill. 397, 117 N. E. 1002. See 40 Cyc. 1426.

⁵⁶ *Polsey v. Newton*, 199 Mass. 450, 454, 85 N. E. 574; *Whitman v. Whitney*, 225 Mass. 213, 116 N. E. 893.

⁵⁷ *Atwater v. Russell*, 49 Minn. 22, 51, 51 N. W. 624; *Greenman v. McVey*, 126 Minn. 21, 28, 147 N. W. 812; *Hadcox v. Cody*, 213 N. Y. 570, 108 N. E. 84; *In re Ives' Estate*, 182 Mich. 699, 148 N. W. 727; *Ironside v. Ironside*, 150 Iowa 628, 130 N. W. 414; *McTigue v. Ettienne*, 155 Iowa 450, 136 N. W. 229; *Miller v. Idaho Industrial Institute*, 222 Mass. 188, 110 N. E. 274; 30 A. & E. Ency. of Law (2

ed.) 668; 40 Cyc. 1409; 28 R. C. L. 227; 11 Prob. Rep. Ann. 84.

⁵⁸ *Atwater v. Russell*, 49 Minn. 22, 51, 51 N. W. 624.

⁵⁹ *Barney v. May*, 135 Minn. 299, 160 N. W. 790; *Powell v. Beebe*, 167 Mich. 306, 133 N. W. 8; *Manke v. Miller*, 220 N. Y. 225, 115 N. E. 462.

⁶⁰ *In re Werlich*, 230 N. Y. 516, 130 N. E. 632.

⁶¹ *Baldwin v. Zien*, 117 Minn. 178, 184, 134 N. W. 498; 30 A. & E. Ency. of Law (2 ed.) 671; 40 Cyc. 1398; 28 R. C. L. 223; *Woerner*, Am. Law of Adm. (2 ed.) § 414.

⁶² *Ironside v. Ironside*, 150 Iowa 628, 130 N. W. 414.

⁶³ *Ware v. Minot*, 202 Mass. 512, 88 N. E. 1091; *Tibbetts v. Tomkinson*, 217 Mass. 244, 104 N. E. 562; *Smith v. Bell*,

meaning of words in a will, whether the words are technical or not, and the strict technical meaning of a word will be departed from in order to effectuate the manifest intention of the testator. Especially is this true where the person drawing the will was unfamiliar with the meaning of legal terminology.⁶⁴ The intention of the testator need not be expressed in exact legal terms. Any language from which such intention may be ascertained is sufficient.⁶⁵ A trust may be created without the use of the words "in trust."⁶⁶ The words "in trust" are not necessarily to be taken as creating a technical trust.⁶⁷ The words "possessed" and "seized" are not generally used in a strict technical sense as indicating only a legal estate, but cover any form of beneficial or equitable ownership.⁶⁸ The word "homestead" is not a technical term within the general rule.⁶¹

327. Ordinary non-technical words—Ordinary non-technical words will be construed in their ordinary and popular sense unless they were clearly used by the testator in a different sense.⁶⁹ If words are susceptible of different shades of meaning according to the connection in which they are used they should be given the meaning which the context or circumstances require.⁷⁰

328. Words of direct gift unnecessary—There may be a gift without direct words of grant or gift.⁷¹ The intention of the testator need not be expressed in exact legal terms. Any language from which such intention may be ascertained is sufficient.⁷²

329. Precatory words—Precatory trusts—A devise or bequest may be in the form of an expression of desire or wish if it is clear that the testator used the expression for the purpose of making a gift, but precatory words are not to be construed as a gift unless clearly so intended by the testator. Usually they merely relate to the future conduct of bene-

6 Pet. (U. S.) 68; 30 A. & E. Ency. of Law (2 ed.) 671; 40 Cyc. 1309.

⁶⁴ In re Swenson's Estate, 55 Minn. 300, 310, 56 N. W. 1115; Barney v. May, 135 Minn. 299, 160 N. W. 790; In re Anderson's Estate, 148 Minn. 44, 180 N. W. 1019; Miller v. Idaho Industrial Institute, 222 Mass. 188, 110 N. E. 274; Overhelser v. Lackey, 207 N. Y. 229, 100 N. E. 738; Black v. Jones, 264 Ill. 548, 106 N. E. 462.

⁶⁵ Elberg v. Elberg, 132 Minn. 15, 155 N. W. 751. See, as to informal testamentary language, 41 L. R. A. (N. S.) 39.

⁶⁶ In re Anderson's Estate, 148 Minn. 44, 180 N. W. 1019.

⁶⁷ In re Little's Estate, 143 Minn. 298, 173 N. W. 659; In re Dever's Will (Wis.) 180 N. W. 839.

⁶⁸ Thomson v. Fidelity Trust Co. (Pa.) 110 Atl. 770.

⁶⁹ International Harvester Co. v. Bye, 184 Iowa 1053, 169 N. W. 382.

⁷⁰ Cowles v. Henry, 61 Minn. 459, 63 N. W. 1028; Barney v. May, 135 Minn. 299, 160 N. W. 790; Mullaney v. Monahan, 232 Mass. 279, 122 N. E. 387; 30 A. & E. Ency. of Law (2 ed.) 670; 40 Cyc. 1396; 28 R. C. L. 223; Woerner, Am. Law of Adm. (2 ed.) § 414.

⁷¹ Barney v. May, 135 Minn. 299, 160 N. W. 790.

⁷² Johrden v. Pond, 126 Minn. 247, 148 N. W. 112; Elberg v. Elberg, 132 Minn. 15, 155 N. W. 751.

⁷³ Elberg v. Elberg, 132 Minn. 15, 115 N. W. 751; Hutchins v. Wenger, 133 Minn. 188, 158 N. W. 52.

ficiaries.⁷³ Where the intention of the testator is clear, and to carry out such intention it is necessary to follow precatory words, they will be deemed mandatory and not merely advisory.⁷⁴ A trust will not be raised from precatory language after an absolute gift unless it is very clear from the will as a whole that the testator intended to create a trust. Precatory trusts are not favored. The modern tendency is to disregard the earlier cases.⁷⁵ A will leaving the residue of testator's property to his son, "save and except I desire that he pay out of said property" certain sums to designated persons, held not to create a precatory trust in favor of such persons.⁷⁶

330. Gift by implication—A devise or bequest may be implied but only where there is no reasonable doubt of the intention of the testator to make it. A gift by implication cannot be inferred from silence but must be founded upon expressions in the will. It cannot add to or detract from an express gift. The implication may be founded on two grounds. It may either arise from an elliptical form of expression which involves and implies something else as contemplated by the person using the expression, or the implication may be founded upon the form of gift, or upon a direction to do something which cannot be carried into effect without, of necessity, involving something else in order to give effect to that direction, or something else which is a consequence necessarily resulting from that direction.⁷⁷ Where a devise or bequest is expressly made there is no room for a gift by implication, and, if the language used relates to a prior gift correctly described, and

⁷³ Long v. Willsey, 132 Minn. 316, 156 N. W. 349; Harrison v. Langftt, 158 Iowa 479, 139 N. W. 1076; Buro v. Olson, 165 Wis. 409, 162 N. W. 429; Clark v. Baker, 91 Conn. 663, 101 Atl. 9; Ogilvie v. Wright, 140 Tenn. 114, 203 S. W. 753; Crisp v. Anderson, 204 Mich. 35, 169 N. W. 855; Hollway v. Atherton (Mich.) 171 N. W. 413; 22 A. & E. Ency. of Law (2 ed.) 1182; 30 Id. 671; 40 Cyc. 1405, 1734; 28 R. C. L. 243; Woerner, Am. Law of Adm. (2 ed.) § 415; Ann. Cas. 1917B, 503; 37 L. R. A. (N. S.) 646; 106 Am. St. Rep. 499; 44 Am. Dec. 372.

⁷⁴ Buro v. Olson, 165 Wis. 409, 162 N. W. 429; Moseley v. Perry, 201 Mass. 135, 87 N. W. 606; Mastellar v. Atkinson, 94 Kan. 279, 146 Pac. 367; Porter v. Tracey, 179 Iowa 1295, 162 N. W. 800; Grieves v. Grieves (Md.) 103 Atl. 572; Beakey v. Knutson (Or.) 174 Pac. 1149; Ellison v. Mattison (S. C.) 98 S. E. 840.

⁷⁵ Long v. Willsey, 132 Minn. 316, 156

N. W. 349; Dexter v. Young, 234 Mass. 588, 125 N. E. 862; Clark v. Baker, 91 Conn. 663, 101 Atl. 9; In re Wynea's Estate (S. D.) 187 N. W. 394; 22 A. & E. Ency. of Law (2 ed.) 1167; 40 Cyc. 1734; Bigelow, Wills, 151; Ann. Cas. 1915D, 418; 38 L. R. A. (N. S.) 646; 44 Am. Dec. 372; 106 Am. St. Rep. 499.

⁷⁶ In re Browne's Estate, 175 Cal. 361, 165 Pac. 960.

⁷⁷ Jones v. Gane, 205 Mass. 37, 91 N. E. 129; Hall v. Beebe, 223 Mass. 806, 111 N. E. 899; Bailey v. Bailey, 236 Mass. 244, 128 N. E. 29; Riverside Trust Co. v. Rogers, 89 Conn. 690, 96 Atl. 180; Calloway v. Calloway, 171 Ky. 366, 188 S. W. 410; Eyer v. Williamson, 256 Ill. 540, 100 N. E. 188; Dunn v. Kearney, 288 Ill. 49, 123 N. E. 105; 30 A. & E. Ency. of Law (2 ed.) 697; 40 Cyc. 1390; 28 R. C. L. 209; Bigelow, Wills, 302; 15 L. R. A. (N. S.) 73; 51 Id. 485; L. R. A. 1917A, 1213; Ann. Cas. 1917D, 431; 21 Harv. L. Rev. 451; 26 Id. 382.

does not otherwise express a gift, there can be no gift by implication. A reference to a disposition in an earlier part of a will, which in fact does not appear, may show an intention to make the gift omitted and the gift may be implied by law, but a reference to an earlier disposition partially existing does not indicate an intention to give the part omitted.⁷⁸ An erroneous recital that the testator has by the will given certain property may operate as a gift of the property by implication.⁷⁹ No gift by implication arises from an erroneous recital in reference to a disposition by an instrument other than the will.⁸⁰ The erroneous recital in a will of ownership or an interest of another in property does not operate as a devise or bequest of the property by implication.⁸¹ A gift to a grandchild cannot be implied from a gift to a daughter de-feasible upon the daughter dying without issue.⁸²

331. With reference to rules of law—It is sometimes said that a testator is presumed to know the law and to have drafted his will with reference thereto.⁸³ A testator is not presumed to know the decisions of another state where he owns property.⁸⁴

332. In conformity with statutes of descent and distribution—Heirs favored—Equality among children—Where the meaning of a will is doubtful and its language is reasonably susceptible of a construction in conformity with the statutes of descent and distribution it should be so construed. Heirs at law are favored and they should not be disinherited by a doubtful construction.⁸⁵ An intention to disinherit an heir need not be expressed, but may appear by unavoidable implication.⁸⁶ A construction which tends toward equality among children is favored.⁸⁷ Where a testator follows the language of the statutes of descent and

⁷⁸ *Riverside Trust Co. v. Rogers*, 89 Conn. 690, 96 Atl. 180.

⁷⁹ *Porter v. Union Trust Co.*, 182 Ind. 637, 108 N. E. 117; *Riverside Trust Co. v. Rogers*, 89 Conn. 690, 96 Atl. 180; 30 A. & E. Ency. of Law (2 ed.) 698; 40 Cyc. 1391; Ann. Cas. 1917D, 431.

⁸⁰ *Smith v. Smith*, 113 Md. 495, 77 Atl. 975; *Porter v. Union Trust Co.*, 182 Ind. 637, 108 N. E. 117. See 30 A. & E. Ency. of Law (2 ed.) 698; 40 Cyc. 1391; Ann. Cas. 1917D, 431.

⁸¹ 30 A. & E. Ency. of Law (2 ed.) 698; 40 Cyc. 1391; Ann. Cas. 1917D, 436.

⁸² *In re Allis' Will*, 163 Wis. 452, 157 N. W. 548.

⁸³ *Smith v. Garber*, 286 Ill. 67, 121 N. E. 173; *Munie v. Gruenewald*, 289 Ill. 468, 124 N. E. 605; *In re Flint's Estate* (Cal.) 177 Pac. 451. See *In re Swenson's Estate*, 55 Minn. 300, 56 N. W. 1115; 28 R. C. L. 233.

⁸⁴ *Shannon v. Ryan* (N. J.) 111 Atl. 155.

⁸⁵ *In re Shumway's Estate*, 194 Mich. 245, 160 N. W. 595; *Scott v. Roethlisberger*, 178 Mich. 581, 146 N. W. 307; *Murdock v. Bilderback*, 125 Mich. 45, 83 N. W. 1007; *Anderson v. Wilson*, 155 Iowa 415, 136 N. W. 134; *Ellsworth College v. Carleton*, 178 Iowa 845, 160 N. W. 222; *In re Ehler's Estate*, 155 Wis. 46, 143 N. W. 1050; *Hellman v. Reitz*, 89 Neb. 422, 131 N. W. 909; *Herter v. Herter*, 97 Neb. 260, 149 N. W. 795; *Smith v. Garber*, 286 Ill. 67, 121 N. E. 173; *In re Werlich*, 230 N. Y. 516, 130 N. E. 632; 30 A. & E. Ency. of Law (2 ed.) 668; 40 Cyc. 1412; Ann. Cas. 1912D, 1146; 28 R. C. L. 229.

⁸⁶ *Mullaney v. Monahan*, 230 Mass. 245, 119 N. E. 755.

⁸⁷ *Rivenett v. Bourquin*, 53 Mich. 10, 18 N. W. 537; *In re Hardin*, 164 N. Y.

distribution with the obvious intention of following them in the disposition of his property, the judicial construction of the statutes will be followed in the construction of his will.⁸⁸

333. Near kindred favored—Any reasonable doubt as to the meaning of the language of a will should be resolved in favor of near kindred of the testator as against more remote kindred or strangers to his blood or affections.⁸⁹ A construction is not to be favored which greatly restricts, to the advantage of more remote beneficiaries, provisions apparently designed for the benefit of nearer and more favored objects of the testator's bounty.⁹⁰

334. Repetition of words—Where the same word or phrase is used in different parts of a will in relation to the same subject-matter it is to be construed in the same sense, unless it was obviously used in different senses.⁹¹

335. Disregarding words—Words may be disregarded in order to carry out the manifest intention of the testator.⁹² But words are never to be rejected as meaningless or repugnant, if by any reasonable construction they may be made consistent and significant. Excision is a desperate remedy to be resorted to only when unavoidable.⁹³

336. Supplying words—Where it is clear on the face of a will that the testator has not accurately or clearly expressed his meaning by the words used, words may be supplied by implication to carry out the obvious intention of the testator as manifested by the will as a whole.⁹⁴

S. 1014; *Taylor v. Taylor*, 174 N. C. 537, 94 S. E. 7.

⁸⁸ *Green v. Hussey*, 228 Mass. 537, 117 N. E. 798.

⁸⁹ *In re Oertle's Estate*, 34 Minn. 173, 24 N. W. 924; *Brookhouse v. Pray*, 92 Minn. 448, 100 N. W. 235; *In re Peavey's Estate*, 144 Minn. 208, 175 N. W. 105; *In re Bell's Will*, 147 Minn. 62, 179 N. W. 650; *In re Anderson's Estate*, 148 Minn. 44, 180 N. W. 1019; *In re Werlich*, 230 N. W. 516, 130 N. E. 632; 30 A. & E. Ency. of Law (2 ed.) 668; 40 Cyc. 1412. See *Fox v. Hicks*, 81 Minn. 197, 538 (grandchild preferred to son).

⁹⁰ *Hale v. St. Paul*, 54 Minn. 421, 56 N. W. 63.

⁹¹ *In re Douglas' Estate*, 149 Minn. 276, 183 N. W. 355; *In re Irish's Will*, 89 Vt. 56, 94 Atl. 173; *Roskrow v. Jewell*, 154 Iowa 634, 135 N. W. 3; *Ellsworth College v. Carleton*, 178 Iowa 845, 160 N. W. 222; *Upham v. Parker*, 220 Mass. 454, 107 N. E. 994; *Ames v. Ames* (Mass.) 130 N. E. 681; *Blaine v. Dow*, 111 Me.

480, 89 Atl. 1126; *Taylor v. Taylor*, 174 N. C. 537, 94 S. E. 7; *Grieves v. Grieves* (Md.) 103 Atl. 572; 30 A. & E. Ency. of Law (2 ed.) 671; 40 Cyc. 1402; *Woerner, Am. Law of Adm.* (2 ed.) § 416; *Ann. Cas.* 1914B, 63.

⁹² *In re Ehler's Will*, 155 Wis. 46, 143 N. W. 1050; *Ellis v. Fairbanks*, 132 Mass. 485; *Patch v. White*, 117 U. S. 210; 30 A. & E. Ency. of Law (2 ed.) 688; 40 Cyc. 1400; *Woerner, Am. Law of Adm.* (2 ed.) § 417. See 26 Harv. L. Rev. 212 (striking words out of a will).

⁹³ *In re Buechner*, 226 N. Y. 440, 123 N. E. 741.

⁹⁴ *Wheaton v. Pope*, 91 Minn. 299, 307, 97 N. W. 1046; *Sorenson v. Carey*, 96 Minn. 202, 104 N. W. 958; *Metcalf v. Framingham Parish*, 128 Mass. 370; *Jordan v. Jordan*, 281 Ill. 421, 117 N. E. 1049; *In re Peter's Estate* (Wash.) 172 Pac. 172; 30 A. & E. Ency. of Law (2 ed.) 690; 40 Cyc. 1400; 28 R. C. L. 225; *Woerner, Am. Law of Adm.* (2 ed.) § 417; 9 Prob. Rep. Ann. 543.

Words may be supplied to fill out the full legal name of a society or corporation.⁹⁵ Words may be supplied by implication only where there is no reasonable doubt of the omitted words.⁹⁶ Words may be supplied only in aid of an obvious intention of the testator, and never to devise a new scheme or to make a new will.⁹⁷

337. Transposing words—Words, phrases or sentences may be transposed in order to effectuate the obvious intention of the testator.⁹⁸ A subsequent clause declaring the intention of the testator may be transposed and read in connection with a prior clause disposing of the property.⁹⁹ Words and phrases cannot be transposed for the purpose of creating an intention not clearly expressed by the will as a whole.¹

338. Ejusdem generis—Where certain things are enumerated in a will and a more general description is coupled with the enumeration, the general description is to be construed as covering only things of a like kind with those enumerated, unless a contrary intention is clearly manifested by the will.²

339. Plural and singular pronouns—A plural pronoun may be construed as singular and vice versa to carry out the obvious intention of the testator as expressed in the will as a whole.³

340. Provisos—A proviso will be limited to the immediate sentence or clause to which it is attached unless a contrary intention is clearly manifested by the will.⁴

341. Inconsistent provisions—Repugnancy—Provisions in a will are not to be deemed repugnant unless they are clearly so. Two apparently inconsistent provisions will be reconciled, when possible without doing unreasonable violence to the language used, in order to carry out the clear intention of the testator as manifested by the will as a whole. The first provision will be disturbed no more than is necessary to give effect to the second.⁵ If two provisions are absolutely irreconcilable

⁹⁵ *Coyne v. Davis*, 98 Neb. 763; 154 N. W. 547. See § 343.

⁹⁶ *Turnbull v. Whitmore*, 218 Mass. 210, 105 N. E. 861; *Clarke v. Rathbone*, 221 Mass. 574, 109 N. E. 651; *Smith v. Baltimore Trust Co. (Md.)* 105 Atl. 534; *Jordan v. Jordan*, 281 Ill. 421, 117 N. E. 1049.

⁹⁷ *Nolan v. Nolan*, 154 N. Y. S. 355.

⁹⁸ *Whiting v. Whiting*, 42 Minn. 548, 44 N. W. 1030; *In re Ehler's Will*, 155 Wis. 46, 143 N. W. 1050; *Renwick v. Macomber*, 225 Mass. 380, 114 N. E. 720; *Patch v. White*, 117 U. S. 210; 30 A. & E. Ency. of Law (2 ed.) 693; 40 Cyc. 1401; 28 R. C. L. 225; *Woerner*, Am. Law of Adm. (2 ed.) § 417.

⁹⁹ *Renwick v. Macomber*, 225 Mass. 380, 114 N. E. 720.

¹ *Manke v. Miller*, 220 N. Y. 225, 115 N. E. 462.

² *Barney v. May*, 135 Minn. 299, 160 N. W. 790; *Stender v. Stender*, 181 Mich. 648, 148 N. W. 255; *In re Robinson*, 203 N. Y. 380, 96 N. E. 925; *Dunnell*, Minn. Digest, § 8977; 30 A. & E. Ency. of Law (2 ed.) 671; 40 Cyc. 1529; 28 R. C. L. 224; L. R. A. 1918A, 222; Ann. Cas. 1916C, 1141.

³ *Cruft v. Owen*, 203 U. S. 368.

⁴ *In re Bovier's Estate (Utah)* 172 Pac. 683.

⁵ *Landis v. Olds*, 9 Minn. 90 (79, 83).

the latter must prevail over the former, unless this would defeat the obvious intention of the testator.⁶ The rule that the later of two inconsistent provisions prevails does not apply to inconsistent words in the same sentence or provision.⁷ Where there are separate gifts in separate paragraphs, both expressed in ambiguous language, and it is obvious that the testator evidently intended to make similar gifts, the language of the later paragraph is not controlling simply because it was a later expression of the testator. Both paragraphs should be considered together.⁸ A clause or provision of a will must, if possible, be so construed as to give effect to the intention of the testator. If doubtful or ambiguous words, in their ordinary literal sense, appear to be inconsistent with plain and unambiguous language in the same clause or sentence, such words will be so construed, if reasonably possible, as to render the whole clause or sentence intelligible and consistent.⁹ Where there is inconsistency between general and specific provisions the latter prevail regardless of the order.¹⁰

342. Presumption that testator intends to give his own property—It is to be presumed that the testator intends to give his own land and not that of another. As between two inconsistent descriptions, one of which covers land that he owns, and the other includes land that he does not own, if there is nothing else to determine which is the true one, it must be presumed that he intended the former.¹¹ It is presumed that the testator knew what property he owned at the time of making his will.¹²

343. Description of beneficiaries—Mistake—A gift to a person by a name other than his true name is good, if it is shown that the testator was accustomed to designate the person by such false name. Parol evidence is admissible to show such designation.¹³ A gift to a church, college or society by the name which it is popularly known, or by which the testator was accustomed to designate it, is good, parol evidence being admissible to identify the legatee.¹⁴ A gift to the "widow" of a certain person includes such wife as may survive him unless the context

30 A. & E. Ency. of Law (2 ed.) 685; 40 Cyc. 1416.

⁶ *Landis v. Olds*, 9 Minn. 90 (79, 83); *McTigue v. Ettienne*, 155 Iowa 450; 136 N. W. 229; *In re Ehler's Will*, 155 Wis. 46, 143 N. W. 1050; 30 A. & E. Ency. of Law (2 ed.) 686; 40 Cyc. 1417; 28 R. C. L. 208.

⁷ *In re Creighton's Estate*, 91 Neb. 654, 136 N. W. 1001.

⁸ *Tucker v. Nugent* (Me.) 102 Atl. 307.

⁹ *In re Creighton's Estate*, 91 Neb. 654, 136 N. W. 1001.

¹⁰ *Porter v. Union Trust Co.*, 182 Ind. 637, 108 N. E. 117; *Schlater v. Lee*

(Miss.) 178 So. 700; 30 A. & E. Ency. of Law (2 ed.) 687; 40 Cyc. 1418.

¹¹ *Case v. Young*, 3 Minn. 209 (140); *Butler v. Trustees*, 27 Minn. 355, 7 N. W. 363; *McGowan v. Baldwin*, 46 Minn. 477, 49 N. W. 25; *Wheaton v. Pope*, 91 Minn. 299, 307, 97 N. W. 1046. See *Stevenson v. Stevenson*, 285 Ill. 486, 121 N. E. 202; 28 R. C. L. 233.

¹² *Hause v. O'Leary*, 136 Minn. 126, 161 N. W. 392.

¹³ *Mosely v. Goodman*, 138 Tenn. 1, 195 S. W. 590.

¹⁴ *In re Stuart's Estate*, 184 Iowa 165, 168 N. W. 779.

restricts it to a particular person.¹⁵ A gift to a "wife" or "husband" of a certain person is a sufficient description of a beneficiary and refers to the person who answers that description at the date of the will, unless the context shows an intention to include a wife or husband subsequently taken.¹⁶ One may take as a wife or husband if living as such though not legally married, if such was clearly the intention of the testator. The same rule applies to a widow.¹⁷ The word "parent" does not include stepfather or stepmother unless the will clearly manifests such intention.¹⁸ The word "mother" does not include a stepmother unless the will clearly manifests such intention.¹⁹ The word "father" does not include a stepfather unless the will clearly manifests such intention.²⁰ A devise to "those members of the 'Society of the Most Precious Blood' who are under my control, and subject to my authority, at the time of my death," held void for uncertainty as to the beneficiaries.²¹ Where a bequest is made to one by name or by a sufficient description, and another bequest is made, not repeating the name or description, but referring for the legatee to the other bequest, it is as though the name or description were repeated, and the latter bequest will not fail because the former does, unless it was clearly the intention of the testator to make the latter bequest depend upon the former taking effect.²² Where it unequivocally appears that the testator intended a gift for a certain person, but through inadvertence or mistake another person is named as the donee, the will may be construed as making the gift to the person intended.²³

344. Substitutional gifts—A gift to one "or his heirs" will be construed as a substitutional gift unless the will clearly shows a contrary intention. The same is true of a gift to children "or their heirs."²⁴ A

¹⁵ *Meeker v. Draffen*, 201 N. Y. 205, 94 N. E. 626; *In re Harris*, 136 N. Y. S. 711; *In re Solms' Estate*, 253 Pa. 293, 98 Atl. 598; 30 A. & E. Ency. of Law (2 ed.) 521; 40 Cyc. 1456; 12 Ann. Cas. 756; Ann. Cas. 1912A, 932; 33 L. R. A. (N. S.) 816.

¹⁶ *Meeker v. Draffen*, 201 N. Y. 205, 94 N. E. 626; *Williams v. Alt*, 226 N. Y. 283, 123 N. E. 499; *Doherty v. Russell*, 116 Me. 269, 101 Atl. 305; 30 A. & E. Ency. of Law (2 ed.) 523; 40 Cyc. 1456; 12 Ann. Cas. 756; Ann. Cas. 1912A, 932; 33 L. R. A. (N. S.) 816.

¹⁷ *In re Weymouth*, 165 Wis. 455, 161 N. W. 373; *Pastene v. Bonini*, 166 Mass. 85, 44 N. E. 246; *McDole v. Thurm*, 276 Ill. 200, 114 N. E. 542; 40 Cyc. 1456; 12 Ann. Cas. 756; L. R. A. 1917B, 1153.

¹⁸ Ann. Cas. 1915A, 867.

¹⁹ Ann. Cas. 1914B, 59.

²⁰ Ann. Cas. 1917B, 1118.

²¹ *Society of the Most Precious Blood v. Moll*, 51 Minn. 277, 53 N. W. 648. See note, 37 L. R. A. (N. S.) 993 (general bequest for charity or religion).

²² *Atwater v. Russell*, 49 Minn. 22, 50, 51 N. W. 624.

²³ *Mohr v. Harder*, 103 Neb. 545, 172 N. W. 753; *Siegley v. Simpson*, 73 Wash. 69, 131 Pac. 479. See 47 L. R. A. (N. S.) 514; Ann. Cas. 1915B, 8, 63; 23 R. C. L. 220.

²⁴ *Taylor v. Taylor*, 118 Iowa 407, 92 N. W. 71; *Speer v. Josenhans*, 274 Ill. 237, 113 N. E. 622; *Defrees v. Brydon*, 275 Ill. 530, 114 N. E. 336; 30 A. & E. Ency. of Law (2 ed.) 812; 40 Cyc. 1519; 19 Ann. Cas. 921; Ann. Cas. 1917C, 306; 48 Am. Dec. 557; 12 Prob. Rep. Ann. 559.

gift to one "and his heirs" or "and his descendants" will not be construed as substitutional unless such was clearly the intention of the testator. The words "and his heirs" are normally words of limitation and not of purchase or substitution, and do not prevent a lapse on the death of the devisee or legatee before the testator.²⁵ Where a testator devises land to his wife for life, remainder to his children or the legal representatives of such as are dead, the word "or" should be read as "and."²⁶

345. Description of property—The words "property" and "estate" are very comprehensive and will be construed to cover all forms of property, both real and personal, legal or equitable, unless they were obviously used in a restricted sense by the testator.²⁷ At common law a devise of "real estate" or "lands," or "lands, tenements and hereditaments" does not include leasehold interests for years unless a contrary intention is clearly manifested by the will. Possibly G. S. 1913, § 9412 (9), has changed the common-law rule in this state.²⁸ A devise of "real estate" has been held to include the interest of the testator in a sheriff's certificate on execution sale, the time for redemption not having expired.²⁹ The word "premises" in this connection is very comprehensive.³⁰ The word "effects" standing alone is very broad, but it is usually restricted by the context. Used in connection with "goods, chattels" it ordinarily includes all personal property. The expression "household furniture and effects" covers only household goods. The expression "personal effects" is ordinarily limited to personal property carried about the person or otherwise intimately related to the person. Its meaning may be determined by the rule of ejusdem generis.³¹ A devise of a "house" will carry the land on which the house is built and the curtilage.³² A gift by words of general description is not to be limited by a subsequent attempt at particular description unless a contrary intention is clearly manifested by the will considered as a whole.³³ In

²⁵ *Poehlman v. Leinweber*, 288 Ill. 58, 122 N. E. 834; *Adams v. Jones*, 176 Mass. 185, 57 N. E. 362; *Manning v. Manning*, 229 Mass. 527, 118 N. E. 676; *In re Wells*, 113 N. Y. 396, 21 N. E. 137; *Manke v. Miller*, 220 N. Y. 225, 115 N. E. 462; 30 A. & E. Ency. of Law (2 ed.) 812; 40 Cyc. 1519; 12 Prob. Rep. Ann. 560.

²⁶ *In re Blair's Estate*, 255 Pa. 169, 99 Atl. 471.

²⁷ See *Case v. Young*, 3 Minn. 209 (140); *In re Gotzian's Estate*, 34 Minn. 159, 24 N. W. 920; *McGowan v. Baldwin*, 46 Minn. 477, 49 N. W. 251; *Bedell v. Fradenburgh*, 65 Minn. 361, 68 N. W. 41; *Morgan v. Joslyn*, 91 Minn. 60, 97 N. W. 449; 30 A. & E. Ency. of Law (2 ed.)

716; 40 Cyc. 1525; 28 R. C. L. 237; 3 Ann. Cas. 420.

²⁸ See *Morgan v. Joslyn*, 91 Minn. 60, 97 N. W. 449; *Orchard v. Wright, etc., Co.*, 225 Mo. 414, 125 S. W. 486; 30 A. & E. Ency. of Law (2 ed.) 714; 40 Cyc. 1539; 20 Ann. Cas. 1089.

²⁹ *Morgan v. Joslyn*, 91 Minn. 60, 97 N. W. 449.

³⁰ See Ann. Cas. 1916C, 1192.

³¹ *Barney v. May*, 135 Minn. 299, 160 N. W. 790. See § 366.

³² *Hartford v. Pennsylvania Co. (N. J.)* 103 Atl. 804; 15 A. & E. Ency. of Law (2 ed.) 771; 40 Cyc. 1531; Ann. Cas. 1914B, 1239; 12 A. L. R. 1179.

³³ *Martin v. Smith*, 124 Mass. 111;

a gift of property described as contained in a particular place, as, for example, a house or safety deposit box, the description relates to the time of the death of the testator unless a contrary intention is clearly manifested by the will and includes everything therein at that time answering the description and not otherwise disposed of by the will, including choses in action. Where the property is specifically mentioned and merely described as being in a certain place, and the language of the will does not localize the legacy, the property will pass whether or not it remains in the place.³⁴ The term "personal property" ordinarily includes money but money may be excluded by the rule of *eiusdem generis*.³⁵

346. Mistake in description of property—Parol evidence—Where it clearly appears from the will as a whole, read in the light of the surrounding circumstances, that there is a mistake in the description of property sought to be given, and that certain other property owned by the testator was intended by him instead of the property mistakenly described, the mistake should be disregarded and the will construed as giving the property intended. If the will described the property by reference to the person from whom the testator acquired it, or by its location with reference to well known objects, or by its popular name or by other means, so that the property can be identified with reasonable certainty, a further erroneous description by reference to the government survey may be disregarded. So, where a testator devises "all my lands" a further erroneous description may be disregarded. The property intended to be given must, however, appear with reasonable certainty from the language of the will read in the light of the surrounding circumstances. The identification of the property intended cannot rest wholly on the presumption that the testator intended to give property which he owned, but such presumption is entitled to consideration in connection with the descriptive language of the will. If, upon rejecting the erroneous description, there is no description left from which the property can be identified, nothing will pass.³⁶ A will purported to devise the northeast quarter of a certain section which the testator did

Hacker v. Hacker, 138 N. Y. S. 194. See 40 Cyc. 1528.

³⁴ *Gaff v. Cornwallis*, 219 Mass. 226, 106 N. E. 860; *In re Thompson*, 217 N. Y. 111, 111 N. E. 762; *Lyon v. Safe Deposit, etc. Co.*, 120 Ind. 514, 87 Atl. 1089. See Ann. Cas. 1916C, 1139.

³⁵ Ann. Cas. 1913D, 857.

³⁶ *Butler v. Trustees*, 27 Minn. 355, 7 N. W. 363; *McGovern v. McGovern*, 75 Minn. 314, 77 N. W. 970; *Wheaton v. Pope*, 91 Minn. 290, 97 N. W. 1046;

Patch v. White, 117 U. S. 210; *Stevenson v. Stevenson*, 285 Ill. 486, 121 N. E. 202; *In re Boeck's Will*, 160 Wis. 577, 152 N. W. 155; *Alford v. Bennett*, 279 Ill. 375, 117 N. E. 89; *Pemberton v. Perrin*, 94 Neb. 718, 144 N. W. 164; *In re Peters' Estate* (Wash.) 172 Pac. 870; 30 A. & E. Ency. of Law (2 ed.) 683; 40 Cyc. 1559; *Wigmore, Ev.* § 2477; 6 L. R. A. (N. S.) 942; L. R. A. 1914E, 1008; Ann. Cas. 1915B, 37; 10 Prob. Rep. Ann. 157; 33 Harv. L. Rev. 560; 28 R. C. L. 279.

not own. He owned the southeast quarter of the section and owned no other land. Held, that the mistake was fatal on the ground that if the false description were rejected as surplusage there was no description whatever left by which the land could be identified.³⁷

347. Will speaks as of what date—It is the general rule that a will speaks as of the date of the death of the testator, but this rule is not an unyielding one, especially when by a change of statute the words would have a different meaning if used in a will executed under the new statute. The clearly expressed intention of the testator controls.³⁸ When a testator refers to an actually existing state of things, as by the use of the word "now" his language is referable to the date of the will, and not to the date of his death.³⁹ An action or proceeding involving the validity of a will must be determined from the same viewpoint as if it had been brought at the time of the death of the testator; for its validity depends, not on what has happened since the death of the testator, but on what might have happened.⁴⁰ As a general rule words descriptive of the objects of a gift refer to the date of the death of the testator, and not to the date of execution of the will, unless a contrary intention is clearly manifested by the will.⁴¹ A will provided for a distribution of an estate to the children "after my death." This was construed as fixing the date of the death of the testator as the time when the children should come into possession of their legacies.⁴²

348. Same—Gifts to members of class—Time of ascertaining members—A gift to a class is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite propor-

³⁷ *McGovern v. McGovern*, 75 Minn. 314, 77 N. W. 970. See *In re Kahoutek's Estate*, 39 N. D. 215, 166 N. W. 816; *Stevenson v. Stevenson*, 285 Ill. 486, 121 N. E. 202; *Rivard v. Rivard*, 285 Ill. 564, 121 N. E. 212; *Wilmes v. Tiernay* (Iowa) 174 N. W. 271; *Pring v. Swarm*, 176 Iowa 153, 157 N. W. 734; *Pember-ton v. Perrin*, 94 Neb. 718, 144 N. W. 164; 6 L. R. A. (N. S.) 942; L. R. A. 1915E, 1008; Ann. Cas. 1915B, 37.

³⁸ *In re Swenson's Estate*, 55 Minn. 300, 56 N. W. 1115; *Johnson v. Johnson*, 32 Minn. 513, 21 N. W. 725; *Simpson v. Cook*, 24 Minn. 180; *Johnson v. Linstrom*, 92 Minn. 8, 99 N. W. 212; *Rong v. Haller*, 109 Minn. 191, 123 N. W. 471; *Elberg v. Elberg*, 132 Minn. 15, 155 N. W. 751; *Barney v. May*, 135 Minn. 299, 160 N. W. 790; *Robinson v. Thom-son*, 137 Minn. 446, 163 N. W. 786; *In re*

Peavey's Estate, 144 Minn. 208, 175 N. W. 105; *In re Bell's Will*, 147 Minn. 62, 179 N. W. 650; *In re Freeman's Estate* (Minn.) 187 N. W. 411; *In re Thompson*, 217 N. Y. 111, 111 N. E. 162; *Upham v. Parker*, 220 Mass. 454, 107 N. E. 994; 30 A. & E. Ency. of Law (2 ed.) 705; 40 Cyc. 1424; 28 R. C. L. 234; *Woerner*, Am. Law of Adm. (2 ed.) § 420.

³⁹ *Johnson v. Johnson*, 32 Minn. 513, 515, 21 N. W. 725. See *Case v. Young*, 3 Minn. 209 (140).

⁴⁰ *Rong v. Haller*, 109 Minn. 191, 123 N. W. 471.

⁴¹ *Yates v. Shern*, 84 Minn. 161, 86 N. W. 1004; *Kottmann v. Gazett*, 66 Minn. 88, 68 N. W. 732; *Savella v. Erickson*, 138 Minn. 93, 163 N. W. 1029. See §§ 348-350.

⁴² *Elberg v. Elberg*, 132 Minn. 15, 155 N. W. 751.

tions, the share of each being dependent for its amount upon the ultimate number of persons.⁴³ It is the general rule that under an immediate gift to a fluctuating class of persons without naming them, as, for example, to children, grandchildren, heirs, relatives, descendants or next of kin of testator, only those are entitled to take who answer the description at the death of the testator, unless a contrary intention is clearly manifested by the will. Those who were living at the date of the will but who died before the testator are excluded and so are their heirs, except as provided by G. S. 1913, § 7262.⁴⁴ This rule will not be applied where the will clearly manifests a contrary intention. Especially is this true where there has been a change of statute since the execution of the will affecting the meaning of the words used therein.⁴⁵ Ordinarily the words "heirs," "heirs at law," "next of kin," refer to those who were or will be such at the death of the testator or other ancestor and not to some later period. This is the natural import of the words. But where it is evident that the heirs or next of kin are to be ascertained as of a later period, due effect will be given to the intention thus expressed, if it can be done consistently with the rules of law. The question in each case is primarily one of intention. And the rules which have been laid down and the cases which have been decided are useful only in so far as they aid the court in ascertaining, and, if possible, in giving effect to, the intention in the particular case before it. The general rule is not a rule of substantive law but an aid in construction.⁴⁶ It is the general rule that where a gift is to a class, and the right of enjoyment is postponed beyond the time that it vests in right and until

⁴³ *Volunteers of America v. Peirce*, 287 Ill. 406, 108 N. E. 318; *In re King's Estate*, 200 N. Y. 189, 93 N. E. 484; *Peck v. Peck*, 76 Wash. 548, 137 Pac. 137; *Denton v. Schnelder*, 80 Wash. 506, 142 Pac. 9; *Wessborg v. Merrill*, 195 Mich. 566, 162 N. W. 102; *Prichard v. Prichard* (W. Va.) 98 S. E. 877; 30 A. & E. Ency. of Law (2 ed.) 718; 40 Cyc. 1473; 28 R. C. L. 260; 21 Ann. Cas. 415; 34 L. R. A. (N. S.) 945; L. R. A. 1918B, 234; 73 Am. St. Rep. 413.

⁴⁴ *Yates v. Shern*, 84 Minn. 161, 86 N. W. 1004; *Savela v. Erickson*, 138 Minn. 93, 163 N. W. 1029; *Clark v. Mack*, 161 Mich. 545, 126 N. W. 632; *Boston Safe Deposit etc. Co. v. Parker*, 197 Mass. 70, 83 N. W. 307; *Upham v. Parker*, 220 Mass. 454, 107 N. E. 994; *Way v. Gelss*, 280 Ill. 152, 117 N. E. 443; 30 A. & E. Ency. of Law (2 ed.) 719; 40 Cyc. 1475; 28 R. C. L. 263; *Woerner*, Am. Law of Adm. (2 ed.) § 422

⁴⁵ *In re Swenson's Estate*, 55 Minn. 300, 56 N. W. 1115; *In re Bell's Will*, 147 Minn. 62, 179 N. W. 650. See *Johnson v. Johnson*, 32 Minn. 513, 21 N. W. 725; *Carr v. New England Anti-Vivisection Soc.*, 234 Mass. 217, 125 N. E. 159.

⁴⁶ *Yates v. Shern*, 84 Minn. 161, 86 N. W. 1004; *Boston Safe Deposit etc. Co. v. Parker*, 197 Mass. 70, 83 N. E. 307; *Heard v. Read*, 169 Mass. 216, 47 N. E. 778; *Welch v. Blanchard*, 208 Mass. 523, 94 N. E. 811; *Welch v. Howard*, 227 Mass. 242, 116 N. E. 492; *State Street Trust Co. v. Sampson*, 228 Mass. 411, 117 N. E. 832; *Carr v. New England Anti-Vivisection Soc. (Mass.)* 125 N. E. 159; *Hill v. Hill*, 90 Neb. 43, 132 N. W. 738; *Beardsley v. Fairchild*, 87 Conn. 359, 87 Atl. 737; *Wilde v. Bell*, 87 Conn. 359, 87 Atl. 8; 30 A. & E. Ency. of Law (2 ed.) 726; 40 Cyc. 1481; 33 L. R. A. (N. S.) 1; 34 Harv. L. Rev. 528.

the termination of a precedent estate, the members entitled to take are determined as of the time when the gift to the class vests in enjoyment. There are two important exceptions to this rule. It does not apply to a gift over to the heirs of the testator and it does not apply where the limitation over is to children either of the testator or the first taker. It is only a rule of construction and yields readily to a contrary intention manifested by the will.⁴⁷ Where final division and distribution is to be made among a class, the benefits of the will must, as a general rule, be confined to those persons who come within the appropriate category at the date when the distribution is directed to be made, unless a contrary intention is clearly manifested by the will. This rule does not apply, however, where the postponement is to let in some other interest, or to permit the enjoyment of an intermediate life estate in another.⁴⁸ Where a gift to a class is contingent, the members constituting the class are not determined as of any time earlier than the vesting of the estate.⁴⁹ A member of a class to whom a legacy is given, without specifying individual names, is not excluded by the fact that he has been made the recipient of an individual legacy in another part of the will.⁵⁰ A gift to a class, not naming them, and to their "heirs," as for example, to "my children and their heirs," or "to my mother and sisters and their heirs," will include heirs of a child or brother or sister who was dead at the time of the execution of the will.⁵¹ Where there is an immediate gift to a class, as grandchildren, and they are specifically named, a grandchild born after the making of the will and not named therein does not take under the will.⁵² An immediate gift to children of the testator, that is, one to take effect in possession immediately on the death of the testator, includes those living at the death of the testator, to the exclusion of those born afterwards and the representatives of those dying before the testator, unless a contrary intention is clearly manifested by the will. This common-law rule is affected by statute in this state.⁵³

⁴⁷ *Savela v. Erickson*, 138 Minn. 93, 163 N. W. 1029; *Norton v. Mortenson*, 88 Conn. 28, 89 Atl. 882; *Baker v. Hibbs*, 167 Iowa 174; 149 N. W. 85; *Sleeper v. Killion*, 182 Iowa 245, 164 N. W. 241; *In re Leonard*, 218 N. Y. 513, 113 N. E. 491; *In re Pullis*, 220 N. Y. 196, 115 N. E. 516; 30 A. & E. Ency. of Law (2 ed.) 720; 40 Cyc. 1477. See as to right of representative of predeceased child to share in remainder given to children as a class, 2 Ann. Cas. 645, 73 Am. St. Rep. 405; Ann. Cas. 1917B, 1245.

⁴⁸ *In re Bell's Will*, 147 Minn. 62, 179 N. W. 650; *In re Pullis*, 220 N. Y. 196, 115 N. E. 516; *Fulton Trust Co. v. Phillips*, 218 N. Y. 573, 113 N. E. 558; *In re*

McQueen's Will, 163 N. Y. S. 287; *Sleeper v. Killion*, 182 Iowa 245, 164 N. W. 241; *Cashman v. Ross*, 155 Wis. 558, 145 N. W. 199.

⁴⁹ *Savela v. Erickson*, 138 Minn. 93, 163 N. W. 1029.

⁵⁰ *Willis v. Richardson*, 212 Mass. 31, 98 N. E. 609.

⁵¹ *Bond's Appeal*, 31 Conn. 183; *Hunters v. Place*, 137 Mass. 409; *Richey v. Johnson*, 30 Ohio St. 288; *Baldwin v. Tucker*, 61 N. J. Eq. 412. See *Anderson v. Wilson*, 155 Iowa 415, 130 N. W. 1070.

⁵² *Hatt v. Green*, 180 Mich. 383, 147 N. W. 593.

⁵³ 30 A. & E. Ency. of Law (2 ed.) 720; 40 Cyc. 1479. See §§ 358, 444.

So an immediate gift to children of any other named ancestor includes those living at the death of the testator, to the exclusion of those born afterwards and the representatives of those dying before the testator, unless a contrary intention is clearly manifested by the will.⁵⁴ In a gift by way of remainder to children of the testator or life tenant the children living at the death of the testator take vested interests, subject to open and let in children born afterwards and before the time for distribution. This is only a rule of construction and yields to a contrary intention manifested by the will.⁵⁵ A gift to one for life with remainder to his children "at his decease" held to include all his children living at the death of the testator. The words "at his death" were held to refer to the time of payment or possession and not to postpone the moment when the gift should operate.⁵⁶ A gift to testator's heirs after the death of a life tenant is a gift to those who are his heirs at the time of his death, unless an intention to make it to those who are his heirs at the time of the death of the life tenant is clearly manifested by the will. This is an exception to the general rule governing postponed gifts. Various reasons for it have been given, such as the leaning of the law toward vested rather than contingent remainders, and, more recently, the fact that heirs at law by the very meaning of the words are usually those persons who inherit property immediately on the death of the owner, if he dies intestate. The same rule applies to gifts to next of kin or other relatives of the testator.⁵⁷ The foregoing rule applies though the life tenant is an heir or next of kin.⁵⁸ A gift over to "heirs" or "next of kin" of a life tenant will be construed as referring to those who are such at the time of the death of the life tenant unless a different

⁵⁴ *Davis v. Sanders*, 123 Ga. 177, 51 S. E. 298 (gift to A and her children—issue of child of A dying before testator excluded); *Moore v. Ennis*, 10 Del. Ch. 170, 87 Atl. 1009 (gift to son of testator and his children—children born after death of testator excluded—rule otherwise where gift is not immediate); *Langmaid v. Hurd*, 64 N. H. 526, 15 Atl. 136 (children of legatee or devisee born after death of testator excluded); *Pierce v. Knight*, 182 Mass. 72, 64 N. E. 692 (id.); *Carter v. Long*, 181 Mo. 701, 81 S. W. 162 (id.); 30 A. & E. Ency. of Law (2 ed.) 720; 40 Cyc. 1470; *Bigelow, Wills*, 284.

⁵⁵ *Savelle v. Erickson*, 138 Minn. 93, 163 N. W. 1029; *Norton v. Mortenson*, 88 Conn. 28, 89 Atl. 882; *Lombard v. Willis*, 147 Mass. 13, 16 N. E. 737; *Way v. Geiss*, 280 Ill. 152, 117 N. E. 443; *Duncan v. De Yampert*, 132 Ala. 528, 62

So. 673; *Sleeper v. Killion*, 182 Iowa 245, 164 N. W. 241; 30 A. & E. Ency. of Law (2 ed.) 721; 40 Cyc. 1480; *Bigelow, Wills*, 285.

⁵⁶ *Lombard v. Willis*, 147 Mass. 13, 16 N. E. 737.

⁵⁷ *Boston Safe Deposit & Trust Co. v. Parker*, 197 Mass. 70, 83 N. E. 307; *White v. Underwood*, 215 Mass. 299, 102 N. E. 426; *Blume v. Kimball*, 222 Mass. 412, 110 N. E. 1036; *Wallace v. Diehl*, 202 N. Y. 156, 95 N. E. 646; *Henkins v. Henkins*, 287 Ill. 62, 122 N. E. 88; *People v. Camp*, 286 Ill. 511, 122 N. E. 43; *Clark v. Mack*, 161 Mich. 545, 126 N. W. 632; *Putbrees v. James*, 162 Iowa 618, 144 N. W. 607; *Allen v. Almy*, 87 Conn. 517, 89 Atl. 205; 30 A. & E. Ency. of Law (2 ed.) 726; 40 Cyc. 1481, 1677; 33 L. R. A. (N. S.) 1; *Ann. Cas.* 1917A, 859.

⁵⁸ See 35 Harv. L. Rev. 890; 13 A. L. R. 616.

intention is plainly manifested by the will.⁵⁹ A gift over to heirs on the termination of a trust held applicable to those who were heirs at the limitation of the trust.⁶⁰

349. Same—Gifts to survivors—Words of survivorship, as in gifts to “survivors” or persons surviving another, generally refer to the date of the death of the testator in the case of immediate gifts, and to the date of the death of the life tenant or the date of distribution in the case of gifts in remainder and other postponed gifts. There are some cases holding that the date of the death of the testator governs even in case of postponed gifts, but they are contrary to the weight of authority. Rules of construction in this connection yield readily to a contrary intention manifested by the will.⁶¹ Under a gift to a wife of the testator for life, with a provision for a distribution of the property equally among his children at her death, without naming the children, only children living at the death of the wife take. A child dying before the wife does not take, nor do the heirs of such child.⁶² Where a testator gave land to his wife for life and at her death directed that it should be sold and the proceeds divided between certain children and “the living heirs of the body” of a deceased son, the remainder to the children of the son was contingent and not vested, and where they died in the widow’s lifetime, the gift failed, and their share did not pass to their mother as their heir at law, as the testator by the term “living heirs” manifestly meant heirs living at the time of the widow’s death.⁶³ A share having once gone over under a clause of survivorship vests absolutely in the survivor, and such accrued share is no longer subject to the original limitations, unless a contrary intention is clearly manifested by the will.⁶⁴ A testator may provide that if the order of death between himself and a beneficiary is unknown the testator shall be deemed to have died first.⁶⁵

⁵⁹ *Gardner v. Skinner*, 195 Mass. 164, 80 N. E. 825; *Walcott v. Robinson*, 214 Mass. 172, 100 N. E. 1109; *Upham v. Parker*, 220 Mass. 454, 107 N. E. 994; *Menard v. Campbell*, 180 Mich. 583, 147 N. W. 556; 30 A. & E. Ency. of Law (2 ed.) 726; 40 Cyc. 1482.

⁶⁰ *In re Irish's Estate*, 89 Vt. 56, 94 Atl. 173. See *Simes v. Ward* (N. H.) 103 Atl. 310.

⁶¹ *Jones v. Miller*, 284 Ill. 348, 119 N. E. 324; *Taylor v. Taylor*, 174 N. C. 537, 94 S. E. 7; *Trenton Trust & Safe Deposit Co. v. Robinson*, 83 N. J. Eq. 226, 89 Atl. 751; *Dexter v. Attorney General*, 224 Mass. 215, 112 N. E. 946; *Smith v. Carroll*, 286 Ill. 137, 121 N. E. 254; *Prichard v. Prichard* (W. Va.) 98 S. E. 877; *In re Buechner*, 226 N. Y. 440, 123 N. E. 741; 28 A. & E. Ency. of Law (2

ed.) 556; 30 Id. 808-811; 40 Cyc. 1511; 34 Harv. L. Rev. 526; 14 Ann. Cas. 706. See *Savelle v. Erickson*, 138 Minn. 93, 163 N. W. 1029; *Cottrell v. Mathews*, 120 Va. 847, 92 S. E. 808.

⁶² *Cashman v. Ross*, 155 Wis. 558, 145 N. W. 199.

⁶³ *Baker v. Hibbs*, 167 Iowa 174, 149 N. W. 85.

⁶⁴ *Marshall v. Safe Deposit Co.*, 101 Md. 1, 60 Atl. 476; *Boggs v. Boggs*, 69 N. J. Eq. 497, 60 Atl. 1114; *Robertson v. Andrews*, 175 N. C. 492, 95 S. E. 892; 30 A. & E. Ency. of Law (2 ed.) 810; 40 Cyc. 1513.

⁶⁵ *Smith v. Brown*, 222 N. Y. 222, 118 N. E. 611. See as to the presumption of survivorship in a common disaster, 14 Ann. Cas. 716; Ann. Cas. 1913A, 871.

350. Same—Death of beneficiary—An immediate gift to one with a provision that if he dies the gift shall pass to another refers to death within the lifetime of the testator, unless a contrary intention is apparent from other provisions of the will.⁶⁶ The rule is somewhat technical and where the gift over is not dependent upon the death simply, but upon death under circumstances that may or may not take place, as for example, upon death under age or without issue, the gift will take effect upon a death under the circumstances indicated whether it occurs before or after the death of the testator. There is great conflict of authority upon this point.⁶⁷ Where the gift is to take effect after a prior estate or at a time appointed the death referred to generally means one occurring during the period of the intervening estate or time appointed, whether before or after the death of the testator.⁶⁸

351. Taking per capita or per stirpes—Expressions of equality such as "equally," or "in equal shares," or "share and share alike," generally indicate a per capita distribution, but the context may show a different intention.⁶⁹ As a general rule beneficiaries take per stirpes only when they stand in unequal degrees of relationship to the testator or other ancestor, and are of different classes, but when they are of equal degree of relationship and of the same class they take per capita.⁷⁰ When the members of a class to whom a gift is made in equal portions are individually named they take per capita unless a contrary intention is clearly manifested by the will.⁷¹ In the case of a gift to a class, where the proportionate share of each member is not determined by the will, the dis-

⁶⁶ *In re Owen's Will*, 164 Wis. 260, 159 N. W. 906; *In re Willit's Estate*, 88 Neb. 805, 130 N. W. 757; *Whitney v. Whitney*, 45 N. H. 311; *Fowler v. Ingersoll*, 127 N. Y. 472, 28 N. E. 471; *Melns v. Pease*, 208 Mass. 478, 94 N. E. 845; *Britton v. Thornton*, 112 U. S. 526; *Butler v. Flint*, 91 Conn. 630, 101 Atl. 19; 30 A. & E. Ency. of Law (2 ed.) 708; 40 Cyc. 1499, 1504; *Woerner, Am. Law of Adm.* (2 ed.) § 439; 25 Harv. L. Rev. 572.

⁶⁷ *In re Peavey's Estate*, 144 Minn. 208, 175 N. W. 105; *In re Willit's Estate*, 88 Neb. 805, 130 N. W. 757; *Lachen-Myer v. Gehlbach*, 266 Ill. 11, 107 N. E. 202; *Morris v. Phillips*, 287 Ill. 633, 122 N. E. 831; *Briggs v. Hopkins* (Ohio) 132 N. E. 843; *Quilliam v. Union Trust Co. (Ind.)* 131 N. E. 428; *Brown v. Gardner*, 233 N. Y. 261, 135 N. E. 325; 30 A. & E. Ency. of Law (2 ed.) 709; 40 Cyc. 1504; *Woerner, Am. Law of Adm.* (2 ed.) § 439; 34 Harv. L. Rev. 527; 25 L. R. A. (N. S.) 1045. See, *contra*, *Blain v. Dean*,

160 Iowa 708, 142 N. W. 418; *Lovass v. Olson*, 92 Wis. 616, 67 N. W. 605; *Eggleston v. Swartz*, 145 Wis. 106, 129 N. W. 48.

⁶⁸ *McLean v. McLean*, 207 N. Y. 365, 101 N. E. 178; 30 A. & E. Ency. of Law (2 ed.) 709; 40 Cyc. 1500. See 25 Harv. L. Rev. 572.

⁶⁹ *In re Farmers' Loan & Trust Co.*, 213 N. Y. 168, 107 N. E. 340; *Ramsey v. Stephenson*, 34 Or. 408, 56 Pac. 520; 30 A. & E. Ency. of Law (2 ed.) 731; 40 Cyc. 1490; 16 A. L. R. 22, 37; 28 R. C. L. 267.

⁷⁰ *Van Gallow v. Brandt*, 168 Mich. 642, 134 N. W. 1018; 30 A. & E. Ency. of Law (2 ed.) 727; 40 Cyc. 1493; *Ann. Cas.* 1916C, 411; 16 A. L. R. 15, 96.

⁷¹ *Hardy v. Roach*, 190 Mass. 223, 76 N. E. 720; *Pennsylvania Co. v. Riley* (N. J. Eq.) 104 Atl. 225; 30 A. & E. Ency. of Law (2 ed.) 726; 40 Cyc. 1491; *Ann. Cas.* 1916C, 411; 16 A. L. R. 58.

tribution will ordinarily be per capita.⁷² Under a gift to "heirs at law," "legal heirs," "issue," or "relatives" of the testator or other ancestor the beneficiaries take per stirpes unless a contrary intention is clearly manifested by the will.⁷³ This rule may apply even though the will contains expressions of equality such as "equally," "in equal shares," or "share and share alike." Terms of equality in such cases may be construed to mean such equality as the statutes of descent and distribution recognize, that is, equality between different members of the same degree of relationship.⁷⁴ Where there is a gift over to the "issue," "heirs," etc., of a beneficiary, in Massachusetts the descendants take per stirpes, unless a contrary intention is clearly manifested by the will. In New York they take per capita, unless a contrary intention is manifested by the will, but a very faint glimpse of a contrary intention is sufficient.⁷⁵ Under a gift to "children and grandchildren," or to A, and the children of B, or to the children of several persons, whether it be to the children of A and B, or to the children of A and the children of B, or to A and B and their children, or to a class and their children, all take per capita, unless a contrary intention is clearly manifested by the will.⁷⁶ Under a gift to the named children of the testator and to the unnamed children of a deceased child the grandchildren will take per stirpes unless the will shows a contrary intention.⁷⁷ Where the gift to children is substitutional, as a gift to A, and B, "or" their children, the children take per

⁷² *Hoadley v. Beardsley*, 89 Conn. 270, 93 Atl. 535. See 16 A. L. R. 20.

⁷³ *Allen v. Boardman*, 193 Mass. 284, 79 N. E. 260; *Thompson v. Thornton*, 197 Mass. 273, 83 N. E. 880; *McClench v. Waldron*, 204 Mass. 554, 91 N. E. 126; *Branch v. DeWolf*, 38 R. I. 395, 95 Atl. 857; *McLean v. Williams*, 116 Ga. 257, 42 S. E. 485; *Johnson v. Bodine*, 103 Iowa 594, 79 N. W. 348; *Eyer v. Beck*, 70 Mich. 179, 38 N. W. 20; *Barker v. Barker*, 158 N. Y. S. 413; In re *Barker*, 230 N. Y. 364, 130 N. E. 579; *Rhode Island Hospital Trust Co. v. Bridgham*, 42 R. I. 161, 106 Atl. 149; *Tucker v. Nugent*, 117 Me. 10, 102 Atl. 307; 30 A. & E. Ency. of Law (2 ed.) 730; 40 Cyc. 1492; 16 A. L. R. 33. See for a contrary intention expressed in the will, *Parker v. Foxworthy*, 187 Iowa 649, 149 N. W. 879; *Van Gallow v. Brandt*, 168 Mich. 642, 134 N. W. 1018; 2 A. L. R. 963.

⁷⁴ *Thompson v. Thornton*, 197 Mass. 273, 83 N. E. 880; *McClench v. Waldron*, 204 Mass. 554, 91 N. E. 126; In re *Farmers Loan & Trust Co.*, 213 N. Y. 168, 107

N. E. 340; *Tucker v. Nugent*, 117 Me. 10, 102 Atl. 307; 30 A. & E. Ency. of Law (2 ed.) 732; 40 Cyc. 1492; Ann. Cas. 1916C, 411; 16 A. L. R. 25, 36.

⁷⁵ *Jackson v. Jackson*, 153 Mass. 374, 26 N. E. 1112; *Coates v. Burton*, 191 Mass. 180, 77 N. E. 311 ("to her lawful issue share and share alike"); In re *Farmers Loan & Trust Co.*, 213 N. Y. 168, 107 N. E. 340; In re *Farmers Loan & Trust Co.*, 231 N. Y. 41, 131 N. E. 562; 16 Col. L. Rev. 147; 2 A. L. R. 963.

⁷⁶ *McIntire v. McIntire*, 192 U. S. 116; *Hoadley v. Beardsley*, 89 Conn. 270, 93 Atl. 535; *Neil v. Stuart*, 102 Kan. 242, 169 Pac. 138; *Leslie v. Wilder*, 228 Mass. 343, 117 N. E. 342; In re *May's Estate*, 197 Mo. App. 555, 196 S. W. 1039; *Bailey v. Orange Memorial Hospital* (N. J. Eq.) 102 Atl. 7; 30 A. & E. Ency. of Law (2 ed.) 727; 40 Cyc. 1495; *Woerner*, Am. Law of Adm. (2 ed.) § 422; 25 Harv. L. Rev. 572; Ann. Cas. 1916C, 411; 16 A. L. R. 83.

⁷⁷ *Dollander v. Dhaemers*, 297 Ill. 274, 130 N. E. 705.

stirpes.⁷⁸ A gift to "each" of the persons of a designated class is a gift to them individually and they take per capita unless a contrary intention is clearly manifested by the will.⁷⁹ Where testatrix devised, after the death of her two named children and the execution of a special trust to a son, that all the remainder of her estate should be divided between those of her grandchildren as should then be living and the issue of each of the grandchildren as shall have died and left issue then surviving, the intention was that final distribution of the estate be made per capita.⁸¹

352. Parol evidence in aid of construction—In general—In cases involving the construction of wills the term parol or extrinsic evidence is used to apply to three classes of cases which it is important to discriminate. First, it is applied to evidence of the circumstances surrounding the testator at the time of the execution of the will. Second, it is applied to declarations of the testator not directly expressing his testamentary intentions but indicating his feelings toward his family or other possible beneficiaries, or showing what property he possessed or his relation to it, or its situation or nature, or showing how he customarily named or described persons or things. Third, it is applied to declarations of the testator, including his instructions to the person preparing the will, directly expressing his testamentary intentions. Unfortunately the reports do not always show the nature of the evidence admitted or excluded. Often courts simply hold that "parol evidence" was admissible or inadmissible, without stating what kind of parol evidence. Much confusion and uncertainty result from this loose use of the term. Parol evidence in the sense of the declarations of the testator directly expressing his testamentary intentions is never admissible in aid of construction except in cases of equivocation. Parol evidence in the other senses of the term is always admissible when relevant and material.⁸⁰

353. Same—Surrounding circumstances—The circumstances surrounding the testator at the time of the will—in other words, his environment—may be considered by the court in aid of construction. The court may place itself, so far as possible, in the position of the testator, with a view of looking at things from his standpoint. To this end parol evidence of the surrounding circumstances is admissible.⁸¹ The language

⁷⁸ 30 A. & E. Ency. of Law (2 ed.) 729; 40 Cyc. 1495; 16 A. L. R. 22.

⁷⁹ *Clafin v. Tilton*, 141 Mass. 343, 5 N. E. 649; *In re Turner*, 208 N. Y. 261, 101 N. E. 905. See Ann. Cas. 1914D, 245. See 16 A. L. R. 28.

⁸⁰ *Granger v. Duryea* (Mich.) 188 N. W. 372.

⁸⁰ See §§ 353-355.

⁸¹ *Case v. Young*, 3 Minn. 209 (140); *Sherman v. Lewis*, 44 Minn. 107, 46 N. W. 318; *Atwater v. Russell*, 49 Minn.

22, 55, 51 N. W. 624; *In re Swenson's Estate*, 55 Minn. 300, 309, 56 N. W. 1115; *Yates v. Shern*, 84 Minn. 161, 165, 86 N. W. 1004; *Mingo v. Huntington*, 92 Minn. 13, 15, 99 N. W. 45; *Sorenson v. Carey*, 96 Minn. 202, 104 N. W. 958; *Miller v. Klossner*, 135 Minn. 377, 160 N. W. 1025; *In re Bell's Will*, 147 Minn. 62, 179 N. W. 650; *Patch v. White*, 117 U. S. 210; *Dunnell*, Minn. Digest and Supplements, § 3400; 30 A. & E. Ency. of Law (2 ed.) 676; 40 Cyc. 1392; 28 R. C. L. 270;

used by the testator must be read in the light of the facts existing and known to him when the will was executed.⁸² Some reference to matters extrinsic to the will is inevitable. Words are symbols and we must compare them with things, persons and events.⁸³ While the surrounding circumstances may be considered in aid of construction the construction adopted must be such as the language used will reasonably bear.⁸⁴ If the language used is free from uncertainty the court may refuse to consider parol evidence of the surrounding circumstances.⁸⁵ The surrounding circumstances include the property which the testator owned at the time of making the will, including its location, extent, character or condition, and his relation to it. In case of uncertainty it is always permissible to identify or locate a devise or bequest by means of parol evidence of such circumstances. To admit such evidence it is not necessary that the ambiguity should be latent. It may be admitted though the will is unambiguous on its face.⁸⁶ The surrounding circumstances include the family, relations, friends and other possible beneficiaries of the testator, and his knowledge, relations and feelings—his state of mind—in respect to them. It is always permissible in case of uncertainty to identify legatees or devisees by parol evidence of such circumstances. It is not necessary that the ambiguity should be latent to admit such evidence.⁸⁷ The fact that a will is made in anticipation of the early death of the testator is a circumstance that may be considered.⁸⁸ The law under which a will was made is one of the surrounding circumstances which it is proper to consider.⁸¹

354. Same—Patent and latent ambiguities—Equivocation—The terms patent and latent ambiguity are often used in this connection. A patent

Ann. Cas. 1915B, 8; 47 L. R. A. (N. S.) 514.

⁸² *Mingo v. Huntington*, 92 Minn. 13, 15, 99 N. W. 45.

⁸³ *Smith v. Browne*, 222 N. Y. 222, 118 N. E. 611.

⁸⁴ *Case v. Young*, 3 Minn. 209 (140); *Sorenson v. Carey*, 96 Minn. 202, 104 N. W. 958.

⁸⁵ *Cowles v. Henry*, 61 Minn. 459, 461, 63 N. W. 1028; *Lohlker v. Lohlker*, 112 Minn. 273, 277, 127 N. W. 1122; 30 A. & E. Ency. of Law (2 ed.) 676; 40 Cyc. 1393; Ann. Cas. 1915B, 16. See, however, *Case v. Young*, 3 Minn. 209 (140). In re *Boeck's Estate*, 160 Wis. 577, 152 N. W. 155.

⁸⁶ *Case v. Young*, 3 Minn. 209 (140); In re *Tower's Estate*, 49 Minn. 371, 376, 52 N. W. 27; *Wheaton v. Pope*, 91 Minn. 299, 97 N. W. 1046; *Sorenson v. Carey*, 96 Minn. 202, 104 N. W. 958; *Miller v.*

Klossner, 135 Minn. 377, 160 N. W. 1025; *Patch v. White*, 117 U. S. 210; In re *Boeck's Estate*, 160 Wis. 577, 152 N. W. 155; *International Harvester Co. v. Bye*, 184 Iowa 1053, 169 N. W. 382; 30 A. & E. Ency. of Law (2 ed.) 683; 40 Cyc. 1393; Ann. Cas. 1915B, 10-14; 47 L. R. A. (N. S.) 514.

⁸⁷ *Miller v. Klossner*, 135 Minn. 377, 160 N. W. 1025; In re *Bell's Will*, 147 Minn. 62, 179 N. W. 650; *McDermott v. Scully*, 91 Conn. 45, 98 Atl. 350; *Smith v. Garber*, 286 Ill. 67, 121 N. E. 173; *Kingman v. New Bedford Home for Aged (Mass.)* 129 N. E. 449; 30 A. & E. Ency. of Law (2 ed.) 679; 40 Cyc. 1393; 47 L. R. A. (N. S.) 514; Ann. Cas. 1915B, 8; 28 R. C. L. 243-254.

⁸⁸ In re *Bell's Will*, 147 Minn. 62, 179 N. W. 650.

⁸¹ *Staigg v. Atkinson*, 144 Mass. 564, 12 N. E. 354.

ambiguity is one which is apparent on the face of the will itself without reference to anything outside the will—one which arises from a bare reading of the will. This is the sense in which it is ordinarily used, but it is sometimes used in the sense of a doubt which remains after reading the will in the light of the surrounding circumstances and which cannot be resolved by reference to the declarations of the testator directly expressing his testamentary intentions. That is, a doubt which cannot be removed by parol evidence and renders the will inoperative so far as it extends. It is sometimes said that the term does not include a doubt arising from mere inaccuracy in the use of language, or the use of uncommon words or common words in an uncommon sense. In fact, the term has no settled, uniform meaning in the law.⁸⁰ The term latent ambiguity has no settled, uniform meaning in the law. Ordinarily it is now used in the sense of a doubt not apparent on the face of the will but arising from a consideration of the will in connection with facts outside the will. It is sometimes used in the narrow, technical sense of a doubt which may be resolved by evidence of the declarations of the testator directly expressing his testamentary intentions. In this state it is settled that a latent ambiguity exists (1) when the will names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things that answer such name or description; or (2) when the will contains a misdescription of the object or subject, as where there is no such person or thing in existence, or if in existence, the person is not the one intended, or the thing does not belong to the testator.⁸⁰ The use of the terms patent and latent ambiguities is condemned by the highest authorities on the law of evidence.⁸¹ When a latent ambiguity is of the first class, as defined above, that is, when extrinsic evidence of the surrounding circumstances shows that there are two persons or things which answer equally well a description in the will, extrinsic evidence in the sense of the testator's declarations directly expressing his testamentary intentions or the sense in which he used words in the will, including his instructions to the person who prepared the will, are admissible. A latent ambiguity of this nature is more appropriately called equivocation. It is only in cases of equivocation that such evidence is admissible. It is not admissible in the case of latent ambiguities of the second class, as defined above.⁸² The reason for this exceptional

⁸⁰ Bouvier, Law Dict.; Dunnell, Minn. Digest, § 3406; 2 A. & E. Ency. of Law (2 ed.) 288; 17 Cyc. 682; 28 R. C. L. 273; Wigmore, Ev. § 2472; 2 C. J. 1313; *McRoberts v. McArthur*, 62 Minn. 310, 64 N. W. 903.

⁸⁰ *Patch v. White*, 117 U. S. 210; *Wheaton v. Pope*, 91 Minn. 299, 97 N. W. 1046; *Sorenson v. Carey*, 98 Minn. 202, 104 N. W. 958; Dunnell, Minn. Digest,

§§ 3398, 3406; 2 A. & E. Ency. of Law (2 ed.) 296; 17 Cyc. 676; Wigmore, Ev. § 2472; *Thayer*, Ev. 425; 47 L. R. A. (N. S.) 520; Ann. Cas. 1915B, 8.

⁸¹ *Thayer*, Ev. 422; 4 Wigmore, Ev. 2472; 1 Elliott, Ev. § 509; *Browne, Parol Ev. v. 116*; *Jones, Construction of Contracts*, § 46; 28 Am. Law Rev. 321.

⁸² *Patch v. White*, 117 U. S. 210; *McDermott v. Scully*, 91 Conn. 45, 98 Atl.

rule in the case of equivocation is purely historical.⁹³ When a latent ambiguity is of the second class extrinsic evidence of the surrounding circumstances, including the testator's property and family and his relation thereto, is admissible.⁹⁴ A latent ambiguity may be raised by extrinsic evidence of the surrounding circumstances and then resolved by extrinsic evidence.⁹⁵

355. Same—Declarations of testator—The declarations of the testator directly expressing his testamentary intentions, including his instructions to the person preparing the will, are inadmissible in aid of construction, with the single exception of the case of equivocation or latent ambiguity of the first class. They are inadmissible whether made before, after, or at the time of the execution of the will, and whether oral or written. They are inadmissible because of the statute requiring wills to be in writing and also because of the general rule that a written instrument cannot be added to, contradicted or modified by oral evidence.⁹⁶ Instructions given by the testator to the person preparing the will and his declarations in the presence of such person as to his testamentary intentions are governed by exactly the same rules as other declarations of the testator.⁹⁷ Declarations of the testator, not directly expressing

350; *Day v. Weblor* (Conn.) 105 Atl. 618; *Jones v. Bennett* (N. H.) 99 Atl. 18; *Baumann v. Steingester*, 213 N. Y. 328, 107 N. E. 578; *Dunnell*, Minn. Digest, § 3398; 2 A. & E. Ency. of Law (2 ed.) 298; 30 Id. 682; 40 Cyc. 1435; *Wigmore*, Ev. § 2472; *Gardner*, Wills, § 107; *Justice Holmes*, 12 Harv. L. Rev. 418; 47 L. R. A. (N. S.) 514; Ann. Cas. 1915B, 8. The Patch case notes the distinction between the two classes of latent ambiguities and recognizes the rule that evidence of the testator's declarations of testamentary intention is admissible only in the case of latent ambiguities of the first class. *Wheaton v. Pope*, 91 Minn. 299, 97 N. W. 104, follows the Patch case but fails to note the distinction. The testator's instructions to the scrivener were held admissible though the ambiguity was one of the second class. The mistake, however, was one of the scrivener and not of the testator, and possibly that was the ground of the decision. It is impossible to determine from the report just what the court intended to decide, but the court is probably not committed to the rule that the testator's declarations of testamentary intention are admissible in all cases of so-called latent ambiguity.

⁹³ See *Thayer*, Ev. 441.

⁹⁴ *Patch v. White*, 117 U. S. 210. See § 353.

⁹⁵ *Case v. Young*, 3 Minn. 209 (140) (ambiguity as to the land devised); *Wheaton v. Pope*, 91 Minn. 299, 97 N. W. 1046 (ambiguity as to land devised—instructions of testator to scrivener held admissible); *Bauman v. Steingester*, 213 N. Y. 328, 107 N. E. 578 (ambiguity as to legatee).

⁹⁶ *McDermott v. Scully*, 91 Conn. 45, 98 Atl. 350; *Day v. Weblor* (Conn.) 105 Atl. 618; *Jones v. Bennett* (N. H.) 99 Atl. 18; *Smith v. American Missionary Assn.* (Mass.) 132 N. E. 358; 30 A. & E. Ency. of Law (2 ed.) 678; 40 Cyc. 1433; 28 R. C. L. 280; *Wigmore*, Ev. § 2470; 47 L. R. A. (N. S.) 514; Ann. Cas. 1915B, 23, 47; 107 Am. St. Rep. 460. See *Hutchins v. Wenger*, 133 Minn. 188, 191, 158 N. W. 52; and title "Declarations of Testator" in index.

⁹⁷ *Wheaton v. Pope*, 91 Minn. 299, 97 N. W. 1046; *Hutchins v. Wenger*, 133 Minn. 188, 191, 158 N. W. 52; *McDermott v. Scully*, 91 Conn. 45, 98 Atl. 350; *Day v. Weblor* (Conn.) 105 Atl. 618; *In re Pierce's Estate* (Wis.) 188 N. W. 78; 40 Cyc. 1435; Ann. Cas. 1913A, 1017; Ann. Cas. 1915B, 8; 44 L. R. A. (N. S.) 1177; 28 R. C. L. 281.

his testamentary intentions, indicative of his feelings toward members of his family or other possible beneficiaries, or showing what property he possessed or his relation thereto, or its situation or nature, or showing how he customarily named or described persons or things, are admissible in aid of construction in identifying legatees or devisees or the property included in a gift. Such declarations are not admissible when they directly express testamentary intentions. The admission of such declarations is not an exception to the general rule. They are not within the scope of the general rule. Instructions of this nature given by the testator to the person preparing his will are admissible.⁹⁸

CONSTRUCTION OF PARTICULAR WORDS AND PHRASES

356. Issue—The word "issue" in a will is not limited to children but includes all lineal descendants in any degree, unless a contrary intention is manifested by the will. The word, however, has no fixed, inflexible meaning and is often limited to children. It is more flexible than "descendants." The modern tendency is to restrict it to children upon a slight indication of an intention to that effect in the will.⁹⁹ It does not include adopted children unless a contrary intention is clearly manifested by the will.¹ It does not include illegitimate children unless an intention to include them is clearly manifested by the will.² By virtue of G. S. 1913, § 6678, abolishing the rule in *Shelley's Case*, the word "issue" is one of purchase and not of limitation.³ In case of a gift to children and the issue of any deceased child the word "issue" generally

⁹⁸ *Moseley v. Goodwin*, 138 Tenn. 1, 195 S. W. 590; *McDermott v. Scully*, 91 Conn. 45, 98 Atl. 350; 30 A. & E. Ency. of Law (2 ed.) 679; 40 Cyc. 1431; *Wigmore*, Ev. § 2470; 47 L. R. A. (N. S.) 514; Ann. Cas. 1915B, 8; 107 Am. St. Rep. 460.

⁹⁹ *Jackson v. Jackson*, 153 Mass. 374, 26 N. E. 1112; *Welch v. Colt*, 228 Mass. 511, 117 N. E. 834; *Manning v. Manning*, 229 Mass. 527, 118 N. E. 676; *Gardiner v. Everett* (Mass.) 134 N. E. 372; *Palmer v. Horn*, 84 N. Y. 516; *Schmidt v. Jewett*, 195 N. Y. 486, 88 N. E. 1110; *Wilkins v. Rowan* (Neb.) 185 N. W. 437; *In re Farmers' Loan & Trust Co.*, 213 N. Y. 168, 107 N. E. 340; *Brisbin v. Huntington*, 128 Iowa 166, 103 N. E. 144; *Bowden v. Lynch*, 173 N. C. 203, 91 S. E. 957; *Hoadley v. Beardsley*, 89 Conn. 270, 93 Atl. 535; *Union Safe Deposit & Trust Co. v. Dudley*, 104 Me. 297, 72 Atl. 166; *Ralph v. Carrick*, 11 Ch. Div. 873. See G. S. 1913, § 9412 (8); *Hemenway*

v. Draper, 91 Minn. 235, 97 N. W. 874; 17 A. & E. Ency. of Law (2 ed.) 543; 40 Cyc. 1456; 28 R. C. L. 257; *Bigelow*, Wills, 167; *Woerner*, Am. Law of Adm. (2 ed.) § 423; *Page*, Wills, § 526; *Underhill*, Wills, § 675; *Tiffany*, Real Property, § 25; 25 Harv. L. Rev. 572; 2 A. L. R. 930; 5 A. L. R. 195.

¹ *New York Life Ins. Co. v. Viele*, 161 N. Y. 11, 55 N. E. 311; *In re Leask*, 197 N. Y. 193, 90 N. E. 652; 17 A. & E. Ency. of Law (2 ed.) 544; 40 Cyc. 1458; Ann. Cas. 1912A, 326; 27 L. R. A. (N. S.) 1158; L. R. A. 1918B, 124.

² *Brisbin v. Huntington*, 128 Iowa 166, 103 N. W. 144; *Olmsted v. Olmsted*, 190 N. Y. 458, 83 N. E. 569; *Marsh v. Field*, 297 Ill. 251, 130 N. E. 753; 17 A. & E. Ency. of Law (2 ed.) 544; 40 Cyc. 1458; 5 Ann. Cas. 936; 2 A. L. R. 972.

³ *Whiting v. Whiting*, 42 Minn. 548, 44 N. W. 1030. See 29 L. R. A. (N. S.) 963; 2 A. L. R. 930.

means children.⁴ In case of a gift to one for life and on his death to his lawful issue the word "issue" generally includes all lineal descendants, but it will be limited to children upon a slight indication of such an intention manifested by the will.⁵ In case of a gift over in the event of the first taker dying without issue the word "issue" is not confined to children, unless a contrary intention is clearly manifested by the will.⁶ In case of a gift to a donee and his issue the word "issue" is not limited to children, but the issue of deceased issue take by representation, unless the will manifests a contrary intention.⁷ Under a gift to members of a class described as "issue" grandchildren and their descendants will not be allowed to compete with their parents, unless such was clearly the intention of the testator.⁸

357. Child—Children—The words "child" or "children" in a will do not include a grandchild or grandchildren unless a contrary intention is clearly manifested by the will. They are limited to the immediate lineal descendants in the first degree of the testator or other named ancestor. Especially is this true when there are any persons in existence at the date of the will, or before the gift takes effect, answering such meaning of the word, and confining the gift to them will satisfy the whole apparent design of the testator.⁹ The word "children" includes children of various marriages of the testator or other named ancestor unless a contrary intention is clearly manifested by the will.¹⁰ At common law the words "child" and "children" in a will do not include illegitimate children unless a contrary intention is clearly manifested by

⁴ *Brisbin v. Huntington*, 128 Iowa 166, 103 N. W. 144; *Horner v. Haase*, 177 Iowa 115, 158 N. W. 548; *King v. Savage*, 121 Mass. 303; *Palmer v. Horn*, 84 N. Y. 516; *Coyle v. Coyle*, 73 N. J. Eq. 528, 68 Atl. 224; *Madison v. Madison*, 170 Ill. 65, 48 N. E. 556. See 2 A. L. R. 944.

⁵ *Schmidt v. Jewett*, 195 N. Y. 486, 88 N. E. 1110; *Palmer v. Dunham*, 125 N. Y. 68, 25 N. E. 1081; *In re Farmers Loan & Trust Co.*, 231 N. Y. 41, 131 N. E. 562; *Brisbin v. Huntington*, 128 Iowa 166, 103 N. W. 144; *Guy v. Osborne*, 91 S. C. 291, 74 S. E. 617; *Underhill, Wills*, § 675.

⁶ *Soper v. Brown*, 136 N. Y. 244, 32 N. E. 768; *In re Farmers Loan & Trust Co.*, 213 N. Y. 168, 107 N. E. 340; *Welch v. Coit*, 228 Mass. 511, 117 N. E. 834. See *In re Nice's Estate*, 227 Pa. St. 75, 75 Atl. 1025; *Silsbee v. Silsbee*, 211 Mass. 105, 97 N. E. 758.

⁷ *Manning v. Manning*, 229 Mass. 527, 118 N. E. 676; *Rhode Island Hospital*

Trust Co. v. Bridgham, 42 R. I. 161, 106 Atl. 149. See 2 A. L. R. 963.

⁸ *Ernst v. Rivers*, 233 Mass. 9, 123 N. E. 93.

⁹ *Yates v. Shern*, 84 Minn. 161, 86 N. W. 1004; *Boston Safe Deposit etc. Co. v. Nevin*, 212 Mass. 232, 98 N. E. 1051; *Lawrence v. Phillips*, 186 Mass. 320, 71 N. E. 541; *Mullaney v. Monahan*, 232 Mass. 279, 122 N. E. 387; *In re King*, 217 N. Y. 358, 111 N. E. 1060; *In re Pulls*, 220 N. Y. 196, 115 N. E. 516; *In re Willson*, 171 Cal. 449, 153 Pac. 927; *In re Allis' Will*, 163 Wis. 452, 157 N. W. 548, 158 N. W. 330; *In re Scull's Estate*, 249 Pa. St. 52, 94 Atl. 474; *Taylor v. Taylor*, 174 N. C. 537, 94 S. E. 7; *In re Puterbaugh's Estate (Pa.)* 104 Atl. 601; *Day v. Webler (Conn.)* 105 Atl. 618; 5 A. & E. Ency. of Law (2 ed.) 1084; 40 Cyc. 1449; 28 R. C. L. 250; *Woerner, Am. Law of Adm. (2 ed.)* § 422. See § 563.

¹⁰ *Crapo v. Pierce*, 187 Mass. 141, 72 N. E. 935; 40 Cyc. 1451.

the will, construed in the light of the surrounding circumstances, or there are no legitimate children and the gift would otherwise fail.¹¹ This rule has perhaps been changed in this state by G. S. 1913, § 7240, so far as the wills of women are concerned.¹² In the case of a gift to a child of a woman it is proper to show that the testator knew that the donee had an illegitimate child and was not likely to have any other children.¹³ If illegitimate children have been legitimated as provided by statute they take under a gift to children unless a contrary intention is clearly manifested by the will.¹⁴ The word "children" in a will does not include step-children unless a contrary intention is clearly manifested by the will.¹⁵ It has often been held, even in states having statutes similar to G. S. 1913, § 7156, that the word "children" in a will does not include adopted children unless an intention to include them is clearly manifested by the will. In view of the policy of our statute it should be held that adopted children are included unless a contrary intention is clearly manifested by the will. At all events they ought to be included by a very slight indication of such intention in the will.¹⁶ The word "children" in a will includes those en ventre sa mere at the time of the death of the testator or other named ancestor, unless a contrary intention is clearly manifested by the will.¹⁷ The word "children" is one of purchase and not of limitation, unless a contrary intention is clearly manifested by the will.¹⁸

358. Posthumous children—When a future estate is limited to heirs, or issue, or children, posthumous children are entitled to take in the

¹¹ *In re Scholl's Estate*, 100 Wis. 650, 76 N. W. 616; *Tuttle v. Woolworth*, 74 N. J. Eq. 310; *Eaton v. Eaton*, 88 Conn. 269, 91 Atl. 191; *Marsh v. Field*, 297 Ill. 251, 130 N. E. 753; 5 A. & E. Ency. of Law (2 ed.) 1095; 40 Cyc. 1451; 28 R. C. L. 251; 27 Harv. L. Rev. 691; Ann. Cas. 1916A, 410; Ann. Cas. 1918B, 261; 11 Prob. Rep. Ann. 164.

¹² See *Smith v. Garber*, 286 Ill. 67, 121 N. E. 173.

¹³ *Smith v. Garber*, 286 Ill. 67, 121 N. E. 173.

¹⁴ *Morton v. Morton*, 62 Neb. 420, 87 N. W. 182; *Harness v. Harness*, 50 Ind. App. 364, 98 N. E. 357. See Ann. Cas. 1918B, 273.

¹⁵ *In re Kurtz's Estate*, 145 Pa. St. 637, 23 Atl. 322. See *In re Ehlers' Will*, 155 Wis. 46, 143 N. W. 1050; *Dunn v. Elliott*, 101 Neb. 411, 163 N. W. 333; 5 A. & E. Ency. of Law (2 ed.) 1099; 40 Cyc. 1452.

¹⁶ *Munle v. Gruenewald*, 289 Ill. 468, 124 N. E. 605; *Eureka Life Ins. Co. v. Gels*, 121 Md. 196, 88 Atl. 153; *Parker v. Carpenter*, 77 N. H. 453, 92 Atl. 955; *Adrian v. Kock*, 83 N. J. Eq. 484, 91 Atl. 123; *In re Leask*, 197 N. Y. 193, 90 N. E. 652; *Lichter v. Thiers*, 139 Wis. 481, 121 N. W. 153; *In re Puterbaugh's Estate* (Pa.) 104 Atl. 601. See *In re Mitchell's Will*, 157 Wis. 327, 147 N. W. 332; 40 Cyc. 1452; 27 L. R. A. (N. S.) 1158; L. R. A. 1918B, 123; 18 Ann. Cas. 518; 34 Harv. L. Rev. 529.

¹⁷ *McLain v. Howard*, 120 Mich. 274, 79 N. W. 182; *Lamar v. Crosby*, 162 Ky. 320, 172 S. W. 693; *Chandler v. Chandler* (Ga.) 94 S. E. 995; Note, 1 B. R. C. 582; Ann. Cas. 1916E, 1034; 5 A. & E. Ency. of Law (2 ed.) 1083; 30 Id. 724; 40 Cyc. 1452; 9 Harv. L. Rev. 349; 16 Id. 601; 19 Id. 624; 20 Id. 651; 21 Id. 360. See G. S. 1913, §§ 6680, 6681.

¹⁸ See § 436.

same manner as if living at the death of their parent.¹⁹ A future estate, depending on the contingency of the death of any person without heirs or issue or children, is defeated by the birth of a posthumous child of such person capable of taking by descent.²⁰

359. Heirs—Heirs at law—The words “heirs,” “heirs at law,” “lawful heirs” and the like in a will are to be construed as meaning those who would take if the testator or other ancestor died intestate, unless they were obviously used in a different sense by the testator.²¹ These terms, however, have no inflexible meaning in a will. They may mean children, adopted children, next of kin, heirs of a particular class or description, heirs presumptive, heirs apparent, heirs at the date of the will, heirs at the death of the testator or at a later date, husband or wife, devisees, legatees or distributees. Their meaning in the particular case is to be inferred from the language of the will as a whole and admissible extrinsic evidence.²² The words “heirs,” or “heirs at law,” or “bodily heirs” will be limited to children or issue when they were obviously used in that sense by the testator.²³ In a devise of a life estate with a remainder to the “heirs” of the life tenant the word “heirs” will not be construed in the sense of children unless it was clearly so used by the testator.²⁴ The words “heir” or “heirs at law” may be construed to mean “next of kin” in order to carry out the manifest intention of the testator.²⁵ By virtue of G. S. 1913, § 7156, a gift to “heirs” of the testator

¹⁹ G. S. 1913, § 6680.

²⁰ G. S. 1913, § 6681.

²¹ *In re Swenson's Estate*, 55 Minn. 300, 310, 56 N. W. 1115; *Gardner v. Skinner*, 195 Mass. 164, 80 N. E. 825; *Rotch v. Lamb*, 232 Mass. 233, 122 N. E. 650; *Beardsley v. Fairchild*, 87 Conn. 359, 87 Atl. 737; *In re Beck's Estate*, 225 Pa. 578, 74 Atl. 607; *Menard v. Campbell*, 180 Mich. 583, 147 N. W. 556; *Brooks v. Parks*, 189 Mich. 490, 155 N. W. 573; *In re Shumway's Estate*, 194 Mich. 245, 160 N. W. 595; *Flint v. Wisconsin Trust Co.*, 151 Wis. 231, 138 N. W. 629; *Walker v. Walker*, 283 Ill. 11, 118 N. E. 1014; *Sherburne v. Howland* (Mass.) 132 N. E. 188; 15 A. & E. Ency. of Law (2 ed.) 320; 40 Cyc. 1459; 28 R. C. L. 247; *Woerner*, Am. Law of Adm. (2 ed.) § 423; *Ann. Cas.* 1917C, 1156.

²² *In re Swenson's Estate*, 55 Minn. 300, 310, 56 N. W. 1115; *Greenwood v. Murray*, 28 Minn. 120, 125, 9 N. W. 629; *In re Anderson's Estate*, 148 Minn. 44, 180 N. W. 1019; 15 A. & E. Ency. of Law (2 ed.) 318; 40 Cyc. 1461.

²³ *Morris v. Phillips*, 287 Ill. 633, 122 N. E. 831; *Walcott v. Robinson*, 214 Mass. 172, 100 N. E. 1109; *Kornegay v. Cunningham*, 174 N. C. 209, 93 S. E. 754; *Bowden v. Lynch*, 173 N. C. 203, 91 S. E. 957; *Brown v. Lane*, 147 Ga. 1, 92 S. E. 517; *McClintic v. McClintic*, 259 Pa. 112, 102 Atl. 416; *Walden v. Smith* (Ky.) 201 S. W. 302; *Jones v. Millel*, 283 Ill. 348, 119 N. E. 324; *Cultice v. Mills*, 97 Ohio 112, 119 N. E. 200; *In re Cramer*, 170 N. Y. 271, 63 N. E. 279; *Hull v. Hull*, 286 Ill. 75, 121 N. E. 239 (bodily heirs). See *Dunn v. Elliott*, 101 Neb. 411, 163 N. W. 333 (gift to “our heirs according to law”—husband and wife had no children by each other but both had children by former marriage); *Ann. Cas.* 1914B, 70.

²⁴ *Walcott v. Robinson*, 214 Mass. 172, 100 N. E. 1109. See *Cultice v. Mills*, 97 Ohio 112, 119 N. E. 200.

²⁵ *In re Swenson's Estate*, 55 Minn. 300, 56 N. W. 1115. See *Comstock v. Baldwin*, 125 Minn. 357, 147 N. W. 278; *Doctor v. Hughes*, 225 N. Y. 305, 122 N. E. 221.

or other ancestor includes adopted children unless the will clearly shows a contrary intention. Independent of statute the rule is otherwise.²⁶ Where there is a devise of a life estate with a gift over to the "heirs" of the life tenant a surviving husband or wife of the life tenant will take as an "heir" unless a contrary intention is clearly manifested by the will.²⁷ A gift to "heirs" or "heirs at law" designates not only the persons who are to take, but also the manner and proportions in which they take, namely, according to the statutes of descent and distribution.²⁸ Under a gift to members of a class described as "heirs" grandchildren and their descendants will not be permitted to compete with their parents, unless such was clearly the intention of the testator.²⁹ The word "heirs" is usually a word of limitation and not of purchase.³⁰ Where there is a devise of a life estate with a gift over to the "heirs" of the life tenant, the word "heirs," by virtue of G. S. 1913, § 6678, is a word of purchase and not of limitation, and the heirs take as purchasers from the life tenant.³¹ The scope of the term "heirs" may be restricted by a *videlicet*.³² Where, as in this state, the husband or wife takes an absolute interest in the estate of a deceased spouse, they come within the technical definition of "heirs" and will take under a gift in a will to the heirs of the testator or other person, unless a contrary intention is plainly manifested by the will.³³

360. Next of kin—The words "next of kin" in a will mean the nearest blood relatives, in equal degree, unless a contrary intention is clearly manifested by the will. Husband and wife are not next of kin to each

²⁶ *Wallace v. Noland*, 246 Ill. 535, 92 N. E. 956; *Young v. Stearns*, 234 Mass. 540, 125 N. E. 697; 40 Cyc. 1463; 28 R. C. L. 252; 27 L. R. A. (N. S.) 1158; L. R. A. 1918B, 123; 34 Harv. L. Rev. 531; 8 A. L. R. 1012. See, under a statute different from ours, *Walcott v. Robinson*, 214 Mass. 172, 100 N. E. 1109 (an adopted child held not to take as an heir under a gift to testator's daughter for life, with remainder to her "heirs").

²⁷ *Menard v. Campbell*, 180 Mich. 583, 147 N. W. 556. See *In re Swenson's Estate*, 55 Minn. 300, 56 N. W. 1115; *Cul-tice v. Mills*, 97 Ohio 112, 119 N. E. 200.

²⁸ *Cummings v. Cummings*, 146 Mass. 501, 16 N. E. 401; *Thompson v. Thornton*, 197 Mass. 273, 83 N. E. 880; *Branch v. De Wolf*, 38 R. I. 395, 95 Atl. 857; *Tucker v. Nugent (Me.)* 102 Atl. 307; 15 A. & E. Ency. of Law (2.ed.) 322; 40 Cyc. 1486.

²⁹ *Ernst v. Rivers*, 233 Mass. 9, 123 N. E. 93.

³⁰ See §§ 344, 428.

³¹ *Menard v. Campbell*, 180 Mich. 583, 147 N. W. 556; *Whiting v. Whiting*, 42 Minn. 548, 44 N. W. 1030; *Doctor v. Hughes*, 225 N. Y. 305, 122 N. E. 221, 29 L. R. A. (N. S.) 963.

³² See Ann. Cas. 1913A, 490.

³³ *Daniels & Fisher Realty Co. v. Kenyon*, 261 Fed. 407; *In re Anderson's Estate*, 148 Minn. 44, 180 N. W. 1019; *Turner v. Burr*, 141 Mich. 111, 104 N. W. 379; *Menard v. Campbell*, 180 Mich. 583, 147 N. W. 556; *Brooks v. Parks*, 189 Mich. 490, 155 N. W. 573; *In re Shumway's Estate*, 194 Mich. 245, 160 N. W. 595; *Walker v. Walker*, 283 Ill. 11, 118 N. E. 1014; *Sherburne v. Howland (Mass.)* 132 N. E. 188; *McElwain v. Allen (Mass.)* 134 N. E. 620. See *In re Swenson's Estate*, 55 Minn. 300, 56 N. W. 1115; *Comstock v. Baldwin*, 125 Minn. 357, 147 N. W. 278; *State v. Probate Court*, 137 Minn. 238, 163 N. W. 285; 40 Cyc. 1463; 28 R. C. L. 255; Ann. Cas. 1915D, 1178; L. R. A. 1918A, 1108.

other within the meaning of a will, unless clearly so regarded by the testator.³⁴ Next of kin are "heirs at law" within the statutes of descent and distribution.³⁵ Under a gift to next of kin persons who would be entitled to take by representation under the statutes of descent and distribution are excluded. Thus brothers and sisters take to the exclusion of the children of a deceased brother or sister, and nephews and nieces take to the exclusion of the children of deceased nephews and nieces.³⁶

361. Relatives—Cousins—The word "relatives" in a will includes only those who are entitled to inherit as next of kin under the statutes of descent and distribution, unless a contrary intention is clearly manifested by the will.³⁷ A gift to cousins is limited to first cousins unless the will clearly manifests a contrary intention.³⁸

362. Lineal descendants—The term "lineal descendants" in a will includes all those, even to the remotest generation, who by consanguinity trace their lineage to the specified ancestor, unless a contrary intention is clearly manifested by the will.³⁹ The term is less flexible than "issue" and requires a stronger context to limit it to children.⁴⁰

363. If and when—The word "if" may be construed as "when" to carry out the manifest intention of the testator.⁴¹

364. And and or—The words "and" and "or" may be substituted for one another to carry out the obvious intention of the testator as manifested by the will as a whole.⁴² The phrase "without leaving a wife or child or children" has been held not to mean "without leaving a wife

³⁴ *Watson v. St. Paul City Ry. Co.*, 70 Minn. 514, 73 N. W. 400; *Clark v. Mack*, 161 Mich. 545, 126 N. W. 632; *Bailey v. Smith*, 222 Mass. 600, 111 N. E. 684; 21 A. & E. Ency. of Law (2 ed.) 538; 40 Cyc. 1466; 28 R. C. L. 254; *Woerner*, Am. Law of Adm. (2 ed.) § 423. See Ann. Cas. 1915A, 474 (meaning of "nearest male heir").

³⁵ *Comstock v. Baldwin*, 125 Minn. 357, 147 N. W. 278.

³⁶ *Clark v. Mack*, 161 Mich. 545, 126 N. W. 632; *Swasey v. Jaques*, 144 Mass. 135, 10 N. E. 758; *Galloway v. Babb*, 77 N. H. 259, 90 Atl. 968. See 21 A. & E. Ency. of Law (2 ed.) 539; 40 Cyc. 1466; *Woerner*, Am. Law of Adm. (2 ed.) § 423; 28 L. R. A. (N. S.) 479.

³⁷ *Cummings v. Cummings*, 146 Mass. 501, 16 N. E. 401; *Thompson v. Thornton*, 197 Mass. 273, 83 N. E. 880; *McMenamy v. Kampelmann* (Mo.) 200 S. W. 1075; 24 A. & E. Ency. of Law (2 ed.) 280; 28 R. C. L. 256; 40 Cyc. 1458;

Woerner, Am. Law of Adm. (2 ed.) § 423.

³⁸ *Bishop v. Russell* (Mass.) 134 N. E. 233.

³⁹ *Green v. Hussey*, 228 Mass. 537, 117 N. E. 798; *Green v. Kelley*, 228 Mass. 602, 118 N. E. 235; *Rasmusson v. Unknown Wife of Hoge*, 293 Ill. 101, 127 N. E. 356; 9 A. & E. Ency. of Law (2 ed.) 399; 40 Cyc. 1454.

⁴⁰ *Ralph v. Carrick*, 11 Ch. Div. 873.

⁴¹ Ann. Cas. 1913B, 726.

⁴² *In re Bair's Estate*, 255 Pa. 169, 99 Atl. 471; *McClench v. Waldron*, 204 Mass. 554, 91 N. E. 126; *Thorp v. Lund*, 227 Mass. 474, 116 N. E. 946; *Clarke v. Andover*, 207 Mass. 91, 92 N. E. 1013; *Hammond v. Hammond*, 234 Mass. 554, 125 N. E. 686; *Rutland v. Emanuel* (Ala.) 80 So. 107; *Poehlman v. Leinweber*, 288 Ill. 58, 122 N. E. 834; 30 A. & E. Ency. of Law (2 ed.) 692; 28 R. C. L. 226; *Dunnell*, Minn. Digest, § 8976; 19 Ann. Cas. 921; Ann. Cas

and children.”⁴³ In the case of a gift over if the first taker dies under age “or” without issue the word “or” will be construed as “and” so that both events must happen before the limitation over can take effect. The same rule applies in the case of several contingencies of whatever kind.⁴⁴

365. Income—A gift of the income from property is to be construed as net income, as distinguished from gross income, unless a contrary intention is clearly manifested by the will. A direction to trustees to pay to beneficiaries the income of the estate, or from certain property, means what is left after paying taxes and other necessary or proper expenses incident to the care, preservation, and handling the estate or property.⁴⁵ In a gift of corporate stock income means dividends.⁴⁶

366. Various words and phrases construed—After all my lawful debts are paid;⁴⁷ after my death;⁴⁸ all I own;⁴⁹ all my estate, all my lands, etc.;⁵⁰ all my personal property and estate;⁵¹ all real estate which I may own at the time of my death;⁵² as and for her absolute property, and for her sole use and benefit;⁵³ as she may be entitled to under the statutes of the state of Minnesota as the same may provide at the date of my decease;⁵⁴ balance;⁵⁵ child, children, grandchild, grandchildren;⁵⁶ contents;⁵⁷ desire;⁵⁸ each;⁵⁹ effects, personal effects;⁶⁰ eldest child;⁶¹ estate;⁶² executor;⁶³ heirs, heirs at law;⁶⁴ home;⁶⁵

1913A, 1058; Ann. Cas. 1917C, 306; 48 Am. Dec. 557; 12 Prob. Rep. Ann. 540.

⁴³ Travers v. Reinhardt, 205 U. S. 423.

⁴⁴ Clarke v. Andover, 207 Mass. 91, 92 N. E. 1013; Tennell v. Ford, 30 Ga. 707; Phelps v. Bates, 54 Conn. 11, 5 Atl. 301; Orem v. Campbell, 175 Ky. 210, 194 S. W. 113; In re Edwards' Estate, 227 Pa. 299, 76 Atl. 28; 30 A. & E. Ency. of Law (2 ed.) 692; 40 Cyc. 1506; 48 Am. Dec. 566; 19 Ann. Cas. 922; Ann. Cas. 1917C, 306; 12 Prob. Rep. 546.

⁴⁵ Goodwin v. McGaughey, 108 Minn. 248, 122 N. W. 6; Held v. Keller, 135 Minn. 192, 160 N. W. 487; Parkhurst v. Ginn, 228 Mass. 159, 117 N. E. 202; Ann. Cas. 1918E, 989. See §§ 366, 399, 434.

⁴⁶ Lauman v. Foster, 157 Iowa 275, 135 N. W. 14.

⁴⁷ Gates v. Shugrue, 35 Minn. 302, 29 N. W. 57.

⁴⁸ Elberg v. Elberg, 132 Minn. 15, 155 N. W. 751.

⁴⁹ McGowan v. Baldwin, 46 Minn. 477, 49 N. W. 251.

⁵⁰ Case v. Young, 3 Minn. 209 (140); In re Gotzian's Estate, 34 Minn. 159, 24 N. W. 920; McGowan v. Baldwin, 46 Minn. 477, 49 N. W. 251; Bedell v. Fradenburgh, 65 Minn. 361, 68 N. W. 41.

⁵¹ Bedell v. Fradenburgh, 65 Minn. 361, 68 N. W. 41.

⁵² Morgan v. Joslyn, 91 Minn. 60, 97 N. W. 449.

⁵³ Held v. Keller, 135 Minn. 192, 160 N. W. 487.

⁵⁴ Johnson v. Linstrom, 92 Minn. 8, 99 N. W. 212.

⁵⁵ Case v. Young, 3 Minn. 209 (140); Landis v. Olds, 9 Minn. 90 (79).

⁵⁶ Yates v. Shern, 84 Minn. 161, 86 N. W. 1004.

⁵⁷ Ann. Cas. 1916C, 1139. See § 345.

⁵⁸ Ann. Cas. 1917B, 508.

⁵⁹ Ann. Cas. 1914D, 245.

⁶⁰ Barney v. May, 135 Minn. 299, 160 N. W. 790. See Dickson v. Dickson (Ky.) 202 S. W. 891.

⁶¹ Simpson v. Cook, 24 Minn. 180, 186.

⁶² Johnson v. Johnson, 32 Minn. 513, 21 N. W. 725; In re Gotzian's Estate, 34 Minn. 159, 24 N. W. 920.

⁶³ Simpson v. Cook, 24 Minn. 180, 187.

⁶⁴ Greenwood v. Murray, 28 Minn. 120, 125, 9 N. W. 629; In re Swenson's Estate, 55 Minn. 300, 56 N. W. 1115; Comstock v. Baldwin, 125 Minn. 357, 147 N. W. 278.

⁶⁵ Hayward v. Hayward (Conn.) 111 Atl. 53.

if living, if not living;⁶⁶ in addition;⁶⁷ in case of the death;⁶⁸ income, net income;⁶⁹ in lieu of her dower and statutory right in all property belonging to me at my death;⁷⁰ issue;⁷¹ lands;⁷² leave;⁷³ legacy or distributive share;⁷⁴ my farm, consisting of about ninety-five acres, in Filmore county;⁷⁵ my real estate;⁷⁶ nearest male heir, nearest relative, and the like;⁷⁷ necessary;⁷⁸ none of my children, or their heirs, shall have any right on my residue property until the death of my beloved husband;⁷⁹ now;⁸⁰ of all my estate;⁸¹ one-half of all I own;⁸² our homestead;⁸³ out of my estate;⁸⁴ personal effects;⁸⁵ proceeds of the personal estate;⁸⁶ property;⁸⁷ pro rata;⁸⁸ provided;⁸⁹ real estate;⁹⁰ revert;⁹¹ securities;⁹² share;⁹³ share and share alike;⁹⁴ subject to the payment, etc.;⁹⁵ the grounds or lot on which the same is situat-

⁶⁶ Kottmann v. Gazett, 66 Minn. 88, 68 N. W. 732.

⁶⁷ Johnson v. Johnson, 32 Minn. 513, 21 N. W. 725.

⁶⁸ Innes v. Potter, 130 Minn. 320, 153 N. W. 604.

⁶⁹ See Huntsman v. Hooper, 32 Minn. 163, 20 N. W. 127; In re Oertle's Estate, 34 Minn. 173, 24 N. W. 924; Armstrong v. Armstrong, 54 Minn. 248, 55 N. W. 971; Hale v. St. Paul, 54 Minn. 421, 56 N. W. 63; Cowles v. Henry, 61 Minn. 459, 62 N. W. 1028; Hershey v. Meeker County Bank, 71 Minn. 255, 73 N. W. 967; Rosbach v. Weidenbach, 95 Minn. 343, 104 N. W. 137; State v. Probate Court, 100 Minn. 192, 110 N. W. 865; Goodwin v. McGaughey, 108 Minn. 248, 122 N. W. 6; State v. Probate Court, 112 Minn. 279, 128 N. W. 18; Bemis v. Northwestern Trust Co., 117 Minn. 409, 135 N. W. 1124; State v. Probate Court, 124 Minn. 508, 145 N. W. 390; Hutchens v. Wenger, 133 Minn. 188, 158 N. W. 52; Held v. Keller, 135 Minn. 192, 160 N. W. 487; Minnesota Loan & Trust Co. v. Douglas, 135 Minn. 413, 161 N. W. 158; State v. Probate Court, 136 Minn. 392, 162 N. W. 459.

⁷⁰ Howe Lumber Co. v. Parker, 105 Minn. 310, 117 N. W. 518.

⁷¹ Whitney v. Whitney, 42 Minn. 548, 44 N. W. 1030; Sorenson v. Rasmussen, 114 Minn. 324, 131 N. W. 325.

⁷² In re Gotzian's Estate, 34 Minn. 159, 24 N. W. 920.

⁷³ Innes v. Potter, 130 Minn. 320, 153 N. W. 604.

⁷⁴ State v. Willrich, 72 Minn. 165, 75 N. W. 123.

⁷⁵ Sorenson v. Carey, 96 Minn. 202, 104 N. W. 958.

⁷⁶ Case v. Young, 3 Minn. 209 (140).

⁷⁷ Ann. Cas. 1915A, 474; 11 A. L. R. 329.

⁷⁸ Ann. Cas. 1918D, 1162.

⁷⁹ State v. Willrich, 72 Minn. 165, 75 N. W. 123.

⁸⁰ Johnson v. Johnson, 32 Minn. 513, 21 N. W. 725.

⁸¹ McGowan v. Baldwin, 46 Minn. 477, 49 N. W. 251.

⁸² McGowan v. Baldwin, 46 Minn. 477, 49 N. W. 251. See Elberg v. Elberg, 132 Minn. 15, 155 N. W. 751.

⁸³ In re Gotzian's Estate, 34 Minn. 159, 24 N. W. 920.

⁸⁴ Johnson v. Johnson, 32 Minn. 513, 21 N. W. 725.

⁸⁵ Barney v. May, 135 Minn. 299, 160 N. W. 790.

⁸⁶ Landis v. Olds, 9 Minn. 90 (79).

⁸⁷ In re Gotzian's Estate, 34 Minn. 159, 24 N. W. 920.

⁸⁸ Ann. Cas. 1918C, 791.

⁸⁹ Davis v. Hancock, 95 Minn. 340, 104 N. W. 299.

⁹⁰ Case v. Young, 3 Minn. 209 (140); Morgan v. Joslyn, 91 Minn. 60, 97 N. W. 449.

⁹¹ In re Owen's Will (Wis.) 159 N. W. 906. See Robinson v. Thompson, 137 Minn. 446, 163 N. W. 786.

⁹² In re Stark's Will (Wis.) 134 N. W. 389.

⁹³ Ann. Cas. 1915B, 572.

⁹⁴ Armstrong v. Armstrong, 54 Minn. 248, 55 N. W. 971.

⁹⁵ Hale v. St. Paul, 54 Minn. 421, 56 N. W. 63.

ed;⁹⁶ the real estate of which I shall die seized;⁹⁷ the real estate I now own;⁹⁸ then;⁹⁹ thereon;¹ things;² this disposition of my property is subject to and not intended to interfere with, the right of dower or other legal right of my wife in and to my said property or any of the same;³ to use and occupy the same for and during his natural life;⁴ until the minority of the youngest child shall cease;⁵ until they shall have homes of their own;⁶ until the youngest child shall become of lawful age;⁷ use and occupy;⁸ whatever remains, remaining property, if there is anything left, whatever of said estate remains unexpended, if anything should remain, that may be left at the death, etc.;⁹ youngest child.¹⁰

LEGACIES AND DEVISES

IN GENERAL

367. Definitions—A legacy or bequest is a gift of personalty by will. A devise is a gift of realty by will.¹¹ The words "legacy," "bequest," "bequeath," "devise" are often used indiscriminately in wills and they should be construed as applying to either real or personal property, or both, according to the obvious intention of the testator.¹²

368. What may be devised or bequeathed—All forms of property which pass under the statutes of descent and distribution in case of intestacy or which are assignable may be devised or bequeathed.¹³ Equitable titles are subject to devise and if not specifically devised form part of the residuary estate. They are covered by a residuary clause in the words, "all the rest and residue of my estate, real, personal and mixed which I now possess or which may hereafter be acquired by me."¹⁴ An equitable interest has been held to pass under the words "real estate."¹⁵ A crop yet to be grown may be bequeathed.¹⁶ A vest-

⁹⁶ *In re Gotzian's Estate*, 34 Minn. 159, 24 N. W. 920.

⁹⁷ *Case v. Young*, 3 Minn. 209 (140).

⁹⁸ *Case v. Young*, 3 Minn. 209 (140).

⁹⁹ *People v. Camp*, 286 Ill. 511, 122 N. E. 43; *Ann. Cas.* 1913B, 320.

¹ *Rong v. Haller*, 109 Minn. 191, 199, 123 N. W. 471.

² *Ann. Cas.* 1915A, 23; *L. R. A.* 1918A, 222.

³ *Redford v. Redford*, 45 Minn. 48, 47 N. W. 308.

⁴ *Farmers' Nat. Bank v. Moran*, 30 Minn. 165, 14 N. W. 805.

⁵ *Simpson v. Cook*, 24 Minn. 180, 186.

⁶ *Lohlker v. Lohlker*, 112 Minn. 273, 277, 127 N. W. 1122.

⁷ *Simpson v. Cook*, 24 Minn. 180, 185.

⁸ *Farmers' Nat. Bank v. Moran*, 30 Minn. 165, 14 N. W. 805.

⁹ *In re Oertle's Estate*, 34 Minn. 173, 24 N. W. 924; *Sherman v. Lewis*, 44 Minn. 107, 46 N. W. 318.

¹⁰ *Simpson v. Cook*, 24 Minn. 180, 186.

¹¹ *State v. Willrich*, 72 Minn. 165, 75 N. W. 123; *Baldwin v. Zien*, 117 Minn. 178, 184, 134 N. W. 498.

¹² *Baldwin v. Zien*, 117 Minn. 178, 184, 134 N. W. 498; 18 A. & E. Ency. of Law (2 ed.) 710; 40 Cyc. 994; 4 A. L. R. 246.

¹³ 18 A. & E. Ency. of Law (2 ed.) 734; 30 Id. 614; 40 Cyc. 1043; 28 R. C. L. 287.

¹⁴ *Mayer v. American S. & T. Co.*, 222 U. S. 295.

¹⁵ *Morgan v. Joslyn*, 91 Minn. 60, 97 N. W. 440.

¹⁶ *Rock v. Zimmerman*, 25 S. D. 237, 126 N. W. 265.

ed remainder may be devised.¹⁷ A contingent remainder may be devised, at least where the contingency is one of event and not of person.¹⁸ Where a contingent remainder is devised and the person who is to take is certain, if such person dies before the happening of the contingency, his representatives or heirs take his interest.¹⁹ An owner of a cemetery lot may devise it to any one of his relatives who may survive him, or to the cemetery association, in trust, for the use and benefit of any person or persons designated in the will. But no such lot shall be affected by any testamentary devise unless the same be specifically mentioned in the will.²⁰

369. To deceased person—It is the general rule that a testamentary gift to a person who is dead when the will is made is void, regardless of whether the testator knew that he was dead. In other words such a gift lapses.²¹

370. To murderer of testator—A murderer cannot take under the will of his victim.²²

371. To mistress or paramour—A will may be made in favor of a mistress or paramour.²³

372. To illegitimate children—A will may be made in favor of existing illegitimate children of the testator.²⁴ A gift to future illegitimate children is generally held void on grounds of public policy, but there are some exceptions to the general rule.²⁵

373. To aliens—Aliens may take under a will the same as citizens.²⁶

374. To subscribing witnesses of will—A beneficial devise or legacy made in a will to a subscribing witness thereto shall be void, unless there be two other competent subscribing witnesses who are not bene-

¹⁷ G. S. 1913, § 6685; *State v. Willrich*, 72 Minn. 165, 75 N. W. 123; *In re Shumway's Estate*, 194 Mich. 245, 160 N. W. 595.

¹⁸ G. S. 1913, § 6685; *Mohn v. Mohn*, 148 Iowa 288, 126 N. W. 1127. See *Tiffany, Real Property*, § 129; 21 L. R. A. (N. S.) 121.

¹⁹ *Rosenzweig v. Gould*, 131 Md. 209, 101 Atl. 665.

²⁰ G. S. 1913, § 6289, as amended by *Laws 1915, c. 233, § 2*.

²¹ *In re Matthews' Estate*, 176 Cal. 576, 169 Pac. 233; *Manke v. Miller*, 220 N. Y. 225, 115 N. E. 462; 18 A. & E. Ency. of Law (2 ed.) 758; 40 Cyc. 1052; 28 R. C. L. 336. See § 444.

²² *Laws 1917, c. 353* (§ 97 *supra*); *Wellner v. Eckstein*, 105 Minn. 444, 455, 117 N. W. 830. See 30 Harv. L. Rev.

622; *Ann. Cas. 1916A, 382* (manslaughter); 28 R. C. L. 75.

²³ *In re Mondorf's Will*, 110 N. Y. 450, 18 N. E. 256; *In re Powers*, 162 N. Y. S. 828. See *Dusbiber v. Melville*, 178 Mich. 168, 146 N. W. 208; 18 A. & E. Ency. of Law (2 ed.) 736; 40 Cyc. 1059; *Ann. Cas. 1913C, 143*.

²⁴ *In re Sanders' Estate*, 126 Wis. 660, 105 N. W. 1064; 3 A. & E. Ency. of Law (2 ed.) 893; 18 Id. 736; 40 Cyc. 1058; 28 R. C. L. 75.

²⁵ *In re Homer*, 115 L. T. R. 703; 30 Harv. L. Rev. 652; 40 Cyc. 1058.

²⁶ See G. S. 1913, § 6696; 2 A. & E. Ency. of Law (2 ed.) 72; 2 C. J. 1054, 1069; *Woerner, Am. Law of Adm.* (2 ed.) § 19; 31 L. R. A. 180; L. R. A. 1915E, 327; 11 A. L. R. 162 (right of alien enemy to take under will).

ficiaries thereunder. But if such witness would have been entitled to any share of the testator's estate in the absence of a will, then so much of the share that would have descended or have been distributed to him as will not exceed the value of the devise or bequest shall be assigned to him by the probate court in its decree of distribution from the part of the testator's estate included in such void bequest.²⁷ This statute does not render void a devise or bequest to a husband or wife of a subscribing witness.²⁸ It does not render void a devise or bequest to a religious order of which a subscribing witness is a member.²⁹ It does not render devisees or legatees incompetent as witnesses.³⁰ It has no application to witnesses on the probate of a will who are not subscribing witnesses.³¹

375. To counties—The question whether a county has capacity to take a bequest of money to the credit of its general revenue fund has been raised but not determined.³²

376. When legacies vest—Contingent and vested legacies—The law favors the immediate vesting of legacies. A legacy will not be construed as contingent unless it is clearly so. Unless a contrary intention is manifested by the will, if futurity is annexed to the substance of the gift, the vesting of title is suspended, but if the gift is absolute, and the time of payment only is postponed, the gift is not suspended, but vests at once. If payment is postponed merely for the benefit or convenience of the estate or to let in some other interest the legacy is vested.³³ Courts are especially inclined to construe a legacy as vested when it is to a child or grandchild of the testator.³⁴ The disposition of the courts to construe a gift as vested is especially strong in the case of a gift of the residue, where intestacy would otherwise result.³⁵ A

²⁷ G. S. 1913, § 7254. See 18 A. & E. Ency. of Law (2 ed.) 738; 40 Cyc. 1060.

²⁸ *In re Holt's Will*, 56 Minn. 33, 57 N. W. 219.

²⁹ *Will v. Sisters*, Order of St. Benedict, 67 Minn. 335, 69 N. W. 1090.

³⁰ *In re Wiese's Estate*, 98 Neb. 463, 153 N. W. 556; *White v. Bower*, 56 Colo. 575, 136 Pac. 1053; *In re Hoppe's Will*, 102 Wis. 54, 78 N. W. 183; *Williams v. Way*, 135 Ga. 103, 68 S. E. 1023.

³¹ *Sellards v. Kirby*, 82 Kan. 291, 108 Pac. 73; *Strickland v. Smith*, 131 Ark. 350, 198 S. W. 690.

³² *Rice County v. Scott*, 88 Minn. 386, 93 N. W. 109.

³³ *Fox v. Hicks*, 81 Minn. 197, 83 N. W. 538; *Davis v. Hancock*, 95 Minn. 340, 104 N. W. 299; *Savela v. Erickson*, 138 Minn. 93, 163 N. W. 1029; *In re Bell's Will*, 147 Minn. 62, 179 N. W. 650;

In re Freeman's Estate (Minn.) 187 N. W. 411; *Fulton Trust Co. v. Phillips*, 218 N. Y. 573, 113 N. E. 558; *In re Hitchcock's Will*, 222 N. Y. 57, 118 N. E. 220; *Bryant v. Plummer*, 111 Me. 511, 90 Atl. 171; *Weller v. Kolb*, 128 Md. 221, 97 Atl. 542; *Benner v. Mauer*, 133 Wis. 325, 113 N. W. 663; *In re Marshall's Estate* (Pa.) 105 Atl. 63; 18 A. & E. Ency. of Law (2 ed.) 731; 30 Id. 762; 40 Cyc. 1648-1664; L. R. A. 1918E, 1097; 10 Am. St. Rep. 471.

³⁴ *Fox v. Hicks*, 81 Minn. 197, 83 N. W. 538; *In re Marshall's Estate* (Pa.) 105 Atl. 63.

³⁵ *Fulton Trust Co. v. Phillips*, 218 N. Y. 573, 113 N. E. 558; *Blaine v. Dow*, 111 Me. 480, 89 N. E. 1126; 30 A. & E. Ency. of Law (2 ed.) 793; 40 Cyc. 1660; L. R. A. 1918E, 1102.

legacy payable on the death of a third person is vested and not contingent.³⁶ A legacy to a nephew of the testator, contingent upon the death of a daughter of the testator without issue after she received her distributive share of the estate, has been held vested upon the death of the testator.³⁷ Where a gift is made entirely dependent upon the beneficiary attaining a certain age it is contingent, as where the gift is to one at, or from and after, a certain age, or if, when, or provided, or in case he reaches a certain age, or on or upon reaching a certain age. But if the gift is to one and its payment is postponed until he attains a certain age it is vested, as where it is payable at a certain age, or if or when the beneficiary reaches the specified age, or upon his reaching that age. Wills vary so much in their language that no hard and fast rules can be laid down in this connection. The intention of the testator controls. The gift will be construed as vested unless it is manifestly contingent.³⁸ A legacy payable at a specified time in the future is not contingent and vests immediately, unless a contrary intention is clearly manifested by the will.³⁹ Where a specific legacy is set apart for a minor legatee, to be given at a specified time in the future, it is vested; and the fund designated therein should be segregated from the estate, and, upon the death of the legatee before its receipt, descends to his heirs in case of intestacy.⁴⁰ A will provided that the executor should set apart interest bearing securities to produce an annuity for the wife of the testator, the residue thereof upon her death to go to the residuary legatees. The title to the securities, with power of disposition, was in the executors. Held, that one of the residuary legatees had a vested interest in the fund from the death of the testator.⁴¹ Where a gift is to be severed instantaneously from the general estate for the benefit of the legatee, and in the meantime the interest thereof is to be paid to him, it indicates the testator's intention that he shall at all events have the principal, and is to wait only for the payment until the day fixed.⁴² A legacy payable on the happening of certain contingencies held to vest on the death of the testator and to pass to his trustee in bankruptcy.⁴³ Where there

³⁶ *Bryant v. Plummer*, 111 Me. 511, 90 Atl. 171; *Higgins v. Beck*, 116 Me. 127, 100 Atl. 553; 30 A. & E. Ency. of Law (2 ed.) 775; 40 Cyc. 1657; L. R. A. 1918E, 1097. See *Watkins v. Bigelow*, 93 Minn. 361, 101 N. W. 497.

³⁷ *Watkins v. Bigelow*, 93 Minn. 361, 101 N. W. 497.

³⁸ *Fox v. Hicks*, 81 Minn. 197, 83 N. W. 538; *State v. Probate Court*, 100 Minn. 192, 110 N. W. 865; *Cammann v. Bailey*, 210 N. Y. 19, 103 N. E. 824; *In re Yates' Estate*, 170 Cal. 254, 149 Pac. 555; 30 A. & E. Ency. of Law (2 ed.) 776; 40 Cyc. 1652; L. R. A. 1915C, 1012; 10 Am. St. Rep. 470.

³⁹ *Brookhouse v. Pray*, 92 Minn. 448, 100 N. W. 235; *Johrden v. Pond*, 126 Minn. 247, 148 N. W. 112; *In re Hitchcock's Will*, 222 N. Y. 57, 118 N. E. 220; 30 A. & E. Ency. of Law (2 ed.) 770; 40 Cyc. 1657.

⁴⁰ *Fox v. Hicks*, 81 Minn. 197, 83 N. W. 538.

⁴¹ *Merriam v. Wagener*, 74 Minn. 215, 77 N. W. 44.

⁴² *Wessborg v. Merrill*, 195 Mich. 556, 162 N. W. 102.

⁴³ *Watkins v. Bigelow*, 93 Minn. 361, 101 N. W. 497.

are no words importing a gift other than a direction to trustees or executors to divide or pay at a future time the legacy is contingent and does not vest until that time arises. This is merely a rule of construction and yields to a slight indication in the will to the contrary. The present tendency is to apply it with extreme caution.⁴⁴

377. Vested legacies may be alienated—A vested legacy may be alienated by the legatee.⁴⁵

378. Vested legacies pass to heirs of deceased legatee—A vested legacy to one dying intestate passes to his heirs.⁴⁶

379. What passes—Mortgage to testator—A bequest of personal property does not carry a sum of money received by the testator after the execution of the will from the sale of real property otherwise devised by the will.⁴⁷ A will giving to a devisee the use of realty on which the testator held a mortgage at the time of his death, passes the interest of the mortgagee, as it actually existed, with all his rights and interests in the debt and the land itself, growing out of that relation to it.⁴⁸

380. After-acquired property passes—Statute—All property acquired by the testator after making his will shall pass thereby in like manner as if possessed by him at the time when he made his will, unless a different intention manifestly and clearly appears from the will.⁴⁹ This statute abolishes the common-law rule that one could not devise realty unless he was seized thereof at the time of making his will. The rule was a corollary of the ancient conception of a will as a species of conveyance.⁵⁰ At common law land would not pass by a devise unless it was owned by the testator at the time of the will and continuously thereafter until his death.⁵¹ Under the statute there may be a general devise of realty, a thing unknown at common law.⁵¹ The contrary intent cannot be

⁴⁴ *In re Bell's Will*, 147 Minn. 62, 179 N. W. 650; *Wessborg v. Merrill*, 195 Mich. 556, 162 N. W. 102; *Fulton Trust Co. v. Phillips*, 218 N. Y. 573, 113 N. E. 558; *In re Lowerre*, 172 N. Y. S. 171; *Wright v. Wright*, 225 N. Y. 329, 122 N. E. 213; *White v. Smith*, 87 Conn. 663, 89 Atl. 272; 30 A. & E. Ency. of Law (2 ed.) 771-773; 40 Cyc. 1656; L. R. A. 1918E. 1097, 1105, 1108; 10 Am. St. Rep. 477. See *Fox v. Hicks*, 81 Minn. 197, 83 N. W. 538; *Watkins v. Bigelow*, 93 Minn. 361, 101 N. W. 497; *In re Freeman's Estate* (Minn.) 187 N. W. 411; *Crawford v. Carlisle* (Ala.) 89 So. 565.

⁴⁵ *Merriam v. Wagener*, 74 Minn. 215, 77 N. W. 44; *Watkins v. Bigelow*, 93 Minn. 361, 368, 101 N. W. 497. See § 1007.

⁴⁶ *Fox v. Hicks*, 81 Minn. 197, 210, 83 N. W. 538.

⁴⁷ *Stender v. Stender*, 181 Mich. 648, 148 N. W. 255; *Kirsher v. Todd*, 195 Mich. 297, 162 N. W. 129.

⁴⁸ *Batley v. Batley*, 94 Neb. 729, 144 N. W. 786.

⁴⁹ G. S. 1913, § 7264.

⁵⁰ *In re Evans' Estate*, 145 Minn. 252, 177 N. W. 126; *George v. Green*, 13 N. H. 521; *Whitney v. Whitney*, 178 Iowa 117, 159 N. W. 657; *Blaney v. Blaney*, 1 Cush. (Mass.) 107. See 30 A. & E. Ency. of Law (2 ed.) 618; 40 Cyc. 1045; 28 R. C. L. 240; *Woerner*, Am. Law of Adm. (2 ed.) § 419; 18 Ann. Cas. 167; 30 Harv. L. Rev. 298.

⁵¹ *In re Evans' Estate*, 145 Minn. 252, 177 N. W. 126.

⁵¹ *Wilts v. Wilts*, 151 Iowa 149, 130 N. W. 906. See § 390.

shown by extrinsic evidence, oral or written. It must appear from the will itself.⁵² The contrary intention need not be expressed in terms, but it must be derivable from the will itself.⁵³ It is not enough that the testator had no definite intent except such as the law supplies; he must have had an affirmative, positive intent to the contrary.⁵⁴ Under the statute it is not necessary that the contrary intention should be manifested by an express declaration, but it is sufficient if it can be clearly inferred from the several provisions of the will or from its general scope and import. The true question seems to be whether the testator intended to die testate as to all his estate which he might leave, or was content to die intestate as to a part.⁵⁵ A general devise of all the testator's realty passes after-acquired property and so does a residuary clause.⁵⁶ Where a will made no special reference to after-acquired property, and there was no general or specific clause under which certain after-acquired land could pass if it had been owned at the time of making the will, it was held that the land did not pass.⁵⁷ A will devised to certain persons "all my real estate which is" (describing it), "also including all other real estate now owned by me." Held, that after-acquired real estate passed, the word "now" being referable to the time of the testator's death.⁵⁸ The common-law rule that residuary devises are specific on the ground that a testator can only dispose of lands owned by him at the time of his will, if ever in force here, was abrogated by this statute.⁵⁹ A testator owning an undivided half of a tract of land devised such half specifically, and afterwards acquired an undivided thirty-second part of the same tract. Held, that the thirty-second part passed under the residuary devise by the statute.⁶⁰ There is a conflict of authority in other states as to whether the statute applies to specific devises.⁶¹ A testator, after making his will, in which he specifically devised his "mansion house, and other buildings thereon, and the privileges thereto belonging," purchased adjoining land which he laid out and used in connection with his mansion house, and built a greenhouse thereon. Held, that the purchased estates passed by the specific de-

⁵² See *Ingersoll v. Hopkins*, 170 Mass. 401, 49 N. E. 623. *Sussex Trust Co. v. Polite* (Del.) 106 Atl. 54.

⁵³ *Pierce v. Root*, 86 Conn. 90, 84 Atl. 295.

⁵⁴ *Pierce v. Root*, 86 Conn. 90, 84 Atl. 295.

⁵⁵ *Bedell v. Fradenburgh*, 65 Minn. 361, 68 N. W. 41; *Brimmer v. Sohler*, 1 Cush. (Mass.) 118; *Ingersoll v. Hopkins*, 170 Mass. 401, 49 N. E. 623; *Whitney v. Whitney*, 178 Iowa 117, 159 N. W. 657.

⁵⁶ *Whitney v. Whitney*, 178 Iowa 117, 159 N. W. 657; *Hardenbergh v. Ray*, 151

U. S. 112; *Redwood v. Howison*, 129 Md. 577, 99 Atl. 863.

⁵⁷ *Bedell v. Fradenburgh*, 65 Minn. 361, 68 N. W. 41. See *Flynn v. Holman*, 119 Iowa 731, 94 N. W. 447.

⁵⁸ *Luers v. Luers*, 145 Iowa 600, 124 N. W. 603. See 33 Harv. L. Rev. 568.

⁵⁹ *Blaney v. Blaney*, 1 Cush. (Mass.) 107. See § 390.

⁶⁰ *Hill v. Bacon*, 106 Mass. 578. See *Carley v. Harper*, 219 N. Y. 295, 114 N. E. 351.

⁶¹ See *Sussex Trust Co. v. Polite* (Del.) 106 Atl. 54. See 33 Harv. L. Rev. 568.

wise.⁶² The local law governs as to whether a will will carry after-acquired property.⁶³ The statute has no effect on personalty. The rule always has been that after-acquired personalty passes.⁶⁴ Cemetery lots are an exception to the statute. To pass by will they must be specifically mentioned.⁶⁵

381. Certainty—In general—A bequest of a sum of money to executors "to use as they see proper" is void for uncertainty.⁶⁶ The following residuary clause of a will held void as too indefinite and uncertain for enforcement: "All personal property, except money, not otherwise disposed of herein, is to be paid and distributed by my executor as follows: To such persons, respectively, as were my friends in my lifetime, and he may think suitable and appropriate, observing my wishes in regard thereto so far as he may know or have reason to believe what they were."⁶⁷

382. Presumed a bounty—Independent of statute the presumption is that a legacy is intended as a bounty, and not as a purchase or in lieu of statutory provisions in the nature of dower.⁶⁸

383. Directions contrary to public policy—It has been assumed, for the purpose of a particular case, that a direction to an executor to destroy all the residue of the money, or cash, or evidences of credit belonging to an estate, was void.⁶⁹

384. Perpetuities—A devise which suspends the power of alienation contrary to our statutes against perpetuities is void.⁷⁰ The statutes against perpetuities are hardly applicable to burial lots.⁷¹ A limitation over which violates the rule against perpetuities will be considered as

⁶² *Kimball v. Ellison*, 128 Mass. 41.

⁶³ *Frazier v. Boggs*, 37 Fla. 307, 20 So. 245; *Doe v. Wynne*, 23 Miss. 251; *Applegate v. Smith*, 31 Wis. 166.

⁶⁴ *Briggs v. Briggs*, 69 Iowa 617, 29 N. W. 632; 30 A. & E. Ency. of Law (2 ed.) 617.

⁶⁵ See § 368.

⁶⁶ *Casey v. Brabec*, 111 Minn. 43, 126 N. W. 401.

⁶⁷ *Kepley v. Caldwell*, 96 Neb. 748, 148 N. W. 966.

⁶⁸ *In re Gotzian*, 34 Minn. 159, 24 N. W. 920; *McGowan v. Baldwin*, 46 Minn. 477, 49 N. W. 251; *Baldwin v. Zien*, 117 Minn. 178, 134 N. W. 498. See § 393.

⁶⁹ *Rice County v. Scott*, 88 Minn. 386, 93 N. W. 109.

⁷⁰ G. S. 1913, §§ 6664-6663; *Simpson v. Cook*, 24 Minn. 180; *Fairchild v. Rogers*, 32 Minn. 269, 20 N. W. 191; *Atwater v. Russell*, 49 Minn. 22, 56, 51 N. W.

624; *Id.*, 49 Minn. 57, 77, 51 N. W. 629; *In re Tower's Estate*, 49 Minn. 371, 52 N. W. 27; *Morse v. Blood*, 68 Minn. 442, 71 N. W. 682; *Lane v. Eaton*, 69 Minn. 141, 71 N. W. 1031; *Owatonna v. Rosebrock*, 88 Minn. 318, 92 N. W. 1122; *Rong v. Haller*, 109 Minn. 191, 123 N. W. 471, 806; *Bailes v. Gunter*, 111 Minn. 383, 127 N. W. 398; *Buck v. Walker*, 115 Minn. 239, 132 N. W. 205; *Bemis v. Northwestern Trust Co.*, 117 Minn. 409, 135 N. W. 1124; *Young Men's Christian Assn. v. Horn*, 120 Minn. 404, 139 N. W. 805; *Mineral Land Invest. Co. v. Bishop Iron Co.*, 134 Minn. 412, 159 N. W. 966; *Minnesota Loan & Trust Co. v. Douglas*, 135 Minn. 413, 161 N. W. 158; *Hause v. O'Leary*, 136 Minn. 126, 161 N. W. 392; *In re Bell's Will*, 147 Minn. 62, 179 N. W. 650. See § 407; *Dunnell*, Minn. Digest and Supplements, § 7480.

⁷¹ *Little v. Universalist Convention*, 143 Minn. 298, 173 N. W. 659.

stricken out, leaving the prior disposition to operate as if the limitation over had never been made.⁷²

385. Selection by beneficiaries—Beneficiaries may be given a right to select their shares, or they may have an implied right of selection, as where the gift is of a portion of property of unequal value or a portion of a larger quantity.⁷³

386. Option to purchase property of estate—A will may grant an option to purchase property of the estate at its appraised value or at a price named or agreed upon.⁷⁴

387. Partial invalidity—If a will contains distinct and independent provisions, some of which are valid and others invalid, effect must be given to the valid ones, and there is an intestacy only as to that part of the estate affected by the invalid ones; but where the several provisions of the will are so dependent upon and connected with each other that they cannot be separated without defeating the general intention of the testator they are all void and there is a total intestacy.⁷⁵ Where a legal and an illegal trust are created by a will, so connected as to constitute one general scheme, so that the scheme must fail if one be retained and the other rejected, the legal trust must fall with the illegal one.⁷⁶

388. Acceptance of devise or bequest—Presumption—Renunciation—A devise of real property is in the nature of an offer to the devisee. If the devise is apparently beneficial to him his acceptance is presumed as of the time the devise takes effect. To affect intervening rights of creditors a renunciation must be made within a reasonable time after knowledge of the gift. When so made a renunciation relates back to the death of the testator and the gift never takes effect.⁷⁷ A parol disclaimer of a gift by a devisee or legatee is sufficient. It need not be by deed

⁷² *Greenough v. Osgood*, 235 Mass. 235, 126 N. E. 461.

⁷³ *In re Turner*, 206 N. Y. 93, 99 N. E. 187; *In re Mizener's Estate* (Pa.) 105 Atl. 46; *Potomac Lodge v. Miller*, 118 Md. 405, 94 Atl. 554. See 40 Cyc. 1488.

⁷⁴ *Watson v. Riley*, 101 Neb. 511, 164 N. W. 81. See 40 Cyc. 2000.

⁷⁵ *Sabledowsky v. Arbuckle*, 50 Minn. 475, 482, 52 N. W. 920; *Rong v. Haller*, 109 Minn. 191, 123 N. W. 471; *Bemis v. Northwestern Trust Co.*, 117 Minn. 409, 135 N. W. 1124; *Minnesota Loan & Trust Co. v. Douglas*, 135 Minn. 413, 424, 161 N. W. 158; *In re Hitchcock's Will*, 222 N. Y. 57, 118 N. E. 220; *Carrier v.*

Carrier, 226 N. Y. 114, 123 N. E. 135; *In re Silsby*, 229 N. Y. 396, 128 N. E. 212; 30 A. & E. Ency. of Law (2 ed.) 665; 40 Cyc. 1080.

⁷⁶ *Rong v. Haller*, 109 Minn. 191, 123 N. W. 471.

⁷⁷ *Albany Hospital v. Albany Guardian Society*, 214 N. Y. 435, 108 N. E. 812; *Mohn v. Mohn*, 148 Iowa 288, 126 N. W. 1127; *Strom v. Wood*, 100 Kan. 556, 164 Pac. 1100; 18 A. & E. Ency. of Law (2 ed.) 743; 40 Cyc. 1892; 28 R. C. L. 328; *Ann. Cas.* 1916D, 1199 (effect of renunciation). See *State v. Probate Court*, 143 Minn. 77, 172 N. W. 902 (effect of refusal to accept gift on inheritance tax).

or matter of record.⁷⁸ The right of a beneficiary to refuse a bequest is superior to the rights of his creditors.⁷⁹

389. General and specific legacies distinguished—A general legacy is a testamentary gift of personal property not separated or distinguished from other property of the same kind, but payable or deliverable out of the general assets of the testator's estate.⁸⁰ A specific legacy is a testamentary gift of personal property separated or distinguished from other property of the same kind, not payable or deliverable out of the general assets of the testator's estate, but calling for the delivery of a particular thing or the payment of money out of a particular source or fund.⁸¹ A legacy is said to be general when it is not answered by any particular portion or article belonging to the estate, the delivery of which will alone fulfill the intent of the testator; and, when it can be so answered, it is said to be a specific thing belonging to the estate, which is by the legacy intended to be transferred in specie to the legatee. If it is the intention to have it paid without reference to the fund upon which it is primarily a charge, it is general; but when it is to be paid out of a particular fund, and not otherwise, it is specific.⁸² A specific legacy is one which separates and distinguishes the property bequeathed from the other property of the testator so that it can be identified. It can only be satisfied by the thing bequeathed; if that has no existence when the bequest would otherwise become operative the legacy has no effect. If the testator subsequently parts with the property, even if he exchanges it for other property or purchases other property with the proceeds, the legatee has no claim on the estate for the value of his legacy. The legacy is adeemed by the act of the testator.⁸³ The fact that the descriptive language includes numerous articles does not necessarily prevent the gift from being specific.⁸⁴ A gift of the

⁷⁸ *Albany Hospital v. Albany Guardian Society*, 214 N. Y. 435, 108 N. E. 812; *Defreese v. Lake*, 109 Mich. 415, 67 N. W. 505. See 28 Harv. L. Rev. 210.

⁷⁹ *Schoonover v. Osborne* (Iowa) 187 N. W. 20.

⁸⁰ *Kramer v. Kramer*, 201 Fed. 248; *Nusley v. Curtiss*, 36 Colo. 464, 85 Pac. 846; *Weed v. Hoge*, 85 Conn. 490, 83 Atl. 636; 18 A. & E. Ency. of Law (2 ed.) 711; 40 Cyc. 1870; 28 R. C. L. 291; *Woerner*, Am. Law of Adm. (2 ed.) § 444; *Bigelow*, Wills, 212; 140 Am. St. Rep. 577; 10 Ann. Cas. 490.

⁸¹ *Merrillam v. Merrillam*, 80 Minn. 254, 259, 83 N. W. 162; *In re Hawgood's Estate*, 37 S. D. 565, 159 N. W. 117; *Kramer v. Kramer*, 201 Fed. 248; *Nusley v. Curtiss*, 36 Colo. 464, 85 Pac. 846; *Tomlinson v. Bury*, 145 Mass. 346, 14 N. E.

137; *Bullard v. Leach*, 213 Mass. 117, 100 N. E. 57; *Keefe v. Cogswell*, 223 Mass. 364, 111 N. E. 858; *Weed v. Hoge*, 85 Conn. 490, 83 Atl. 636; 18 A. & E. Ency. of Law (2 ed.) 714; 40 Cyc. 1869; 28 R. C. L. 289; *Woerner* Am. Law of Adm. (2 ed.) § 444; 140 Am. St. Rep. 577; 10 Ann. Cas. 490.

⁸² *Davis v. Close*, 104 Iowa 262, 73 N. W. 600; *Carpenter's Estate v. Wiley*, 166 Iowa 48, 147 N. W. 175; *In re Hawgood's Estate*, 37 S. D. 565, 159 N. W. 117.

⁸³ *Tomlinson v. Bury*, 145 Mass. 346, 14 N. E. 137; *Weed v. Hoge*, 85 Conn. 490, 83 Atl. 636.

⁸⁴ *Tomlinson v. Bury*, 145 Mass. 346, 348, 14 N. E. 137; *Weed v. Hoge*, 85 Conn. 490, 83 Atl. 636.

proceeds of the sale of specific real or personal property is specific.⁸⁵ Whether a legacy is general or specific depends on the intention of the testator. There is no technical arbitrary rule requiring the use of particular words or phrases to make a legacy specific. The intention may be distinctly expressed or it may be inferred from the general scope and tenor of the will. In case of any reasonable doubt a legacy should be held general rather than specific.⁸⁶ A gift of a sum of money without specifying the fund out of which it is to be paid is a general legacy.⁸⁷ A gift of the proceeds of an insurance policy has been held a specific legacy.⁸⁸ A gift of all the money of the testator deposited in a specified bank is specific.⁸⁹ A gift of all the personal property of the testator, or of all except certain specified property, or of all other personal property, is a general legacy.⁹⁰ A gift of all the personal property of the testator of a designated kind, as for example, all his household goods, or all his stocks, bonds, notes, cash in hand or in bank, is specific.⁹¹ A gift of a specified proportion of all the personal property of the testator of a certain kind is a general legacy.⁹² In a gift of shares of corporate stock a very slight indication of an intention to give shares then owned by the testator is enough to make the gift specific.⁹³ A gift of stocks and bonds in a specified amount of money without describing them is a general legacy.⁹⁴ A residuary bequest is ordinarily general.⁹⁵ An

⁸⁵ *Weed v. Hoge*, 85 Conn. 490, 83 Atl. 636; *May v. Sherrard's Legatees*, 115 Va. 617, 79 S. E. 1026; *Ann. Cas.* 1913C, 546.

⁸⁶ *Wyckoff v. Perrine*, 37 N. J. Eq. 118; *Johnson v. Conover*, 54 N. J. Eq. 344; *In re Security Trust Co.*, 221 N. Y. 213, 116 N. E. 1006; *Collar v. Gaarn* (Colo.) 171 Pac. 63; 18 A. & E. Ency. of Law (2 ed.) 712, 715; 40 Cyc. 1871; 140 Am. St. Rep. 613; 10 *Ann. Cas.* 490.

⁸⁷ *In re Martin*, 25 R. I. 1, 54 Atl. 589. See *In re Hawgood's Estate*, 37 S. D. 565, 159 N. W. 117; 18 A. & E. Ency. of Law (2 ed.) 712; 40 Cyc. 1873; 140 Am. St. Rep. 605.

⁸⁸ *Kelleher v. Kelleher*, 140 Minn. 409, 168 N. W. 586. See 10 *Ann. Cas.* 1137. ⁸⁹ *Bullard v. Leach*, 213 Mass. 117, 100 N. E. 57.

⁹⁰ *In re Hawgood's Estate*, 37 S. D. 565, 159 N. W. 117; 18 A. & E. Ency. of Law (2 ed.) 713; 40 Cyc. 1877; 140 Am. St. Rep. 577.

⁹¹ *Kearns v. Kearns*, 77 N. J. Eq. 453, 76 Atl. 1042; *Morehead's Ex. v. France*, 153 Ky. 44, 154 S. W. 378; *Rock v. Zimmerman*, 25 S. D. 237, 126 N. W. 263;

Weed v. Hoge, 85 Conn. 490, 83 Atl. 636; 18 A. & E. Ency. of Law (2 ed.) 718; 40 Cyc. 1877; 140 Am. St. Rep. 577; 10 *Ann. Cas.* 494.

⁹² *In re Vanderbilt's Estate* (N. J.) 106 Atl. 364.

⁹³ *Thayer v. Paulding*, 200 Mass. 98, 88 N. E. 868; *In re Security Trust Co.*, 221 N. Y. 213, 116 N. E. 1006. See *Duffy v. Bourneuf*, 227 Mass. 513, 116 N. E. 814; *In re Bugbee's Will* (N. J.) 102 Atl. 484; *Sherman v. Riley* (R. I.) 110 Atl. 629; 18 A. & E. Ency. of Law (2 ed.) 718; 40 Cyc. 1875; *Woerner*, *Am. Law of Adm.* (2 ed.) § 444; 14 Col. L. Rev. 74; 10 *Ann. Cas.* 490; 19 *Ann. Cas.* 1187; 140 Am. St. Rep. 607; 35 *Harv. L. Rev.* 474; 6 A. L. R. 1383.

⁹⁴ *Boston Safe Deposit & Trust Co. v. Reed*, 229 Mass. 267, 118 N. E. 333. See 140 Am. St. Rep. 607; 10 *Ann. Cas.* 490; 35 *Harv. L. Rev.* 474.

⁹⁵ *In re Martin*, 25 R. I. 1, 54 Atl. 589; *Kemp v. Dandison*, 169 Mich. 578, 135 N. W. 270; 18 A. & E. Ency. of Law (2 ed.) 713; 40 Cyc. 1877; 140 Am. St. Rep. 610. This rule seems to be a curious survival of the original common-law con-

enumeration of specific articles in a residuary clause does not make the legacy specific as to such articles, but a legacy is specific if the specified articles are so enumerated as to distinguish them from the residue, as by the use of such words as "together with," "as well as," and "also."⁸⁶ A bequest of the remainder of testator's "personal effects, including furniture, bric-a-brac, etc.," is specific.⁸⁷ A legacy payable out of a certain residue, in case there should be such residue, held not specific or demonstrative.⁸⁸

390. General and specific devises—Statute—At common law all devises of realty are deemed specific. Under G. S. 1913, § 7264, authorizing a testator to devise after-acquired property, there may be a general devise of realty.⁸⁹ The common-law rule that residuary devises are necessarily specific was abrogated by this statute.¹ A will devised to testator's wife "one-third" of all my property, both real, personal and mixed, of which I shall die seized and possessed or to which I shall be entitled at the time of my decease." Held, not a specific devise.² The question whether a devise is general or specific is determined by the same tests as whether a legacy is general or specific.³ A general devise will not cover cemetery lots. They must be specifically mentioned.⁴

391. Demonstrative legacies—A demonstrative legacy is a bequest of a certain sum of money with a direction that it shall be paid out of a particular fund. It differs from a specific legacy in that if the fund out of which it is payable fails for any cause it is nevertheless entitled to come on the estate as a general legacy.⁵ Where a testator provides a

ception of an executor as the successor of the decedent. See Holmes, *Common Law*, 344.

⁸⁶ *Kemp v. Dandison*, 169 Mich. 578, 135 N. W. 270; *Le Rougetel v. Mann*, 63 N. H. 472, 3 Atl. 746; *In re Painter's Estate*, 150 Cal. 505, 89 Pac. 98; *Bristol v. Stump* (Md.) 110 Atl. 470; *Stehn v. Hayssen*, 124 Wis. 583, 102 N. W. 1074; 18 A. & E. Ency. of Law (2 ed.) 713; 40 Cyc. 1877; 11 Ann. Cas. 765.

⁸⁷ *Weed v. Hoge*, 85 Conn. 490, 83 Atl. 636.

⁸⁸ *In re Douglas' Estate*, 149 Minn. 276, 183 N. W. 355.

⁸⁹ *Wilts v. Wilts*, 151 Iowa 149, 130 N. W. 906; *In re Suttons' Estate* (Del.) 97 Atl. 624; 18 A. & E. Ency. of Law (2 ed.) 720; 40 Cyc. 1878; 28 R. C. L. 291; *Woerner, Am. Law of Adm.* (2 ed.) § 444; 140 Am. St. Rep. 578; Ann. Cas. 1914D, 32. See *Elberg v. Elberg*, 132 Minn. 15, 155 N. W. 751. The common-law rule

was a result of the feudal system. See Holmes, *Common Law*, c. 10.

¹ *Blaney v. Blaney*, 1 Cush. (Mass.) 107; *Wilts v. Wilts*, 151 Iowa 149, 130 N. W. 906; *In re Sutton's Estate* (Del.) 97 Atl. 624. See Ann. Cas. 1914D, 32; Holmes, *Common Law*, 344.

² *Wilts v. Wilts*, 151 Iowa 149, 130 N. W. 906. See Ann. Cas. 1914D, 32.

³ *Bristol v. Stump* (Md.) 110 Atl. 470.

⁴ See § 368.

⁵ *Merriam v. Merriam*, 80 Minn. 254, 83 N. W. 162; *In re Douglas' Estate*, 149 Minn. 276, 183 N. W. 355; *In re Hawgood's Estate*, 37 S. D. 565, 159 N. W. 117; *Johnson v. Conover*, 54 N. J. Eq. 333; *Collar v. Gaarn* (Colo.) 171 Pac. 63; *Pennsylvania Co. v. Riley* (N. J. Eq.) 104 Atl. 225; 18 A. & E. Ency. of Law (2 ed.) 721; 40 Cyc. 1870; 28 R. C. L. 292; 6 A. L. R. 1353; 4 Ann. Cas. 158; 4 L. R. A. (N. S.) 922; 11 L. R. A. (N. S.) 49 (demonstrative legacies of stocks, bonds and the like).

fund to furnish a certain income for the widow, designating the amount of the income, and providing that it shall be paid each year, and that securities shall be selected sufficient to secure that result, the selection of such securities in the first instance does not constitute a specific and changeless fund or legacy, the income of which must necessarily be diminished upon diminution of the producing capacity of such fund. Such a legacy is what is called a "general" or "demonstrative" legacy, and, when the fund fails to produce the income directed by the testator for the benefit of his widow, such income, to the full amount, should be made up from the corpus of the estate.⁶

392. Residuary gifts—Conflict of laws—A residuary gift in a will is a gift of all the residue of the estate of a testator, or all the residue of his real or personal property, remaining after the other gifts in the will are satisfied. No particular form of words is necessary to create a residuary gift.⁷ All property of the testator, whether real or personal, excepting cemetery lots, not otherwise disposed of by the will, passes under a general residuary clause, unless a contrary intention is clearly manifested by the will.⁸ There is a statutory exception in the case of cemetery lots. They will not pass under a residuary clause, but must be specifically mentioned.⁹ One of the chief purposes of a residuary clause is to prevent intestacy as to any part of the estate.¹⁰ One may take under a residuary clause though he is a beneficiary under other provisions of the will.¹¹ A surviving spouse may take as an "heir" under

⁶ *Merriam v. Merriam*, 80 Minn. 254, 83 N. W. 162; *Eggleston v. Merriam*, 83 Minn. 98, 85 N. W. 937, 86 N. W. 444; *Id.*, 86 Minn. 88, 90 N. W. 118.

⁷ *Church of St. Vincent De Paul v. Brannan*, 97 Minn. 349, 353, 107 N. W. 141; *Falson v. Middleton*, 171 N. C. 170, 88 S. E. 141; 18 A. & E. Ency. of Law (2 ed.) 723; 40 Cyc. 1563; *Woerner, Am. Law of Adm.* (2 ed.) § 462; 44 L. R. A. (N. S.) 803; *Ann. Cas.* 1917E, 75. See, for example, *Prentiss v. Prentiss*, 14 Minn. 18 (5); *Huntsman v. Hooper*, 32 Minn. 163, 20 N. W. 127; *In re Gotzian's Estate*, 34 Minn. 159, 24 N. W. 920; *Cheever v. Converse*, 35 Minn. 179, 28 N. W. 217; *Sherman v. Lewis*, 44 Minn. 107, 46 N. W. 318; *Atwater v. Russell*, 49 Minn. 22, 51 N. W. 624; *Atwater v. Russell*, 49 Minn. 22, 51 N. W. 629; *In re Swenson's Estate*, 55 Minn. 300, 56 N. W. 1115; *Cowles v. Henry*, 61 Minn. 459, 63 N. W. 1028; *Lane v. Eaton*, 69 Minn. 141, 71 N. W. 1031; *State v. Willrich*, 72 Minn. 165, 75 N. W. 123; *Yates*

v. Shern, 84 Minn. 161, 86 N. W. 1004; *Johnson v. Linstrom*, 92 Minn. 8, 99 N. W. 212; *Goodwin v. McGaughey*, 108 Minn. 248, 122 N. W. 6; *Larson v. Curran*, 121 Minn. 104, 140 N. W. 337; *Barney v. May*, 135 Minn. 299, 160 N. W. 790; *Savela v. Erickson*, 138 Minn. 93; 163 N. W. 1029.

⁸ *Larson v. Curran*, 121 Minn. 104, 140 N. W. 337 (homestead held to pass under a residuary clause free from claims of creditors of testator); *Bigelow v. Gillott*, 123 Mass. 102; *Lamb v. Lamb*, 131 N. Y. 227, 235, 30 N. E. 133; *Vandwalker v. Rollins*, 63 N. H. 460; 18 A. & E. Ency. of Law (2 ed.) 724; 40 Cyc. 1567; 28 R. C. L. 296; *Woerner, Am. Law of Adm.* (2 ed.) § 462.

⁹ See § 368.

¹⁰ *Beidler v. Dehner*, 178 Iowa 1338, 161 N. W. 32; *Grant v. Stephens (Tex.)* 200 S. W. 893.

¹¹ *In re Swenson's Estate*, 55 Minn. 300, 308, 56 N. W. 1115.

a residuary clause.¹² If a residuary clause is void the residuum passes as intestate property.¹³ A gift of either real or personal property which is void because in violation of some rule of law or because the beneficiary is incompetent to take it passes under a residuary clause.¹⁴ If there is no residuary clause a partial intestacy necessarily results where any of the beneficiaries are incompetent or there is a void gift.¹⁵ A testatrix at the time of making a will owned a valuable apartment building, the bulk of her estate. She had then no personal property of consequence, save household and personal belongings. By her will she first divided her real estate equally between her son and daughter, her sole heirs at law. She then made four bequests, numbered 3 to 6, giving to different persons enumerated personal belongings, such as jewelry, plate, china, pictures, furniture and books, and then by a seventh bequest gave "the residue * * * of my personal effects * * * not herein enumerated" to her son. After making the will she sold the apartment building and received money and securities therefor. Held, the money and securities did not pass under the residuary clause of the seventh bequest.¹⁶ Gifts which lapse for any reason pass under a residuary clause if they are not themselves in that clause.¹⁷ A certain will and codicil construed and held that it was the intention of the testator, by the codicil, to substitute to the residuary bequest in the will, in lieu of the legatee mentioned in it, a new beneficiary brought in by the codicil, although that instrument made no express reference to the residuary clause in the will.¹⁸ A failure of a scrivener to include a residuary clause as directed by the testator held not fatal because the residuum descended under the statute as the testator wished it should under his will.¹⁹ A rejected devise or legacy passes under a general residuary clause unless the will clearly provides otherwise.²⁰ A revoked devise or legacy passes under a general residuary clause unless a contrary intention is clearly manifested by the will.²¹ A general

¹² *In re Swenson's Estate*, 55 Minn. 300, 308, 56 N. W. 1115. See §§ 105, 359.

¹³ *Church of St. Vincent De Paul v. Brannan*, 97 Minn. 349, 107 N. W. 141; *State v. Holmes*, 115 Mich. 456, 73 N. W. 548; *McHugh v. Cole*, 97 Wis. 166, 72 N. W. 631; *Bowden v. Brown*, 200 Mass. 269, 86 N. E. 351; 18 A. & E. Ency. of Law (2 ed.) 765; 40 Cyc. 1951.

¹⁴ *Atwater v. Russell*, 49 Minn. 22, 52, 51 N. W. 624; *Beldler v. Dehner*, 178 Iowa 1338, 161 N. W. 32 (legacy void for indefiniteness); *Albany Hospital v. Albany Guardian Soc.*, 214 N. Y. 435, 108 N. E. 812; *Benedict v. Levi*, 163 N. Y. S. 846; 18 A. & E. Ency. of Law (2 ed.) 764; 40 Cyc. 1569; *Woerner*, Am. Law of Adm. (2 ed.) § 437.

¹⁵ *Atwater v. Russell*, 49 Minn. 22, 52, 51 N. W. 624.

¹⁶ *Barney v. May*, 135 Minn. 299, 160 N. W. 790.

¹⁷ See § 452.

¹⁸ *Atwater v. Russell*, 49 Minn. 22, 51 N. W. 624.

¹⁹ *Church of St. Vincent De Paul v. Brannan*, 97 Minn. 349, 107 N. W. 141.

²⁰ *Albany Hospital v. Albany Guardian Soc.*, 214 N. Y. 435, 108 N. E. 812; 18 A. & E. Ency. of Law (2 ed.) 762; 40 Cyc. 1942; Ann. Cas. 1916D, 1199.

²¹ *Giddings v. Giddings*, 65 Conn. 149, 32 Atl. 334; *Bigelow v. Gillott*, 123 Mass. 102; 18 A. & E. Ency. of Law (2 ed.) 765; 40 Cyc. 1570; 26 Harv. L. Rev. 382.

residuary clause carries all reversionary interests unless a contrary intention is clearly manifested by the will.²² The test of the power of a residuary clause to carry property is whether the property was the testator's and not whether he knew it was his.²³ Equitable as well as legal estates or interests pass under a general residuary clause.²⁴ What will pass under a residuary clause is to be determined by the law of the last domicile of the testator.²⁵

393. Legacy in satisfaction of a debt of testator to legatee—It is a general rule that a legacy given by a debtor to his creditor, which is equal to or greater than the debt, is to be deemed a satisfaction of the debt, unless a contrary intention is manifested by the will. This rule has apparently never been applied in this state. Where it is recognized it is not favored and there are many exceptions to it. It is not applied where, independent of the legacy, there is a general direction to pay debts, or if there is a difference in the time when they are payable, or where one is certain and absolute and the other contingent and uncertain, or where the debt was contracted after the execution of the will, or where the debt is unliquidated, or where the debt is evidenced by a negotiable instrument, or where the debt is less than the legacy, or where the creditor is named as a residuary legatee and the amount of the residuum is uncertain in amount or time of payment, or where the legatee is one of several to whom equal amounts are given, or where the legacy is of specific things. Evidence of the declarations of the testator is admissible to overcome the presumption.²⁶

394. Stock dividends—Right of life tenant—As between a life tenant, who is entitled to the income from certain stock in a corporation and a remainderman, who will receive the corpus of the estate after the death of the life tenant, stock dividends declared out of a surplus produced by the accumulation of earnings after the death of the testator belong to the life tenant as a part of the earnings of the original stock.²⁷

²² *Clement v. Whittaker*, 231 Fed. 940; 18 A. & E. Ency. of Law (2 ed.) 724; 40 Cyc. 1566.

²³ *Clement v. Whittaker*, 231 Fed. 940.

²⁴ *Mayer v. American S. & T. Co.*, 222 U. S. 295.

²⁵ *Proctor v. Clark*, 154 Mass. 45, 27 N. E. 673.

²⁶ *Strong v. Williams*, 12 Mass. 391; *Smith v. Smith*, 1 Allen (Mass.) 129; *Reynolds v. Robinson*, 82 N. Y. 103; *Glover v. Patten*, 165 U. S. 394; *Olsen v. Hagan* (Wash.) 172 Pac. 1173; *Dickson v. Dickson*, 180 Ky. 423, 202 S. W. 891; *Mitchell v. Vest*, 157 Iowa 336, 136

N. W. 1054; *Noyes v. Noyes*, 224 Mass. 125, 112 N. E. 850; *White v. Deering* (Cal.) 177 Pac. 516; *McNaughton v. McClure* (Wis.) 171 N. W. 936; *Kupsick v. Diestelhorst* (Wis.) 177 N. W. 873; 18 A. & E. Ency. of Law (2 ed.) 769; 40 Cyc. 1885; 28 R. C. L. 299; *Woerner*, Am. Law of Adm. (2 ed.) § 447; L. R. A. 1915B, 1156.

²⁷ *Goodwin v. McGaughey*, 108 Minn. 248, 122 N. W. 6. See 12 L. R. A. (N. S.) 768; 35 Id. 563; 50 Id. 510; L. R. A. 1916D, 211; 118 Am. St. Rep. 162; 26 Harv. L. Rev. 77.

395. Abatement of legacies—Conflict of laws—An abatement of a legacy is a reduction from it because of the insufficiency of the estate of the testator to pay all his debts, expenses of administration and legacies in full.²⁸ Unless the will clearly directs otherwise abatement of legacies takes place in the following order: (1) Residuary legacies; (2) general legacies pro rata; (3) specific legacies pro rata. If the fund out of which a demonstrative legacy is payable exists as a part of the testator's estate at his death it is classed as a specific legacy and abates only with other specific legacies ratably, but if the fund does not so exist or is insufficient a demonstrative legacy is classed as a general legacy and abates only with other general legacies. Different classes of legacies do not prorate between each other, but each class in its order must be exhausted before abatement can take place at all in the next higher class. If the chances of deficiency are anticipated and clearly provided for by the testator, his directions will govern, and the loss must be borne by those upon whom he places it.²⁹ Where the property to pay a demonstrative legacy has been sold and the only other property has been specifically disposed of by the will, the demonstrative legacy fails.³⁰ A special statutory rule governs abatement where a child is unintentionally omitted from a will and where a child is born after the death of the testator.³¹ A legacy may be specific though it is the residuary clause and in such a case it will abate only as a specific legacy.³² A legacy given for a valuable consideration does not abate with legacies which are mere bounties.³³ A legacy given in satisfaction of a debt or claim will not abate with legacies which are mere bounties, at least if the debt or claim is unliquidated.³⁴ A legacy in lieu of dower does not abate with other legacies in case the fund is insufficient to pay all. The widow takes the estate which she elects to receive in lieu of dower as purchaser, for which she pays a consideration by surrender-

²⁸ *In re Neistrath's Estate*, 66 Cal. 330, 5 Pac. 507; *In re Hawgood's Estate*, 37 S. D. 565, 159 N. W. 117; 1 A. & E. Ency. of Law (2 ed.) 42; 40 Cyc. 1899; *Pomeroy's Equity*, § 1136.

²⁹ *Merriam v. Merriam*, 80 Minn. 254, 83 N. W. 162 (demonstrative legacy); *Towle v. Swasey*, 106 Mass. 100; *Richardson v. Hall*, 124 Mass. 228; *Emery v. Batchelder*, 78 Me. 233, 3 Atl. 733; *In re Hawgood's Estate*, 37 S. D. 565, 159 N. W. 117; *Pennsylvania Co. v. Riley* (N. J. Eq.) 104 Atl. 225; 1 A. & E. Ency. of Law (2 ed.) 45-62; 40 Cyc. 1899-1914; 28 R. C. L. 302; *Pomeroy's Equity*, § 1136; *Woerner, Am. Law of Adm.* (2 ed.) § 452; 4 L. R. A. (N. S.) 922; 2 Ann. Cas. 976; 8 Am. St. Rep. 720.

³⁰ *Pennsylvania Co. v. Riley* (N. J. Eq.) 104 Atl. 225.

³¹ See § 151.

³² *In re Corby's Estate*, 154 Mich. 353, 117 N. W. 906; *In re Kemp's Estate*, 169 Mich. 578, 135 N. W. 270.

³³ *Reynolds v. Reynolds*, 27 R. I. 520, 63 Atl. 804; 1 A. & E. Ency. of Law (2 ed.) 48; 40 Cyc. 1906; 28 R. C. L. 303; *Pomeroy, Equity*, § 1142; *Woerner, Am. Law of Adm.* (2 ed.) § 452; 8 Am. St. Rep. 725.

³⁴ *McLean v. Robertson*, 126 Mass. 537; *Matthews v. Targarona*, 104 Md. 442, 65 Atl. 60; 1 A. & E. Ency. of Law (2 ed.) 48; 40 Cyc. 1906; *Pomeroy, Equity*, § 1142; *Woerner, Am. Law of Adm.* (2 ed.) § 452; 21 Harv. L. Rev. 60; 10 Ann. Cas. 158.

ing her claim.³⁵ Whether a legacy abates is to be determined by the law of the domicile of the testator at the time of his death, unless a contrary intention is clearly manifested by the will.³⁶

396. Ademption of legacies—Ademption literally means taking away. The ademption of a legacy is its extinction either by the voluntary act of the testator or by the loss or destruction of the thing bequeathed.³⁷ The satisfaction of a general legacy depends on the intention of the testator as inferred from his acts, but the ademption of a specific legacy takes place without regard to the intention of the testator. If a thing bequeathed in a will, by such description as to distinguish it from all other things, is disposed of, so that it does not remain at the testator's death, or if it is so changed that it cannot be called the same thing, the bequest is gone. If such legacy is a debt, payment necessarily makes an end of it. The legatee is entitled to the very thing bequeathed if it be possible for the executor to give it to him, but if not, he cannot have money in the place of it. This results from an inflexible rule of law applied to the mere fact that the thing bequeathed does not exist, and it is not founded on any presumed intention of the testator. In other words, the intention of the testator is immaterial. Parol evidence is inadmissible to show the intention of the testator.³⁸ A specific legacy is adeemed by such a material change in the subject-matter of the gift that it cannot fairly be called the same thing or by the substitution of something else in its place.³⁹ A specific legacy is adeemed by a sale of the thing bequeathed and the legatee has no claim on the money received on the sale.⁴⁰ A specific legacy of stock in a corporation is adeemed where, after the execution of the will, the testator exchanges the stock for stock in a corporation which has succeeded to the rights,

³⁵ *In re Gotzian's Estate*, 34 Minn. 159, 187, 24 N. W. 920; *McGowan v. Baldwin*, 46 Minn. 477, 49 N. W. 251; *Baldwin v. Zlen*, 117 Minn. 178, 185, 134 N. W. 498; *Towle v. Swasey*, 106 Mass. 100; 1 A. & E. Ency. of Law (2 ed.) 48; 40 Cyc. 1906; 28 R. C. L. 304; *Woerner, Am. Law of Adm.* (2 ed.) § 452; *Ann. Cas.* 1913E, 418; 8 Am. St. Rep. 725.

³⁶ *In re Apple's Estate*, 66 Cal. 432, 6 Pac. 7.

³⁷ *In re Brown's Estate*, 139 Iowa 219, 117 N. W. 280; 1 A. & E. Ency. of Law (2 ed.) 611; 40 Cyc. 1914; 28 R. C. L. 344; *Woerner, Am. Law of Adm.* (2 ed.) § 446; *Pomeroy, Equity*, § 1131; 40 L. R. A. (N. S.) 542, 553; 95 Am. St. Rep. 342; 8 Ann. Cas. 144.

³⁸ *Wyckoff v. Executors of Perine*, 37 N. J. Eq. 118; *Kennedy v. Sinnott*, 179

U. S. 606; *In re Tillinghast*, 23 R. I. 121, 49 Atl. 634; *In re Brann*, 219 N. Y. 263, 114 N. E. 404; *Hoke v. Herman*, 21 Pa. St. 301; *Morse v. Converse* (N. H.) 113 Atl. 214; *Snowden v. Banks*, 9 Ired. (N. C.) 373; *Woerner, Am. Law of Adm.* (2 ed.) §§ 446, 449; 30 Harv. L. Rev. 523; 40 L. R. A. (N. S.) 542, 553; L. R. A. 1916C, 618; L. R. A. 1918D, 538; 95 Am. St. Rep. 356; 8 Ann. Cas. 144.

³⁹ *In re Brann*, 219 N. Y. 263, 114 N. E. 404. See 40 L. R. A. (N. S.) 553; L. R. A. 1918D, 538; 28 R. C. L. 345.

⁴⁰ *Trustees v. Tufts*, 151 Mass. 76, 23 N. E. 1006 (sale of stock); *May v. Sherrard's Legatees*, 115 Va. 617, 79 S. E. 1026. See 1 A. & E. Ency. of Law (2 ed.) 624; 40 Cyc. 1919; 28 R. C. L. 345; 8 Ann. Cas. 144.

duties and property of the first corporation.⁴¹ Where a specific legacy is made a charge on real property a subsequent sale and conveyance of the property adeems the legacy.⁴² If a specific legacy has no existence when the bequest would otherwise become operative the legacy has no effect. If the testator subsequently parts with the property, even if he exchanges it for other property or purchases other property with the proceeds, the legatee has no claim on the estate for the value of his legacy. The legacy is adeemed by the act of the testator.⁴³ A specific legacy of a debt is adeemed by its payment whether the payment is voluntary or involuntary. The intention of the testator is immaterial.⁴⁴ Where the thing bequeathed has been destroyed or disposed of in part the doctrine of ademption operates pro tanto.⁴⁵ The doctrine of ademption does not apply to general or demonstrative legacies, but is limited to specific legacies.⁴⁶ A specific legacy of stock in a specified sealed envelope has been held adeemed by being withdrawn from the envelope by the testator.⁴⁷ A legacy payable out of a certain residue, in case there was any such residue, held adeemed by the non-existence of such residue.⁴⁸

397. Ademption of devises—Strictly speaking there is no such thing as an ademption of a devise, but a subsequent conveyance of real property devised is in the nature of an ademption of the devise, revoking it in the sense that there is no real property at the time of the testator's death upon which the will can operate as respects the particular devise.⁴⁹

398. Charge of legacy on realty—Interest—Remedies—At common law realty not charged by a will with the payment of legacies is not liable for their payment. To what extent, if any, this rule has been changed by statute in this state is undetermined.⁵⁰ A general, formal

⁴¹ *Slater v. Slater*, 1 Ch. 665, 8 Ann. Cas. 141.

⁴² *Miller v. Klossner*, 135 Minn. 377, 160 N. W. 1025. See 40 Cyc. 1920; Ann. Cas. 1913B, 57.

⁴³ *Tomlinson v. Bury*, 145 Mass. 346, 14 N. E. 137.

⁴⁴ *Wyckoff v. Executors of Perrine*, 37 N. J. Eq. 118; *Hoke v. Herman*, 21 Pa. St. 301; 1 A. & E. Ency. of Law (2 ed.) 631; 40 L. R. A. (N. S.) 544.

⁴⁵ *In re Tillinghast*, 23 R. I. 121, 49 Atl. 634; *In re Brann*, 219 N. Y. 263, 114 N. E. 404; 1 A. & E. Ency. of Law (2 ed.) 625; 40 Cyc. 1920; *Woerner*, Am. Law of Adm. (2 ed.) § 446.

⁴⁶ *Merriam v. Merriam*, 80 Minn. 254, 83 N. W. 162; *In re Douglas' Estate*, 149 Minn. 276, 183 N. W. 355; *Giddings*

v. Seward, 16 N. Y. 365; *Johnson v. Conover*, 54 N. J. Eq. 333; *Collar v. Gaarn* (Colo.) 171 Pac. 63; *Kramer v. Kramer*, 201 Fed. 248; 1 A. & E. Ency. of Law (2 ed.) 626; 40 Cyc. 1914; 28 R. C. L. 344; *Woerner*, Am. Law of Adm. (2 ed.) § 446. See 38 L. R. A. (N. S.) 588; L. R. A. 1916C, 618.

⁴⁷ *Succession of Cannon*, 144 La. 218, 80 So. 218.

⁴⁸ *In re Douglas' Estate*, 149 Minn. 276, 183 N. W. 355.

⁴⁹ *Gregory v. Lansing*, 115 Minn. 73, 131 N. W. 1010; *Miller v. Klossner*, 135 Minn. 377, 160 N. W. 1025. See § 228; 28 R. C. L. 347; 8 A. L. R. 1638 (lease of property devised).

⁵⁰ See § 1089.

direction in the introductory part of a will for the payment of legacies does not charge the realty specifically devised, or even realty in a residuary clause.⁵¹ A specific devise with a direction to the devisee to pay legacies, or upon condition that he pays them, or subject to their payment, or after their payment, charges the devise with the legacies.⁵² But a specific devise followed by a general charge of legacies on the realty will generally be restricted to the realty not specifically devised.⁵³ A residuary devise "after the payment of legacies" or equivalent phrases is chargeable with the legacies.⁵⁴ Where land is specifically devised and the devisee is also made a residuary devisee and legatee the land specifically devised is not charged with general legacies.⁵⁵ Where there is a general pecuniary legacy with a residuary gift of real and personal property blended in one mass, the legacy is charged on the entire residue, including the residuary realty, unless the will clearly manifests a contrary intention.⁵⁶ A direction for the payment of legacies out of the "estate" of the testator charges the realty unless the term estate is manifestly used by the testator in the sense of personalty only.⁵⁷ Where realty is devised with a naked direction to the devisee to pay a legacy, or upon condition that he pay it, the legacy is a charge on the person of the devisee, and, if he accepts the devise, he is personally liable for its payment. But where the devise is merely subject to the payment of the legacy, the legacy is not a charge on the person of the devisee, and the acceptance of the devise does not render him personally liable. The personal liability of the devisee is not affected by the

⁵¹ *Larson v. Curran*, 125 Minn. 104, 140 N. W. 337; 19 A. & E. Ency. of Law (2 ed.) 1356; 40 Cyc. 2031; 44 L. R. A. (N. S.) 1177; 12 Prob. Rep. Ann. 121.

⁵² *In re Oertle's Estate*, 34 Minn. 173, 24 N. W. 924; *Eddy v. Kelly*, 72 Minn. 32, 74 N. W. 1020; *Whereley v. Rowe*, 106 Minn. 494, 119 N. W. 222; *Casey v. Brabec*, 111 Minn. 43, 126 N. W. 401; *Miller v. Klossner*, 135 Minn. 377, 380, 160 N. W. 1025; *Hause v. O'Leary*, 136 Minn. 126, 161 N. W. 392; *Pendleton v. Kinney*, 65 Conn. 222, 32 Atl. 331; *Thayer v. Finnegan*, 134 Mass. 62; *Smith v. Jackman*, 115 Mich. 192, 73 N. W. 228; *In re More's Estate*, 179 Mich. 237, 146 N. W. 319; *Dixon v. Helena etc. Church* (Okla.) 166 Pac. 114; 19 A. & E. Ency. of Law (2 ed.) 1357; 40 Cyc. 2016; 28 R. C. L. 306; *Woerner, Am. Law of Adm.* (2 ed.) § 491; 12 Prob. Rep. Ann. 119.

⁵³ *Conron v. Conron*, 7 H. L. Cas. 168; 19 A. & E. Ency. of Law (2 ed.) 1356; 40 Cyc. 2030; 12 Prob. Rep. Ann. 120.

⁵⁴ *Hogan v. Kavanaugh*, 138 N. Y. 417, 34 N. E. 292; *In re Root's Will*, 81 Wis. 263, 51 N. W. 435; 19 A. & E. Ency. of Law (2 ed.) 1354; 40 Cyc. 2023; *Woerner, Am. Law of Adm.* (2 ed.) § 491; 12 Prob. Rep. Ann. 114.

⁵⁵ *Humes v. Wood*, 8 Pick. (Mass.) 478.

⁵⁶ *Bengtsson v. Johnson*, 75 Minn. 321, 78 N. W. 3; *Klug v. Seegabarth*, 98 Neb. 272, 152 N. W. 385; *In re Strolberg's Estate* (Neb.) 183 N. W. 97; *Lewis v. Darling*, 16 How. (U. S.) 1; *Wilcox v. Wilcox*, 13 Allen (Mass.) 252; *Walters v. Young* (Del.) 114 Atl. 164; *Greville v. Browne*, 7 H. L. C. 689; *Shannon v. Ryan* (N. J.) 111 Atl. 155; 19 A. & E. Ency. of Law (2 ed.) 1354; 40 Cyc. 2024-2028; *Woerner, Am. Law of Adm.* (2 ed.) § 452; 12 Prob. Rep. Ann. 114. See *Larson v. Curran*, 121 Minn. 104, 140 N. W. 337.

⁵⁷ *Hunt v. Hunt*, 4 Gray (Mass.) 190; *Worth v. Worth*, 95 N. C. 239; 19 A. & E. Ency. of Law (2 ed.) 1353; 40 Cyc. 2023; 12 Prob. Rep. Ann. 113.

fact that the land is of less value than the legacy.⁵⁸ An intention to charge a devise of realty with the payment of a legacy need not be expressed but may be implied from the language used in the will, read in the light of the circumstances. The intention of the testator controls. The condition of the testator's estate as he knew or believed it to be at the time he made his will may reveal a deficiency of personal property so great and so obvious as to preclude any possible inference other than that he intended to charge the legacies on the real estate, but such an intention will not be inferred from such a deficiency, though great, if the testator might have been unconscious of its existence, mistaken in judgment as to the value of his personal property, or in reasonable expectation of increasing his personal estate before his death. The presence in the will of a power of sale of real estate otherwise unnecessary is a persuasive consideration, and so is a blending of real and personal property in the residuary clause.⁵⁹ If the language of the will indicates that the testator intended legacies to be paid, knowing that his personal estate would be insufficient for that purpose, or if it appears that in giving the legacies he had the real estate in mind, they will be a charge thereon though it is devised.⁶⁰ If the testator had sufficient personal property at the time he made his will to pay legacies the presumption is that he did not intend to charge them on the real estate. The fact that he subsequently lost or disposed of the personal property is immaterial.⁶¹ Where a testator makes a pecuniary bequest and directs that it shall be paid before any of the other bequests and obviously used the word "bequests" as including devises, land devised may be sold to pay the legacy.⁶¹ The mere fact that realty is charged by a will with the payment of legacies does not necessarily make the realty the primary fund for that purpose. Unless the will clearly shows an intention to exonerate the other personalty the realty charged with the payment of legacies can be resorted to only in case such personalty

⁵⁸ *In re Oertle's Estate*, 34 Minn. 173, 24 N. W. 924; *Eddy v. Kelly*, 72 Minn. 32, 74 N. W. 1020; *Miller v. Klossner*, 135 Minn. 377, 160 N. W. 1025; *Stringer v. Gamble*, 155 Mich. 295, 118 N. W. 979; *Dixon v. Helena etc. Church (Okla.)* 166 Pac. 114; 19 A. & E. Ency. of Law (2 ed.) 1365; 40 Cyc. 2054; *Woerner, Am. Law of Adm.* (2 ed.) § 491; 9 L. R. A. 585; L. R. A. 1917A, 617; 129 Am. St. Rep. 1056. See *Bengtsson v. Johnson*, 75 Minn. 321, 324, 78 N. W. 3; *Mohn v. Mohn*, 148 Iowa 288, 126 N. W. 1127.

⁵⁹ *Ely v. Megle*, 219 N. Y. 112, 113 N. E. 800; *Carley v. Harper*, 219 N. Y. 295, 114 N. E. 351; *Klug v. Seegabarth*, 98 Neb. 272, 152 N. W. 385; *Lacey v. Collins*, 134 Iowa 583, 112 N. W. 101; *Hib-*

ler v. Hibler, 104 Mich. 274, 62 N. W. 361; *Fetch v. Henze*, 162 Mich. 52, 127 N. W. 26; *Stroh v. O'Hearn*, 176 Mich. 164, 142 N. W. 865; *In re Gray's Estate*, 27 N. D. 417, 146 N. W. 722; 19 A. & E. Ency. of Law (2 ed.) 1351, 1354; 40 Cyc. 2013 et seq.; *Bigelow, Wills*, 312; *Woerner, Am. Law of Adm.* (2 ed.) § 491; *Ann. Cas.* 1915B, 53; 12 Prob. Rep. Ann. 102.

⁶⁰ *Stroh v. O'Hearn*, 176 Mich. 164, 142 N. W. 865. See *Baldwin v. Zien*, 117 Minn. 178, 134 N. W. 498.

⁶¹ *Coon v. Coon (Ind.)* 118 N. E. 820; *Hoyt v. Hoyt*, 69 N. H. 303, 45 Atl. 138; 19 A. & E. Ency. of Law (2 ed.) 1352; 40 Cyc. 2021; 12 Prob. Rep. Ann. 111.

⁶¹ *Baldwin v. Zien*, 117 Minn. 178, 134 N. W. 498.

is insufficient. The realty may, however, be made the primary fund by the use of clear language to that effect.⁶² Where a legacy is made a charge on real property specifically devised and the devisee mortgages the property pending administration the mortgage is ordinarily subject to the charge.⁶³ A bare charge of legacies upon realty does not give the representative an implied power to sell the realty to pay the legacies.⁶⁴ Realty charged with the payment of legacies may be sold for that purpose under a license from the probate court in administration proceedings.⁶⁵ Usually, however, realty so charged is assigned by the probate court subject to the charge, remitting the legatees to the district court for their remedies.⁶⁶ Where land is devised subject to the payment of a legacy by the devisee the legacy carries interest from the time it is due.⁶⁷ A charge upon property devised for life is also a charge upon the rents and profits thereof to which the life-tenant is entitled.⁶⁸ A charge on land is not a charge on agricultural products growing thereon.⁶⁹ A wife who possessed no other property devised certain land to her husband for life and gave the remainder to her son, with a provision that certain legacies should be paid to her daughter. Held, that the legacies were a charge on the land.⁷⁰ Where a specific legacy is made a charge on real property a subsequent sale and conveyance of the property by the testator adeems the legacy, unless a contrary intention is clearly manifested by the will.⁷¹ A testator devised a farm to each of his three children, two daughters and a son. He gave to each daughter a certain sum of money and provided that it should be paid by the son. The three children were also residuary legatees. During his lifetime the testator conveyed to each child the farms so devised. Held, that the specific legacies to the daughters were not revoked by the conveyances since they were not made a charge on the land devised.⁷² Gifts were made to two daughters on condition that each should keep two of the children of a deceased daughter of the testator "until such time as they are able to provide for themselves, or until their father will come and claim them." Whether this provision was a charge on real estate devised to the daughters was left unde-

⁶² 19 A. & E. Ency. of Law (2 ed.) 1303, 1362; 40 Cyc. 2043; 28 R. C. L. 305.

⁶³ Conkling v. Weatherwax, 173 N. Y. 43, 65 N. E. 855; Wilson v. Piper, 77 Ind. 437; Perkins v. Emory, 55 Md. 27; Blauvelt v. Van Winkle, 29 N. J. Eq. 111; Lovejoy v. Raymond, 58 Vt. 509. See 40 Cyc. 2046; 30 L. R. A. 818.

⁶⁴ See §§ 468, 957.

⁶⁵ See § 957.

⁶⁶ See § 957.

⁶⁷ Wherley v. Rowe, 106 Minn. 494, 119 N. W. 222.

⁶⁸ In re Oertle's Estate, 34 Minn. 173, 180, 24 N. W. 924.

⁶⁹ Roberts v. Burwell (Miss.) 78 So. 357.

⁷⁰ Hause v. O'Leary, 136 Minn. 126, 161 N. W. 392.

⁷¹ Miller v. Klossner, 135 Minn. 377, 160 N. W. 1025.

⁷² Miller v. Klossner, 135 Minn. 377, 160 N. W. 1025.

terminated.⁷³ Failure of a devisee to pay a legacy charged on his devise gives the legatee a choice of remedies. He may sue at law for the amount due or he may sue in equity and have the amount due declared a lien on the real estate.⁷⁴ Where a legacy is charged on realty it may be enforced against a purchaser from the devisee, at least if there is a deficiency of personalty and the legatee has exhausted his remedy against the devisee in case he is personally liable. The will may be so worded as to make the realty the primary fund. There is a conflict of authority as to whether a legatee must exhaust his remedy against the devisee personally before resorting to the realty. The purchase may be on such terms as to render the purchaser personally liable for the payment of the legacy.⁷⁵ In an action in the district court to enforce a charge the plaintiff is concluded by the decree of distribution in the probate court and cannot rely on the will in opposition to the decree. If the decree does not make the legacy a charge no recovery can be had in the district court.⁷⁶ Parol evidence of the declarations of the testator, including his instructions to the person preparing the will, directly expressing his intentions as to charging legacies on the realty, are inadmissible.⁷⁷ The district court has original jurisdiction of an action to have a specific bequest of money declared a lien upon, and enforced against, real estate in the hands of the residuary legatee, though the construction of the will is involved.⁷⁸ A devisee of land, subject to the payment of a legacy charged as a lien thereon, is not a trustee of an express trust, and an action by the legatee to enforce the lien may be barred by limitations, though the devisee was appointed executor and discharged as such, for no duty devolved on him, as executor, to pay the legacy.⁷⁹

399. Annuities—The directions of a will as to the funds out of which an annuity is to be paid are controlling.⁸⁰ Where a testator provides a fund to furnish a certain income for the widow, designating the amount of the income, and providing that it shall be paid each year, and that securities shall be selected sufficient to secure that result, the selection of such securities in the first instance does not constitute a specific and

⁷³ *Casey v. Brabec*, 111 Minn. 43, 126 N. W. 401.

⁷⁴ *Nolan v. First Nat. Bank*, 161 Wis. 22, 152 N. W. 468; *Klug v. Seegabarth*, 98 Neb. 272, 152 N. W. 385; *Stringer v. Gamble*, 155 Mich. 295, 118 N. W. 979; 19 A. & E. Ency. of Law (2 ed.) 1363, 1366; 40 Cyc. 2051; 30 L. R. A. (N. S.) 815; 129 Am. St. Rep. 1063.

⁷⁵ 19 A. & E. Ency. of Law (2 ed.) 1366; 40 Cyc. 2045, 2056; 28 R. C. L. 309; *Woerner*, Am. Law of Adm. (2 ed.) § 491; 129 Am. St. Rep. 1062.

⁷⁶ *Eddy v. Kelly*, 72 Minn. 32, 74 N.

W. 1020; *Bengtsson v. Johnson*, 75 Minn. 321, 78 N. W. 3.

⁷⁷ *Wentworth v. Read*, 166 Ill. 139, 46 N. E. 777; *Canfield v. Bostwick*, 21 Conn. 550. See Ann. Cas. 1915B, 54; 19 L. R. A. (N. S.) 457.

⁷⁸ *Klug v. Seegabarth*, 98 Neb. 272, 152 N. W. 385.

⁷⁹ *Nolan v. First Nat. Bank*, 161 Wis. 22, 152 N. W. 468. See *Stringer v. Gamble*, 155 Mich. 295, 118 N. W. 979; 129 Am. St. Rep. 1064.

⁸⁰ *Hale v. St. Paul*, 54 Minn. 421, 56 N. W. 63; *Goodwin v. McGaughey*, 108 Minn. 248, 122 N. W. 6.

changeless fund or legacy, the income of which must necessarily be diminished upon diminution of the producing capacity of such fund. Such a legacy is what is called a "general" or "demonstrative" legacy and, when the fund fails to produce the income directed by the testator for the benefit of his widow, such income, to the full amount, should be made up from the corpus of the estate.⁸¹ Where it appears that the fund set apart to furnish the annuity is sufficient for several years for that purpose it is not necessary to impose obligations upon other funds that have already been distributed. That may be done subsequently if necessary.⁸² Where an absolute and unqualified annuity is given by a will with instructions to invest a sum sufficient to purchase the annuity, the annuitant may elect to take the capital sum, instead of having it invested for the purpose of producing the annuity.⁸³ A will created a trust in certain funds with directions that the income therefrom, less the expense of administration, be paid to the wife of the testator, semi-annually during her life. Held, conceding for the purposes of the case that the rights of the wife became vested as of the date of the death of the testator, and before the trust property had been turned over to the trustees, that the payment of the income to the beneficiary was subject to deductions of the necessary expense of administering the property while in the hands of the executors of the will. The will is construed to have intended to vest in the beneficiary the absolute title and right to the income, received by the trustees, less expenses; and it is held that income in the form of interest upon money investments which had accrued but was not due and collectible at the time of the death of the beneficiary, as well as interest which was then due but not collected was the property of the beneficiary, and passed to the executor of her last will and testament.⁸⁴ A gift in trust to pay the annual income therefrom to each of three sons during his life has been held valid though other provisions of the will were invalid.⁸⁵ M. provided in his will that his executors should set apart, out of his estate, interest bearing securities sufficient to produce an annual income of \$8,000 per annum, which they should collect and pay over to his wife during her natural life, and upon her death such securities to be held by the executors as a part of the residue of his estate, and go to his residuary legatees.

⁸¹ *Merriam v. Merriam*, 80 Minn. 254, 83 N. W. 162; *Eggleston v. Merriam*, 83 Minn. 98, 85 N. W. 937; 86 N. W. 444; *Eggleston v. Merriam*, 86 Minn. 88, 90 N. W. 118. See 2 A. & E. Ency. of Law (2 ed.) 398; 2 Cyc. 465; 40 Id. 1631; 2 R. C. L. 8; 3 C. J. 216; 22 Harv. L. Rev. 459; 24 Id. 309; L. R. A. 1917E, 580.

⁸² *Eggleston v. Merriam*, 86 Minn. 88, 90 N. W. 118.

⁸³ *Parker v. Cobe*, 208 Mass. 260, 94 N. E. 476; *In re Cole's Estate*, 219 N. Y. 435, 114 N. E. 785. See 21 Ann. Cas. 1100; Ann. Cas. 1918E, 808; 33 L. R. A. (N. S.) 978; 3 C. J. 218.

⁸⁴ *Held v. Keller*, 135 Minn. 192, 160 N. W. 487.

⁸⁵ *Bemis v. Northwestern Trust Co.*, 117 Minn. 409, 135 N. W. 1124.

The executors were given power to sell any of the securities for the purpose of reinvesting the proceeds. The executors set apart, for the purposes of this trust, certain corporate stocks. The balance of the estate has been fully administered and distributed under the final order of the probate court, by which the securities referred to were assigned to the executors, as trustees. The conditions of the trust are still unperformed, the widow of M. still living. R. is one of the residuary legatees under the will. Held, that while R. has a vested interest in this fund, yet so long as the title to and dominion over these securities, with power to sell the same, are vested in the trustees, and the conditions of the trust in favor of the widow are not fully performed, R. has no attachable interest in the specific securities.⁸⁶

400. Remedies of creditors of devisees and legatees pending administration—A creditor of a devisee or legatee may sue him pending administration and reach his interest by attachment, garnishment or execution, even before a final decree of distribution. But the claims of such a creditor are always subordinate to the claims of creditors of the decedent, duly proved and allowed, and to the charges and expenses of administration.⁸⁷ He may petition for the probate of a will.⁸⁸ He may take an assignment of the interest of a legatee and require the executor to deliver the legacy to him.⁸⁹ He cannot have the share of the devisee or legatee assigned to him in the final decree of distribution, but he may appear at the hearing on the final settlement and assert his claim on the share.⁹⁰ If the interest of the devisee or legatee is of an equitable nature not subject to attachment the creditor may reach it through a creditors' suit.⁹¹ The claims of creditors of devisees or legatees are subject to the claims of the estate against the devisee or legatee.⁹²

CONDITIONS

401. What conditions valid—In general—A will may provide that upon the breach or non-fulfilment of any reasonable condition the property devised shall pass from the devisee to another.⁹³ As a general rule, a testator may impose such conditions as he pleases upon a beneficiary as conditions precedent to the vesting of an estate in him, or to the enjoyment of a trust estate by him as cestui que trust. But he cannot impose a condition which is uncertain, unlawful, or opposed to public policy.⁹⁴

⁸⁶ *Merriam v. Wagener*, 74 Minn. 215, 77 N. W. 44.

⁸⁷ See §§ 984, 1106, 1134, 1135, 1140.

⁸⁸ See §§ 253, 301.

⁸⁹ See §§ 1044, 1097.

⁹⁰ See § 1071.

⁹¹ *Merriam v. Wagener*, 74 Minn. 215, 77 N. W. 44.

⁹² See § 1093.

⁹³ *Gulford v. Gardner*, 180 Iowa 1210, 162 N. W. 261.

⁹⁴ *Holmes v. Connecticut Trust & Safe Deposit Co.*, 92 Conn. 507, 103 Atl. 640 (condition on conduct of husband invalid—condition to refrain from tobacco and liquor valid); *In re Kathan's Will*.

402. What constitutes—No particular form of words is necessary to create a condition. The word "provided" is often used for the purpose but it is not conclusive.⁹⁵ Conditions are not favored and language will not be construed to create a condition if it is reasonably susceptible of any other construction.⁹⁶ A bequest to three employees of the testator ended as follows: "Provided these three named parties, as above, shall continue to manage and have charge of the business I am now engaged in. They to decide whether it is best to continue said business, and if not so continued, how to close it out or sell it to the best advantage of my estate." Held, that the bequest vested immediately and was not conditional on the continuance of the business.⁹⁷

403. Conditions precedent and subsequent distinguished—A condition precedent is an act which must be done or an event which must occur before a gift will take effect or become vested. A condition subsequent is an act done or event occurring after a gift becomes vested whereby it is divested.⁹⁸ Whether a condition is precedent or subsequent depends upon the language of the particular will and precedents are of slight value. It is a question of the intention of the testator. If there is any reasonable doubt as to the meaning of the language used it will not be construed as creating a condition precedent.⁹⁹ The terms "condition precedent" and "condition subsequent" are not of controlling importance in determining the intention of the testator.¹ The fact that a will does not provide for a devise over to another on failure of the first-named devisee to perform a condition attached to the gift is a circumstance of much weight, indicating that the condition is not precedent to the vesting of the estate; the courts being inclined to construe condi-

141 N. Y. S. 705. See L. R. A. 1918E, 372; 28 R. C. L. 310; 40 Cyc. 1686; In re Anderson's Estate, 148 Minn. 44, 180 N. W. 1019 (gift to a son on condition that he should be thought worthy to receive it by the executors).

⁹⁵ Davis v. Hancock, 95 Minn. 340, 104 N. W. 299; Henderson v. Gray, 27 N. D. 417, 146 N. W. 722; 6 A. & E. Ency. of Law (2 ed.) 501; 30 Id. 798; 40 Cyc. 1683; Dunnell, Minn. Digest, §§ 1728, 2675, 3381, 7534.

⁹⁶ Henderson v. Gray, 27 N. D. 417, 146 N. W. 722; Brooks v. Davis, 82 N. J. Eq. 118, 88 Atl. 178; Lingo v. Smith, 174 Iowa 461, 156 N. W. 402; 6 A. & E. Ency. of Law (2 ed.) 502; 30 Id. 797; 40 Cyc. 1684.

⁹⁷ Davis v. Hancock, 95 Minn. 340, 104 N. W. 299.

⁹⁸ See Chambers v. Northwestern Mutual Life Ins. Co., 64 Minn. 403, 67 N. W.

367; Hobart v. Kehoe, 110 Minn. 490, 126 N. W. 66; Samuel H. Chute Co. v. Latta, 123 Minn. 69, 142 N. W. 1048; 6 A. & E. Ency. of Law (2 ed.) 500; 30 Id. 799; 40 Cyc. 1683; 28 R. C. L. 311; Dunnell, Minn. Digest & Supplements, §§ 1728, 2675.

⁹⁹ Brookhouse v. Pray, 92 Minn. 448, 100 N. W. 235; Davis v. Hancock, 95 Minn. 340, 104 N. W. 299; Gotchall v. Gotchall, 98 Neb. 730, 154 N. W. 243; Scott v. Roethlisberger, 178 Mich. 581, 146 N. W. 307; In re Gray's Estate, 27 N. D. 417, 146 N. W. 722; Lingo v. Smith, 174 Iowa 461, 156 N. W. 402; Brannon v. Mercer, 138 Tenn. 415, 198 S. W. 253; 30 A. & E. Ency. of Law (2 ed.) 800; 40 Cyc. 1689; Woerner, Am. Law of Adm. (2 ed.) § 440; 102 Am. St. Rep. 366.

¹ Davis v. Hancock, 95 Minn. 340, 104 N. W. 299.

tions, even when stated to be "conditions precedent," as conditions subsequent, if it can be fairly done from the construction of the entire instrument.² The fact that the condition requires something to be done which may take time is a circumstance in favor of construing it as a condition subsequent. On the other hand, the fact that the condition involves something in the nature of a consideration is a circumstance in favor of construing it as a condition precedent.³ A provision that a gift shall be void on non-performance of a condition tends to show that the condition is not precedent.⁴ Directions to pay a legacy or a charge on a gift implying possession of a fund are usually not regarded as conditions precedent. Where it appears from the will and the circumstances that the enjoyment of the property is necessary to enable the devisee or legatee to perform the condition the condition is not regarded as precedent.⁵ It cannot be made a condition precedent to the vesting of an estate in fee that, after such vesting, certain conditions subsequent should be observed.⁶

404. Conditions in restraint of marriage—Except in the case of husband or wife conditions in general restraint of marriage are void, but conditions against marriage to a particular person, or to a member of a class of persons, are valid.⁷ A condition against the marriage of the donee to a particular person is valid though it requires the breach of a promise of marriage made before the execution of the will.⁸ A gift by a testator to his wife conditioned to divest if she marries again, or so long as she remains his widow, is valid, whether there is a gift over or not. If there is no gift over or other disposition the property descends as intestate property upon her death or remarriage.⁹ A gift by a testatrix to her husband conditioned to divest if he marries again is valid.¹⁰ A gift to a wife "so long as she remains unmarried," or "so long as she remains my widow," with a gift over creates a life estate in the wife,

² *Schrader v. Schrader*, 158 Iowa 85, 139 N. W. 160; *In re Gray's Estate*, 27 N. D. 417, 146 N. W. 722.

³ *Markham v. Huffort*, 123 Mich. 505, 82 N. W. 222; *Brannon v. Mercer*, 138 Tenn. 415, 198 S. W. 253; 30 A. & E. Ency. of Law (2 ed.) 800; 40 Cyc. 1691.

⁴ *Brannon v. Mercer*, 138 Tenn. 415, 198 S. W. 253.

⁵ *Brannon v. Mercer*, 138 Tenn. 415, 198 S. W. 253.

⁶ *Bell v. Nesmith*, 217 Mass. 254, 104 N. E. 721.

⁷ *Onkley v. Seaman*, 218 N. Y. 77, 112 N. E. 576; *Daboll v. Moon*, 88 Conn. 387, 91 Atl. 646; 30 A. & E. Ency. of Law (2 ed.) 803; 40 Cyc. 1699; 28 R. C. L. 321; *Woerner*, Am. Law of Adm. (2 ed.) § 443; L. R. A. 1917A, 44; Ann. Cas.

1918B, 1141; 84 Am. St. Rep. 147. Possibly a condition against marriage to a person of a particular religious sect is invalid. See Laws 1919, c. 188.

⁸ *Turner v. Evans* (Md.) 106 Atl. 617.

⁹ *Case v. Young*, 3 Minn. 209 (140); *Appleby v. Appleby*, 100 Minn. 408, 425, 111 N. W. 305; *Robinson v. Thomson*, 137 Minn. 446, 163 N. W. 786; *Knight v. Mahoney*, 152 Mass. 523, 25 N. E. 971; *Chaplin v. Cooke*, 73 Conn. 72, 46 Atl. 282; *In re Weymouth*, 165 Wis. 455, 161 N. W. 373; *Fetter v. Rettig*, 98 Ohio St. 428, 121 N. E. 696; 6 A. & E. Ency. of Law (2 ed.) 514; 30 Id. 805; 40 Cyc. 1702; Ann. Cas. 1918B, 1144.

¹⁰ *Stivers v. Gardner*, 88 Iowa 307, 55 N. W. 516; *Appleby v. Appleby*, 106 Minn. 408, 425, 111 N. W. 305.

with the gift over becoming operative in the event either of her death or remarriage.¹¹ A condition in a gift to a daughter that her marriage shall be with the consent of her parents is valid. Such a condition is not satisfied by the assent of the parents after a marriage. A waiver of such a condition is not to be inferred from the fact that the testator lived for a considerable time after the marriage of his daughter without changing his will.¹² A condition designed to provide for a sister or daughter so long as she remains unmarried is valid.¹³ A condition that if a daughter of the testator marries one-half of her income under the will should go to another has been held void.¹⁴ A condition making the vesting of an estate in a daughter depend on her marriage to "some one who is her social equal" is too indefinite to be enforceable.¹⁵ A provision in a will directing that the share of a child of the testator shall be held in trust, and the income only paid to her until the death of a specified person, if she marries him, or remains unmarried, is not void as against public policy.¹⁶ Some cases hold that the intention of the testator is a controlling consideration in determining the validity of restrictions.¹⁷ According to the better view the intention of the testator is immaterial. Each case should be considered with regard to all the circumstances and decided on its own inherent reasonableness. Such a condition should be held invalid only when as a practical matter it would ordinarily operate as a material check upon marriage.¹⁸

405. Conditions encouraging divorce or separation—A condition which directly tends to bring about a divorce or separation is void, but a condition designed to make provision for a person in case of divorce or separation is valid.¹⁹ A bequest to a woman on condition that the executor should determine that it was impossible for her to live with her hus-

¹¹ *Thompson v. Baxter*, 107 Minn. 122, 126, 119 N. W. 797; *Harlow v. Bailey*, 189 Mass. 208, 75 N. E. 259; *Fuller v. Wilbur*, 170 Mass. 506, 49 N. E. 916; *Dana v. Murray*, 122 N. Y. 604, 26 N. E. 21; *In re Schriever's Estate*, 221 N. Y. 268, 116 N. E. 995; *Trenton Trust Co. v. Armstrong*, 70 N. J. Eq. 572, 62 Atl. 456; *Maddox v. Yoe*, 121 Md. 288, 88 Atl. 225; *In re Beaty's Estate*, 172 Iowa 714, 154 N. W. 1028; *In re Merrigan's Estate*, 34 S. D. 644, 150 N. W. 285; *Price v. Ewell*, 169 Iowa 206, 151 N. W. 79; *Schminke v. Sinclair*, 100 Neb. 101, 158 N. W. 458. See *Staack v. Detterding*, 182 Iowa 582, 161 N. W. 44; *Weymouth v. Weymouth*, 165 Wis. 455, 161 N. W. 373; 6 A. & E. Ency. of Law (2 ed.) 514; 30 Id. 748; 40 Cyc. 1622; Ann. Cas. 1918B, 1145; 28 L. R. A. (N. S.) 861; L. R. A. 1918C, 861.

¹² *Pacholder v. Rosenheim*, 129 Md. 455, 99 Atl. 672.

¹³ *Harlow v. Bailey*, 189 Mass. 208, 75 N. E. 259; *Ruggles v. Jewett*, 213 Mass. 167, 99 N. E. 1092; *Maddox v. Yoe*, 121 Md. 288, 88 Atl. 225; *Mann v. Jackson*, 84 Me. 400, 24 Atl. 886; 40 Cyc. 1702; Ann. Cas. 1918B, 1145; 84 Am. St. Rep. 149; 2 L. R. A. (N. S.) 545.

¹⁴ *Goffe v. Goffe*, 37 R. I. 542, 94 Atl. 2.

¹⁵ *Turner v. Evans* (Md.) 106 Atl. 617.

¹⁶ *Oakley v. Seaman*, 218 N. Y. 77, 112 N. E. 576.

¹⁷ See *Robinson v. Martin*, 200 N. Y. 159, 93 N. E. 488; *Mann v. Jackson*, 84 Me. 400, 24 Atl. 886; *Harlow v. Bailey*, 189 Mass. 208, 212, 75 N. E. 259; *Coe v. Hill*, 201 Mass. 15, 86 N. E. 949.

¹⁸ 24 Harv. L. Rev. 405.

¹⁹ *Coe v. Hill*, 201 Mass. 15, 86 N. E. 949; *Daboll v. Moon*, 88 Conn. 387, 91

band on account of his cruelty to her has been sustained.²⁰ A legacy to a woman provided she is legally divorced from her husband when the will takes effect at the testator's death is valid. Such a condition is a condition precedent and if the legatee is not divorced at the death of the testator the legacy lapses and a subsequent divorce is unavailing.²¹

406. Conditions against contest of will—A condition that a gift shall be void if the beneficiary contests the will is valid. It is immaterial whether the gift is of real or personal property or whether there is a gift over or not.²² It is immaterial that the contest is made in good faith and on reasonable grounds.²³ Such a condition is binding on minor beneficiaries.²⁴ A contest over a codicil may be within such a condition.²⁵ A condition against contesting a disposition of property which is prohibited by law is void.²⁶ Merely delivering to the probate court and proposing for probate a later and inconsistent will has been held not a contest.²⁷ An attempt to secure the probate of a spurious document as a subsequent will, with knowledge of its character, is a breach of such a condition.²⁸ An action or proceeding merely to secure a judicial construction of the will is not a breach of the condition.²⁹ Possibly a contest on the ground of forgery does not work a forfeiture.³⁰ Merely objecting to the jurisdiction of a court to probate a will has been held not a contest.³¹ One who encourages a contest contrary to such a condition cannot have relief in equity based on the resulting forfeiture.³² Whether

Atl. 646; *Dusbiber v. Melville*, 178 Mich. 168, 146 N. W. 208; *In re Gunning*, 234 Pa. 139, 83 Atl. 60; *Snorgrass v. Thomas*, 166 Mo. App. 603, 150 S. W. 106; *In re Nichols' Estate*, 102 Wash. 303, 172 Pac. 1146; 6 A. & E. Ency. of Law (2 ed.) 512; 40 Cyc. 1703; 28 R. C. L. 328; 49 L. R. A. (N. S.) 637; Ann. Cas. 1917B, 187; 84 Am. St. Rep. 147.

²⁰ *Dusbiber v. Melville*, 178 Mich. 601, 146 N. W. 208.

²¹ *In re Nichols' Estate*, 102 Wash. 303, 172 Pac. 1146.

²² *Smithsonian Institution v. Meech*, 169 U. S. 398; *Moran v. Moran*, 144 Iowa 451, 123 N. W. 202; *In re Hite's Estate*, 155 Cal. 436, 101 Pac. 443; *South Norwalk Trust Co. v. St. John*, 92 Conn. 168, 101 Atl. 961; 30 A. & E. Ency. of Law (2 ed.) 806; 40 Cyc. 1705; 28 R. C. L. 315; 17 Ann. Cas. 997; Ann. Cas. 1913E, 1296; 68 L. R. A. 447 (effect of condition); 21 L. R. A. (N. S.) 953 (what constitutes a contest); 5 A. L. R. 1370 (id.); 14 A. L. R. 609 (id.); 28 Harv. L. Rev. 336.

²³ *Moran v. Moran*, 144 Iowa 451, 123

N. W. 202; *In re Miller's Estate*, 156 Cal. 119, 103 Pac. 842. Contra, *In re Friend's Estate*, 209 Pa. St. 442, 58 Atl. 853; *South Norwalk Trust Co. v. St. John*, 92 Conn. 168, 101 Atl. 961.

²⁴ *Moorman v. Louisville Trust Co.*, 181 Ky. 30, 203 S. W. 856. See contra, *Bryant v. Thompson*, 59 Hun (N. Y.) 545.

²⁵ *In re Hite's Estate*, 155 Cal. 436, 101 Pac. 443.

²⁶ *In re Kathan*, 141 N. Y. S. 705.

²⁷ *In re Bergland's Estate*, 177 Cal. 227, 170 Pac. 400; *Id.*, 180 Cal. 629, 182 Pac. 277; *In re Moore's Estate*, 180 Cal. 570, 182 Pac. 285.

²⁸ *In re Kirkholder's Estate*, 157 N. Y. S. 37.

²⁹ *Black v. Herring*, 79 Md. 152, 28 Atl. 1063; *South Norwalk Trust Co. v. St. John*, 92 Conn. 168, 101 Atl. 961. See 5 A. L. R. 1372.

³⁰ See *Rouse v. Branch*, 91 S. C. 111, 74 S. E. 133; 25 Harv. L. Rev. 745.

³¹ *In re Hill's Estate*, 176 Cal. 619, 169 Pac. 371.

³² *Drennen v. Heard*, 211 Fed. 335.

a beneficiary has forfeited his rights by a contest properly arises on the hearing for a final decree of distribution.³³

407. Conditions against alienation—A condition restraining the alienation of a legal estate in fee, or of an absolute interest in personalty, wholly or for any specified length of time, is void. This rule is not technical but is based on broad grounds of public policy, for such conditions tend to prevent the proper use and improvement of property.³⁴ The right of alienation is an inherent and inseparable quality of an estate in fee simple. In a devise of land in fee simple, therefore, a condition against all alienation is void because repugnant to the estate devised. For the same reason a limitation over, in case the first devisee shall alien, is equally void, whether the estate be legal or equitable. A condition limiting the power of alienation for a limited time is also void.³⁵ A testator cannot qualify a devise of a legal estate in land or a bequest of an absolute legal interest in personal property by a condition that the devisee's estate or the legatee's interest shall not be alienated nor taken for his debts.³⁶ A condition in a gift of real and personal property by a testator to his wife that she shall not give or bequeath one cent of the property to any member of his family or to any of her relatives has been held void as in restraint of alienation.³⁷ Where a will devises a fee with a subsequent void restraint on alienation, but providing that the devisee may leave the land to his children the fee is not reduced to a life estate.³⁸ A condition against a partition and sale within a limited time of land devised to two or more in common is not void, each tenant in common being free to dispose of his share.³⁹ A condition against the alienation of a legal life estate in real or personal property is void.⁴⁰

³³ *In re Bergland's Estate*, 177 Cal. 227, 170 Pac. 400.

³⁴ *Morse v. Blood*, 68 Minn. 442, 71 N. W. 682; *Hause v. O'Leary*, 136 Minn. 126, 161 N. W. 392; *Ogle v. Burmister*, 146 Iowa 33, 124 N. W. 758; *Goldsmith v. Petersen*, 159 Iowa 692, 141 N. W. 60; *Potter v. Couch*, 141 U. S. 296; *Davis v. Hutchinson*, 282 Ill. 523, 118 N. E. 721; *Zillmer v. Landguth*, 94 Wis. 607, 69 N. W. 568; 24 A. & E. Ency. of Law (2 ed.) 863; 40 Cyc. 1713; 28 R. C. L. 316; *Gray, Restraints on Alienation* (2 ed.) § 23; *Ann. Cas.* 1912C, 1329; *Ann. Cas.* 1916D, 1254. See as to perpetuities, §§ 384, 437.

³⁵ *Potter v. Couch*, 141 U. S. 296.

³⁶ *Lathrop v. Merrill*, 207 Mass. 6, 92 N. E. 1019. See *Gray, Restraints on Alienation* (2 ed.) § 113; 28 R. C. L. 318; *Barnes v. Gunter*, 111 Minn. 383, 127 N. W. 398.

³⁷ *Morse v. Blood*, 68 Minn. 442, 71 N. W. 682.

³⁸ *Goldsmith v. Peterson*, 159 Iowa 692, 141 N. W. 60.

³⁹ *Porter v. Tracey*, 179 Iowa 1295, 162 N. W. 800.

⁴⁰ *Bridge v. Ward*, 35 Wis. 687; *Todd v. Sawyer*, 147 Mass. 570, 17 N. E. 527; *McCormick Harvesting Machine Co. v. Gates*, 75 Iowa 343, 39 N. W. 657; *Henderson v. Harness*, 176 Ill. 302, 52 N. E. 68; *Hunt v. Hawes*, 181 Ill. 343, 54 N. E. 953; *Gray v. Shinn*, 293 Ill. 573, 127 N. E. 755; *Wool v. Fleetwood*, 136 N. C. 460, 48 S. E. 785; *Kerns v. Carr*, 82 W. Va. 78, 95 S. E. 606; *Bruceton Bank v. Alexander* (W. Va.) 98 S. E. 804; *Gray, Restraints on Alienation* (2 ed.) § 134; 24 A. & E. Ency. of Law (2 ed.) 870; *L. R. A.* 1918E, 571. For cases contra see 40 Cyc. 1716.

But a provision for a forfeiture or limitation over to a third person of a legal life estate or interest upon the alienation, voluntary or involuntary, of such estate or interest, is valid.⁴¹ A condition against the alienation of a cemetery lot has been held valid.⁴²

408. Conditions against liability for debts—A condition exempting a devise of a legal estate from liability for the debts of the devisee is void.⁴³

409. Same—Spendthrift trusts—It is an open question whether a so-called spendthrift trust can be created under our laws. There are grave economic and social objections to such trusts but they are allowed in most states.⁴⁴

410. Conditions as to care of others—Wills frequently make gifts conditional on the donee caring for another.⁴⁵

411. Conditions as to devisee dying without issue—A devise to B, with a condition that if he dies without issue the property shall pass to C, is valid.⁴⁶

412. Conditions for payment of taxes, insurance, repairs, etc.—Wills sometimes include a condition subsequent requiring the beneficiary to pay taxes, insurance and current expenses for upkeep.⁴⁷

413. Conditions or restrictions as to religious belief—A provision in a will devising real estate which discriminates against any class of persons on account of their religious faith or creed is invalid.⁴⁸

⁴¹ *Barnes v. Gunter*, 111 Minn. 383, 127 N. W. 398; *Camp v. Cleary*, 76 Va. 140; *Van Osdel v. Champion*, 89 Wis. 661, 62 N. W. 539; *Kerns v. Carr* (W. Va.) 95 S. E. 606; 24 A. & E. Ency. of Law (2 ed.) 870; *Gray, Restraints on Alienation* (2 ed.) § 78; L. R. A. 1918E, 573. See § 586.

⁴² *Little v. Universalist Convention*, 143 Minn. 298, 173 N. W. 659.

⁴³ *Van Osdel v. Champion*, 89 Wis. 661, 62 N. W. 539. See 40 Cyc. 1707; 28 R. C. L. 318.

⁴⁴ *Nichols v. Eaton*, 91 U. S. 716; *Boston Safe Deposit & Trust Co. v. Collier*, 222 Mass. 390, 11 N. E. 163; *Sherman v. Havens*, 94 Kan. 654, 146 Pac. 1030; *Merchants Nat. Bank v. Christ*, 140 Iowa 308, 118 N. W. 394; *Plitt v. Yakel*, 129 Md. 464, 99 Atl. 669; *Wagner v. Wagner*, 244 Ill. 101, 91 N. E. 66; *O'Hare v. Johnston*, 273 Ill. 458, 113 N. E. 127; *Hartley v. Unknown Heirs of Wyatt*, 281 Ill. 321, 117 N. E. 995; *Bowlin v. Citizens' Bank & Trust Co.*, 131 Ark. 97, 193 S. W. 288; *Weller v. Noffsinger*, 57 Neb. 455, 77 N. W. 1075; *Everitt v. Haskins*,

102 Kan. 546, 171 Pac. 632; *Bruceton Bank v. Alexander* (W. Va.) 98 S. E. 804; 24 A. & E. Ency. of Law (2 ed.) 870; 26 Id. 137; 39 Cyc. 240; 40 Id. 1743; 25 R. C. L. 318; *Gray, Restraints on Alienation* (2 ed.), Introduction and §§ 143 et seq., 57 Am. Dec. 488; 9 Am. St. Rep. 405; 24 Id. 686; 93 Id. 416; 132 Id. 275; 2 L. R. A. 113; 11 Id. 565; 13 Id. 212; 2 L. R. A. (N. S.) 369; 40 Id. 1215; 3 Ann. Cas. 1006; 18 Id. 490; Ann. Cas. 1917B, 400; 2 Probate Reports Ann. 532; 6 Id. 485; 31 Harv. L. Rev. 1038. See *Hause v. O'Leary*, 136 Minn. 126, 161 N. W. 392.

⁴⁵ *In re Oertle's Estate*, 34 Minn. 173, 24 N. W. 924. See *Casey v. Brabee*, 111 Minn. 43, 126 N. W. 401.

⁴⁶ *Howe Lumber Co. v. Parker*, 105 Minn. 310, 117 N. W. 518; *Gulford v. Gardner*, 180 Iowa 1210, 162 N. W. 261. See 17 A. & E. Ency. of Law (2 ed.) 556; 40 Cyc. 1712; and § 350.

⁴⁷ *Rosbach v. Weidenbach*, 95 Minn. 343, 104 N. W. 137.

⁴⁸ *Laws* 1919, c. 188.

414. Conditions as to payment of debts or money—A condition requiring a donee to pay a specified debt is valid.⁴⁹ A condition requiring a donee to pay a certain sum of money to another is valid.⁵⁰

415. Conditions as to payment of legacies—A condition requiring a beneficiary to pay legacies is common and valid.⁵¹ A wife may will property to her children on condition that they pay their father each year for his life such part of a specified sum as he may demand of them.⁵²

416. Conditions as to use of property—A condition against the sale of liquors on the premises devised is valid.⁵³

417. Conditions against mortgaging estate—A condition against mortgaging a legal estate in fee is void.⁵⁴

418. Conditions against division of lot—A testator may devise a lot to several with a condition that it shall not be divided but sold as a single tract and the proceeds divided among the devisees.⁵⁵

419. Conditions as to residence of devisee on premises—A condition requiring a devisee to reside on the premises devised is valid.⁵⁶

420. Conditions as to donee recovering from insanity—A testator, after providing for his wife and other children, made a bequest to his insane daughter in these words: "I further give and bequeath the sum of one thousand dollars to my only other daughter (naming her), who is now in the Hospital for the Insane at St. Peter, this state, said amount to be paid to her on the recovery of her sanity, provided that if she does not recover her reason or dies, then the amount is to be divided equally between her three children now living." Held, that the children are only entitled to the bequest in case their mother dies before recovering her reason, and that, until the possibility of recovery is extinguished by her death, they cannot maintain an action to enforce the payment of the bequest to themselves.⁵⁷

421. Conditions as to the reappearance of devisee or legatee—A will provided as follows: "Pay to Daniel Brookhouse, son of my sister Mary, the sum of five thousand dollars. I do not know the place of residence of said Daniel Brookhouse, or even that he is now living.

⁴⁹ *Ledeburh v. Wisconsin Trust Co.*, 112 Wis. 657, 88 N. W. 607; *Monjo v. Woodhouse*, 185 N. Y. 295, 78 N. E. 71; *Taylor v. Carter*, 117 Va. 845, 86 S. E. 120; 40 Cyc. 1710; L. R. A. 1917A, 617. See § 944.

⁵⁰ *Sturmwald v. Poppe*, 151 N. Y. S. 570; *Schrader v. Schrader*, 158 Iowa 85, 139 N. W. 160; 40 Cyc. 1710. See § 944.

⁵¹ *Miller v. Klossner*, 135 Minn. 377, 160 N. W. 1025. See § 398.

⁵² *Ober v. Seegmiller*, 180 Iowa 462, 160 N. W. 21.

⁵³ *Nudd v. Powers*, 136 Mass. 273. See 6 A. & E. Ency. of Law (2 ed.) 513; 40 Cyc. 1712.

⁵⁴ *Ogle v. Burmister*, 146 Iowa 33, 124 N. W. 758. See *Rosbach v. Weidenbach*, 95 Minn. 343, 104 N. W. 137.

⁵⁵ *Brown v. Brown*, 42 Minn. 270, 44 N. W. 250.

⁵⁶ *Thompson v. Baxter*, 107 Minn. 122, 126, 119 N. W. 797. See 30 A. & E. Ency. of Law (2 ed.) 806; 40 Cyc. 1709.

⁵⁷ *Mingo v. Huntington*, 92 Minn. 13, 99 N. W. 45.

Now this bequest is made on condition that he, said Daniel Brookhouse, shall appear and claim this bequest before the final distribution of my estate according to the terms hereof, and in no event later than ten years from the date hereof." Held, that the bequest was upon a condition subsequent, and that a contingent interest in the bequest vested in the children of Daniel Brookhouse.⁵⁸ A devise to a son who had disappeared on condition that if he was not heard from within ten years from the date of the will the land should go to nephews and nieces has been sustained.⁵⁹

422. Alternative gift if prior gift held invalid—An alternative gift, based on the contingency of a prior gift being held invalid, is valid.⁶⁰

423. Effect of breach of valid condition—Upon a breach of a valid condition precedent to a gift of land without a gift over the land passes as intestate property, there being no residuary clause.⁶¹ A right or interest in land which depends on a condition precedent does not vest until or unless the condition is performed, though it is or becomes, for any reason, impossible of performance.⁶² Upon a breach of a valid condition subsequent to a gift of land without a gift over the land passes as intestate property, there being no residuary clause.⁶³ The same rule applies to the breach of a valid condition subsequent to a gift of personal property.⁶⁴ There is some authority, however, to the effect that the breach of a valid condition subsequent attached to a gift of personal property does not divest the title of the legatee unless there is a gift over. The condition is regarded as merely in terrorem.⁶⁵ If a condition subsequent is impossible of performance its breach does not affect the gift to which it is attached. This applies to both real and personal property.⁶⁶ Upon the non-fulfilment or breach of a conditional limitation the first estate comes to an end and the subsequent estate vests in the remainderman immediately.⁶⁷

424. Effect of invalid condition—If an invalid condition precedent is attached to a gift of personalty the gift passes to the legatee as if no

⁵⁸ *Brookhouse v. Pray*, 92 Minn. 448, 100 N. W. 235.

⁵⁹ *Connor v. Sheridan*, 116 Wis. 666, 93 N. W. 835.

⁶⁰ *Watkins v. Bigelow*, 93 Minn. 210, 100 N. W. 1104.

⁶¹ *Conant v. Stone*, 176 Mich. 654, 143 N. W. 39.

⁶² *Hobart v. Kehoe*, 110 Minn. 490, 126 N. W. 66.

⁶³ *Morse v. Blood*, 68 Minn. 442, 444, 71 N. W. 682.

⁶⁴ *Reuff v. Coleman*, 30 W. Va. 171, 3 S. E. 597. See 40 Cyc. 1713.

⁶⁵ See *Hogan v. Curtin*, 88 N. Y. 171; *Robinson v. Martin*, 200 N. Y. 159, 93 N. E. 488; *In re Arrowsmith*, 147 N. Y. S. 1016; *Sherman v. Richmond Hose Co.*, 166 N. Y. S. 586; 40 Cyc. 1712.

⁶⁶ *Burnham v. Burnham*, 79 Wis. 557, 48 N. W. 661; *Sherman v. Richmond Hose Co.*, 166 N. Y. S. 586; 30 A. & E. Ency. of Law (2 ed.) 802; 40 Cyc. 1694; 27 L. R. A. (N. S.) 684; L. R. A. 1915A, 91.

⁶⁷ *Brattle Square Church v. Grant*, 3 Gray (Mass.) 146; *Smith v. Smith*, 23 Wis. 180; 6 A. & E. Ency. of Law (2 ed.) 514.

condition were attached.⁶⁸ If an invalid condition precedent is attached to a gift of realty the gift does not pass unless the condition is satisfied.⁶⁹ A condition subsequent which is invalid or impossible of performance is of no effect on the title of the donee when once vested. It is as if it had never been written in the will. This applies to both real and personal property.⁷⁰

ESTATES OR INTERESTS CREATED

425. Only recognized estates may be created—A testator cannot create new kinds of legal estates but is limited to those recognized by law. The law defines the nature and incidents of such estates and a testator cannot change them. This applies to legal as distinguished from equitable estates.⁷¹

426. Devise of a particular estate with unauthorized restraints or limitations—In general—An attempt of a testator to impose restraints or limitations on the owner of a legal estate in real property, using the term "estate" in its technical sense, is void; and this is so whether there is a gift of the estate coupled with the imposition of repugnant restraints or limitations or whether in making the gift all the rights appertaining to the estate are given with the exception of one or more specified which are withheld. The rights of the owner of a specified estate in land are defined by the law, and all attempts of a testator to give to a devisee all the rights of the owner of a specified estate but one or more is futile and void.⁷²

427. Extent of estate given—Presumption—Where the testator has only a qualified, partial or undivided interest in property a gift of it in a will under general terms is presumptively intended by him as a gift of such interest as he had. This presumption may be rebutted by the character and terms of the will.⁷³ A devise in general terms passes all the estate which the testator had in the property devised unless a contrary intention is clearly manifested by the will.⁷⁴

428. Devise in general terms—What passes—Statute—Every devise of land shall convey all the estate of the testator therein, unless it ap-

⁶⁸ *Dusblber v. Melville*, 178 Mich. 601, 146 N. W. 208; *In re Farmer's Will*, 163 N. Y. S. 1089. See 30 A. & E. Ency. of Law (2 ed.) 801; 40 Cyc. 1694.

⁶⁹ *Conant v. Stone*, 176 Mich. 654, 143 N. W. 39; *Dusblber v. Melville*, 178 Mich. 601, 146 N. W. 208. See 30 A. & E. Ency. of Law (2 ed.) 801; 40 Cyc. 1691.

⁷⁰ *Morse v. Blood*, 68 Minn. 444, 71 N. W. 682; *Burnham v. Burnham*, 79 Wis. 557, 48 N. W. 661; *Anonymous*, 141 N. Y. S. 700; *In re Farmer's Will*, 163 N.

Y. S. 1089; 30 A. & E. Ency. of Law (2 ed.) 802; 40 Cyc. 1695; 70 Am. St. Rep. 834.

⁷¹ *Johnson v. Whiton*, 159 Mass. 424, 34 N. E. 542; *Dunn v. Dobson*, 198 Mass. 142, 84 N. E. 327. See 40 Cyc. 1571.

⁷² *Dunn v. Dobson*, 198 Mass. 142, 84 N. W. 327. See § 435.

⁷³ *In re Gotzlan's Estate*, 34 Minn. 159, 24 N. W. 920; *Sherman v. Lewis*, 44 Minn. 107, 46 N. W. 318.

⁷⁴ See § 428.

pears by the will that he intended to convey a less estate.⁷⁵ The statute relates to the nature of the estate transferred and has no bearing on the question of an implied revocation by a subsequent conveyance.⁸¹ At common law a devise to one generally, without words of inheritance, or other words indicating an intention to grant a greater interest, passed an estate for life only. This statute changes that rule.⁷⁶ Even at common law words of inheritance were not necessary to pass a fee in a devise. In this respect wills differed from deeds.⁷⁷ Under this statute a general devise passes a fee if the testator had a fee and there is no gift over. Words of inheritance, such as "to have and to hold the same to him, his heirs and assigns forever," are not necessary to pass a fee. A fee is passed where the will simply "gives" or "devises" land in general terms without limitations, if the testator had a fee.⁷⁸ The customary words of inheritance, "their heirs and assigns, to have and to hold the same for their own use, benefit and behoof forever," are merely words of limitation and not of purchase. They do not avoid a lapse by the substitution of the heirs in place of a predeceased devisee or legatee. Unnecessary as the habendum clause is, if it is used it must be restricted to its usual and ancient office unless a contrary intention is clearly manifest.⁷⁹ The statute is a rule of construction.⁸⁰ If an estate is given to a person generally or indefinitely, with power of disposition, it carries a fee, unless the testator gives to the first taker an estate for life only, and annexes to it a power of disposition of the reversion. In that case, the express limitation for life will control the operation of the power, and prevent it from enlarging the estate into a fee. Words of implication do not merge or destroy an express life estate, unless it becomes absolutely necessary to uphold some manifest general intent. At common law and under this statute an intention to convey a less estate, expressed or clearly implied, will control.⁸¹ The contrary intention must appear from the will and cannot be shown by ex-

⁷⁵ G. S. 1913, § 7263.

⁸¹ *In re Evans' Estate*, 145 Minn. 252, 177 N. W. 126.

⁷⁶ *In re Oertle's Estate*, 34 Minn. 173, 24 N. W. 924; *Thompson v. Baxter*, 107 Minn. 122, 126, 119 N. W. 797; *In re Evans' Estate*, 145 Minn. 252, 177 N. W. 126; *Bassett v. Nickerson*, 184 Mass. 169, 68 N. W. 25; 30 A. & E. Ency. of Law (2 ed.) 745; 40 Cyc. 1575; 28 R. C. L. 238.

⁷⁷ *Bassett v. Nickerson*, 184 Mass. 169, 68 N. E. 25; *Ashby v. McKinlock*, 271 Ill. 254, 111 N. E. 101; *In re Catlin*, 160 N. Y. 1034; *Tiffany, Real Property*, § 20; 40 Cyc. 1573.

⁷⁸ *Bassett v. Nickerson*, 184 Mass. 169, 68 N. E. 25; *Dexter v. Young*, 234 Mass.

588, 125 N. E. 862; *Myrick v. Stowe*, (Mass.) 132 N. E. 349; *Dew v. Kuehn*, 64 Wis. 293, 25 N. W. 212; *Manke v. Miller*, 220 N. Y. 225, 115 N. E. 462; *In re Weymouth*, 165 Wis. 455, 161 N. W. 373; *Brock v. Conkwright* (Ky.) 200 S. W. 962; *Hollway v. Atherton* (Mich.) 171 N. W. 413; 30 A. & E. Ency. of Law (2 ed.) 746; 40 Cyc. 1576; 28 R. C. L. 238.

⁷⁹ *Manke v. Miller*, 220 N. Y. 225, 115 N. E. 462. See 40 Cyc. 1573.

⁸⁰ *Bassett v. Nickerson*, 184 Mass. 169, 68 N. E. 25.

⁸¹ *In re Oertle's Estate*, 34 Minn. 173, 24 N. W. 924; *Collins v. Wickwire*, 162 Mass. 143, 38 N. E. 365; *Pattison v. Farley*, 130 Md. 408, 100 Atl. 634.

trinsic evidence. In other words such intention cannot be shown by the declarations of the testator not embodied in the will. Parol evidence, however, is admissible to prove the surrounding circumstances in a proper case.⁸² The contrary intention need not be declared in express terms; it is sufficient if it is inferable from particular provisions inconsistent with an intent to give a fee, or from the general import, scheme and object of the will.⁸³ It is a common practice to insert words of inheritance though not necessary. A testator devised and bequeathed all his real and personal estate to his son "to have and to hold the same to him, his heirs, assigns, executors and administrators, to his and their use and behalf forever." Held, that the son took an estate in fee simple, the word "heirs," though unnecessary being used as a word of limitation and not of purchase.⁸⁴ A clause giving "all the residue of the estate" held to give a fee.⁸⁵ A devise to a daughter "to be kept and retained by her as long as she shall live, and to be disposed of as to her seems proper at her decease," with no devise over, vests a fee in the devisee.⁸⁶ A general devise to a residuary devisee "for her sole use and benefit" held to pass the fee.⁸⁷ A will provided as follows: "I give and bequeath to my beloved wife L. all my real and personal estate wherever situated of which I may die possessed for the purpose of maintaining herself and our children to her and her heirs forever." Held, that the widow took an absolute devise in fee simple in the real estate of the testator, and that no trust was created.⁸⁸ The same rule applies to a gift of personalty. If the testator had an absolute title it will pass under a general gift unless a contrary intention is clearly manifested by the will.⁸⁹ Unaccrued rents pass under a devise of land as a part thereof.⁹⁰

429. Estates in fee—How granted—No particular language is necessary to pass a fee. If the testator had a fee it will pass by a general devise without limitation. No habendum clause or words of inheritance are necessary. A fee is passed where the will simply "gives" or "devises" land in general terms without limitations, if the testator had

⁸² *Ingersoll v. Hopkins*, 170 Mass. 401, 49 N. E. 623; *Dew v. Kuehn*, 64 Wis. 293, 25 N. W. 212; 30 A. & E. Ency. of Law (2 ed.) 747.

⁸³ *Fay v. Fay*, 1 Cush. (Mass.) 93; *Ingersoll v. Hopkins*, 170 Mass. 401, 49 N. E. 623.

⁸⁴ *Smith v. Rice*, 183 Mass. 251, 66 N. E. 806. See also, *Pitts v. Milton*, 192 Mass. 88, 77 N. E. 1028.

⁸⁵ *Willcut v. Calnan*, 98 Mass. 75. See also, *Spooner v. Lovejoy*, 108 Mass. 529.

⁸⁶ *Todd v. Sawyer*, 147 Mass. 570, 17 N. E. 527.

⁸⁷ *Gallison v. Quinn*, 183 Mass. 241, 66 N. E. 961. See § 433.

⁸⁸ *Pitts v. Milton*, 192 Mass. 88, 77 N. E. 1028.

⁸⁹ *Gregg v. Bailey (Me.)* 113 Atl. 397.

⁹⁰ *Boeing v. Owsley*, 122 Minn. 190, 142 N. W. 129; *State v. Royal Mineral Assn.*, 132 Minn. 232, 156 N. W. 128; *Minnesota L. & T. Co. v. Douglas*, 135 Minn. 413, 161 N. W. 158; *Orr v. Bennett*, 135 Minn. 443, 161 N. W. 165; 11 A. & E. Ency. of Law (2 ed.) 841; 18 Cyc. 182.

a fee.⁹⁰ The fact that there is no limitation over is an indication of an intention to give a fee.⁹¹ A devise will be construed as in fee rather than of a lesser estate in case of reasonable doubt.⁹²

430. Base, conditional, or defeasible fee—A testator may make a devise which standing alone would create a fee, and then limit it to a base or conditional fee by words clearly showing such intention. A will may provide that upon the happening of any reasonable condition the property devised shall pass from the devisee first named to another.⁹³ There may be a devise of a fee with a conditional limitation over in the event of the first devisee dying without issue, or without heirs, or without heirs of his body, or without children.⁹⁴ When a remainder is limited to take effect on the death of any person without heirs or heirs of his body, or without issue, the word "heirs" or "issue" shall be construed to mean heirs or issue living at the death of the person named as ancestor.⁹⁵ At common law such a limitation over was construed to mean an indefinite failure of heirs or issue and was void.⁹⁶ There may be a devise in fee with a conditional limitation to the issue of the devisee if he dies within a certain period, provided the statute against perpetuities is not offended.⁹⁷ The holder of a conditional fee may convey such estate.⁹⁸ A devise of a conditional fee is not converted into an absolute fee by a power of disposition attached to it.⁹⁹

431. Estates for life—How granted—At common law an estate for life was created by a general devise without words of inheritance, or

⁹⁰ 30 A. & E. Ency. of Law (2 ed.) 744; 40 Cyc. 1573. See §§ 428, 433-435.

⁹¹ Bassett v. Nickerson, 184 Mass. 169, 68 N. E. 25. See 40 Cyc. 1624 and §§ 431, 432.

⁹² Putbrees v. James, 162 Iowa 618, 144 N. W. 607; Montgomery v. Witson, 189 Ala. 289, 66 So. 503; Strawbridge v. Strawbridge, 220 Ill. 61, 77 N. E. 78; 30 A. & E. Ency. of Law (2 ed.) 744; 40 Cyc. 1573. See §§ 431-435.

⁹³ Schnitter v. McManaman, 85 Neb. 337, 123 N. W. 299; Gullford v. Gardner, 180 Iowa 1210, 162 N. W. 261; Van Horne v. Campbell, 100 N. Y. 287, 3 N. E. 316, 771; 30 A. & E. Ency. of Law (2 ed.) 751; 16 Cyc. 602; 40 Cyc. 1589; 10 R. C. L. 652; 28 R. C. L. 241. See Thomas v. Williams, 105 Minn. 88, 117 N. W. 155.

⁹⁴ G. S. 1913, § 6672; In re Peavey's Estate, 144 Minn. 208, 175 N. W. 105; Schnitter v. McManaman, 85 Neb. 337, 123 N. W. 299; Ashby v. McKinlock, 271 Ill. 254, 111 N. E. 101; Defrees v. Brydon, 275 Ill. 530, 114 N. E. 336; Black-

stone v. Althouse, 278 Ill. 481, 116 N. E. 154; Hooper v. Bradbury, 133 Mass. 303; May v. Lewis, 132 N. C. 115, 43 S. E. 550; Bristol v. Atwater, 50 Conn. 402; Gullford v. Gardner, 180 Iowa 1210, 162 N. W. 261; In re New York etc. Ry. Co., 105 N. Y. 89, 11 N. E. 492; In re Bearse, 153 N. Y. S. 514; 24 A. & E. Ency. of Law (2 ed.) 431; 40 Cyc. 1591, 1646; 11 R. C. L. 471; 28 R. C. L. 241; Tiffany, Real Property, § 138; 3 L. R. A. (N. S.) 1143; 25 Id. 1045.

⁹⁵ G. S. 1913, § 6672.

⁹⁶ Wilson v. Wilson, 32 Barb. 328; Seamen v. Harvey, 16 Hun (N. Y.) 71.

⁹⁷ Whiting v. Whiting, 42 Minn. 548, 44 N. W. 1030; Johnson v. Buck, 220 Ill. 226, 77 N. E. 163; Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 197 S. W. 261. See 40 Cyc. 1647.

⁹⁸ Gullford v. Gardner, 180 Iowa 1210, 162 N. W. 261. See 16 Cyc. 603.

⁹⁹ Gullford v. Gardner, 180 Iowa 1210, 162 N. W. 261.

other words indicating an intention to grant a greater estate. This rule has been changed by statute in this state.¹ While no particular language is necessary to create an estate for life, yet an intention to grant such an estate rather than an estate in fee must be clearly expressed. In case of reasonable doubt language will be construed to grant a fee rather than an estate for life and where a fee is clearly granted it cannot be cut down to an estate for life by subsequent indefinite language. If the language of a will leaves it in doubt whether an estate for life or a fee was intended it will be construed to grant a fee if there is a power of disposition.² The creation of a life estate is indicated by a limitation over on the death of the first taker, or on his death without issue, or without heirs of the body, or under age.³ Where a devise is in general terms so that standing alone it would pass a fee under G. S. 1913, § 7263, and it is coupled with a limited power of disposition for the use and benefit of the devisee for life, with a limitation over in the event of there being anything left at the death of the first devisee, a life estate is thereby created by implication.⁴ A power of disposition which excludes by implication a power to dispose of property by will is inconsistent with a fee and indicates an intention to give only a life estate.⁵ An estate for life clearly granted cannot be converted into an estate in fee by subsequent indefinite language.⁶ At common law an estate for life clearly granted is not converted into an estate in fee by

¹ See § 428.

² *Chemedlin v. Prince*, 15 Minn. 331 (263); *Farmers Nat. Bank v. Moran*, 30 Minn. 165, 14 N. W. 805; *In re Oertle's Estate*, 34 Minn. 173, 24 N. W. 924; *In re Swenson's Estate*, 55 Minn. 300, 56 N. W. 1115; *Cowles v. Henry*, 61 Minn. 459, 63 N. W. 1028; *Hershey v. Meeker County Bank*, 71 Minn. 255, 73 N. W. 967; *State v. Willrich*, 72 Minn. 165, 75 N. W. 123; *Ashton v. Great Northern Ry. Co.*, 78 Minn. 201, 80 N. W. 963; *Schacht v. Schacht*, 86 Minn. 91, 90 N. W. 127; *Wheaton v. Pope*, 91 Minn. 299, 97 N. W. 1046; *Semper v. Coates*, 93 Minn. 76, 100 N. W. 662; *Rosbach v. Weidenbach*, 95 Minn. 343, 104 N. W. 137; *Sorenson v. Carey*, 96 Minn. 202, 104 N. W. 958; *Thompson v. Baxter*, 107 Minn. 122, 126, 119 N. W. 797; *Barnes v. Gunter*, 111 Minn. 383, 127 N. W. 398; *Lohlker v. Lohlker*, 112 Minn. 273, 127 N. W. 1122; *Sprague v. Stroud*, 114 Minn. 64, 129 N. W. 1053; *Baldwin v. Zien*, 117 Minn. 178, 134 N. W. 498; *Greenman v. McVey*, 126 Minn. 21, 147 N. W. 812; *Johrden v. Pond*, 126 Minn. 247, 148 N.

W. 112; *Elberg v. Elberg*, 132 Minn. 15, 155 N. W. 751; *Long v. Willsey*, 132 Minn. 316, 156 N. W. 349; *Hause v. O'Leary*, 136 Minn. 126, 161 N. W. 392; *Robinson v. Thompson*, 137 Minn. 446, 163 N. W. 786; *Savela v. Erickson*, 138 Minn. 93, 163 N. W. 1029; *In re Meuwissen's Estate*, 146 Minn. 9, 177 N. W. 668; *In re Meldrum's Estate*, 149 Minn. 342, 183 N. W. 835; 30 A. & E. Ency. of Law (2 ed.) 736-747; 40 Cyc. 1615. See § 435.

³ See § 430; 40 Cyc. 1619.

⁴ *Chase v. Ladd*, 153 Mass. 126, 26 N. E. 429; *Kent v. Morrison*, 153 Mass. 137, 26 N. E. 427; *Barry v. Austin*, 118 Me. 51, 105 Atl. 806; *Reed v. Creamer* (Me.) 108 Atl. 82; *Shaw v. Hughes* (Del.) 108 Atl. 747; 24 A. & E. Ency. of Law (2 ed.) 448.

⁵ *Kemp v. Kemp*, 223 Mass. 32, 111 N. E. 673; *Knost v. Knost* (Ky.) 198 S. W. 917.

⁶ *In re Oertle's Estate*, 34 Minn. 173, 178, 24 N. W. 924; *Adams v. Massey*, 184 N. Y. 62, 76 N. E. 916; 30 A. & E. Ency. of Law (2 ed.) 750; 40 Cyc. 1623.

being coupled with a power of disposition, however absolute.⁷ This common-law rule has been modified by statute in this state.⁸ An estate for life clearly granted is not converted into a fee by the absence of any provision for the remainder, but the absence of a limitation over is an indication of an intention to give a fee where an estate for life is not clearly granted.⁹ This common-law rule is modified by statute in this state where there is a power of absolute disposition coupled with the life estate.¹⁰ A devise subject to be defeated by a particular event, without limitation in point of time, creates a life estate at common law, but possibly not under G. S. 1913, § 7263.¹¹ A devise to one so long as he resides on the premises devised, with a limitation over, creates an estate for life in the devisee at common law.¹² A devise of premises so long as the devisee "may desire to occupy the same as a drug store" has been held to create a life estate in the devisee.¹³ A gift to a wife "so long as she remains unmarried" or "so long as she remains my widow," with a gift over, creates a life estate in the wife.¹⁴ A gift to a woman "as long as she remains single" creates a life estate determinable on her marriage.¹⁵ A life tenant may dispose of his life interest without any express authority in the will.¹⁶ Life estates may be created in personalty as well as realty.¹⁷

432. Devise for life or years with power of disposition—Statute—It is provided by statute that "when an absolute power of disposition, not accompanied by any trust, is given to the owner of a particular estate for life or years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estate limited thereon, in case the power is not executed, or the lands sold for the satisfaction of debts."¹⁸ In New York the statute

⁷ *In re Oertle's Estate*, 34 Minn. 173, 24 N. W. 924; *Semper v. Coates*, 93 Minn. 76, 100 N. W. 662; *In re Mel-drum's Estate*, 149 Minn. 342, 183 N. W. 835; *Brant v. Virginia Coal etc. Co.*, 93 U. S. 326; *Laberteaux v. Gale*, 196 Mich. 150, 162 N. W. 968; *Fetter v. Rettig* (Ohio) 121 N. E. 696; *Barry v. Austin* (Me.) 105 Atl. 806; 30 A. & E. Ency. of Law (2 ed.) 737, 750; 6 L. R. A. (N. S.) 1186; 40 Cyc. 1626; 28 R. C. L. 238; Ann. Cas. 1912B, 424; *Woerner*, Am. Law of Adm. (2 ed.) § 439. See cases under § 432; and *State v. Probate Court*, 102 Minn. 268, 113 N. W. 888.

⁸ G. S. 1913, §§ 6735-6739. See § 432.

⁹ *Evans' Appeal*, 51 Conn. 435; *Shaner v. Wilson*, 207 Pa. St. 550, 56 Atl. 1086; *Bassett v. Nickerson*, 184 Mass. 169, 68 N. E. 25; *Fetter v. Rettig* (Ohio) 121 N. E. 696; 30 A. & E. Ency. of Law (2 ed.)

750; 40 Cyc. 1624. See *Greenman v. McVey*, 126 Minn. 21, 147 N. W. 812.

¹⁰ G. S. 1913, § 6737. See § 432.

¹¹ See *Thompson v. Baxter*, 107 Minn. 122, 126, 119 N. W. 797.

¹² See *Thompson v. Baxter*, 107 Minn. 122, 126, 119 N. W. 797.

¹³ *Thompson v. Baxter*, 107 Minn. 122, 126, 119 N. W. 797.

¹⁴ See § 404.

¹⁵ *Ruggles v. Jewett*, 213 Mass. 167, 99 N. E. 1092. See 40 Cyc. 1622.

¹⁶ *Gullford v. Gardner*, 180 Iowa 1210, 162 N. W. 261.

¹⁷ *In re Oertle's Estate*, 34 Minn. 173, 24 N. W. 924; *State v. Probate Court*, 102 Minn. 268, 113 N. W. 888; *Johrden v. Pond*, 126 Minn. 247, 148 N. W. 112. See 40 Cyc. 1614.

¹⁸ G. S. 1913, § 6735; *Hershey v. Meeker County Bank*, 71 Minn. 255, 73

applies to powers respecting personal property as well as powers respecting real property.¹⁹ The statute changes the life estate into a fee only as to purchasers and creditors.²⁰ Only creditors and purchasers can question the validity of the future estates limited on the life estate.²¹ A general and beneficial power to devise, given to a tenant for life, is an absolute power of disposition within the statute, as much as a power to sell and convey.²² Where the power of disposition is not absolute and is accompanied by a trust the statute does not apply.²³ The statute has no application where the title is vested in a trustee and a subordinate power is given to a beneficiary under the trust.²⁴ The holder of such a life estate with absolute power to devise may convey the fee by deed though the will attempts to restrain any conveyance by deed. The purpose of these statutes was to annihilate all limitations and restrictions upon the power of disposition in such cases.²⁵ The word "purchasers" in the statute is not used in its technical sense but is used in its ordinary sense of purchasers for a valuable consideration.²⁶ Where a widow is given a life estate in her husband's lands by his will, with an absolute power of disposition, remainder over to his heirs of lands not disposed of, a warranty deed by the widow is sufficient to bar the remainder though it does not refer to the will and for that reason does not constitute a technical execution of the power. The grantee in such a deed is a "purchaser" within the statute. There is no trust in favor of the heirs in such a case.²⁷ Where an estate for life is coupled with an absolute power of disposition and there is no provision for the remainder the grantee of the life estate takes the fee. The same principle applies to a similar gift of personalty and the legatee takes an absolute title.²⁸ A testator

N. W. 967; *Ashton v. Great Northern Ry. Co.*, 78 Minn. 201, 80 N. W. 963. See *Farmers Nat. Bank v. Moran*, 30 Minn. 165, 14 N. W. 805; *In re Oertle's Estate*, 34 Minn. 173, 24 N. W. 924; *Semper v. Coates*, 93 Minn. 76, 100 N. W. 662; *Rosbach v. Weidenbach*, 95 Minn. 343, 104 N. W. 137; 49 McKinney's Consol. Laws, N. Y. § 149; 30 A. & E. Ency. of Law (2 ed.) 737 note; 6 L. R. A. (N. S.) 1199; 39 Id. 805; 139 Am. St. Rep. 110; Ann. Cas. 1912B, 424; 1916D, 401. As to what constitutes an absolute power of disposition, see § 462.

¹⁹ *In re Moehring*, 154 N. Y. 423, 48 N. E. 818.

²⁰ *Hershey v. Meeker County Bank*, 71 Minn. 255, 268, 73 N. W. 967; *Barr v. Howell*, 147 N. Y. S. 483.

²¹ *Head v. Lane*, 186 Ala. 335, 65 So. 343.

²² *Hayes v. Gunning*, 101 N. Y. S. 875.

²³ *Rose v. Hatch*, 125 N. Y. 427, 26 N. E. 467; *Haynes v. Sherman*, 117 N. Y. 433, 22 N. E. 938.

²⁴ *Hume v. Randall*, 141 N. Y. 499, 36 N. E. 402.

²⁵ *Hume v. Randall*, 141 N. Y. 499, 36 N. E. 402; *Deegan v. Wade*, 144 N. Y. 573, 39 N. E. 692; *In re Moehring*, 154 N. Y. 423, 48 N. E. 818; *Barr v. Howell*, 147 N. Y. S. 483; *Auer v. Brown*, 121 Wis. 115, 98 N. W. 966.

²⁶ *Perkinson v. Clarke*, 135 Wis. 584, 116 N. W. 229. See *Ashton v. Great Northern Ry. Co.*, 78 Minn. 201, 80 N. W. 963.

²⁷ *Auer v. Brown*, 121 Wis. 115, 98 N. W. 966.

²⁸ G. S. 1913, § 6737; 49 McKinney's Consol. Laws N. Y. § 151; *In re Moehring*, 154 N. Y. 423, 48 N. E. 818.

may give a life estate expressly, with absolute power of disposition during life or by will at death, without making the gift absolute, if he uses clear language to that effect, subject to the provisions of G. S. 1913, §§ 6735, 6737.²⁹ M. devised certain lands to R. for life, with a general and beneficial power to him to devise the remainder in fee. R. executed to defendant mortgages on the lands, purporting to convey an absolute fee, and subsequently died testate, devising the lands to the plaintiffs. Afterwards, in the administration of the estate of M., the probate court made a decree of distribution by which it construed the will of M. as granting to R. a life estate, with power of disposition by will only, and, in accordance with such construction, assigned the lands to plaintiffs, as appointees under the will of R. In a prior action the plaintiffs obtained by default a judgment against defendant Willis, adjudging his mortgage null and void. Subsequently the court, on motion of Willis made an order vacating the judgment; and from that order the plaintiffs appealed, and gave a supersedeas bond. That appeal is still pending. In this action to determine the adverse claims of the defendants under these mortgages, held that R. had, under the statute relating to powers, an absolute power of disposition of the lands, and that his life estate was changed into a fee absolute, as respects the rights of creditors and purchasers.³⁰ A. devised all of his real estate, except a part not herein involved, to his wife, during the term of her natural life, and also provided: "I do hereby fully authorize and empower her to sell and dispose of my said estate, or any part thereof, and give good and absolute title thereto by deed or otherwise, whenever in her judgment it is expedient to dispose of the same; and purchasers of said property are not required to look after the application of the proceeds thereof." And further: "That at the death of my said wife all of my said estate that may remain unsold and undisposed of by her I give, devise, and bequeath to my three children aforesaid, Thomas Ashton, Isaiah Heylin Ashton and Eliza Burton Ashton, to be divided equally between them,

²⁹ In re Oertle's Estate, 34 Minn. 173, 24 N. W. 924; Semper v. Coates, 93 Minn. 76, 100 N. W. 662; In re Meldrum's Estate, 149 Minn. 342, 183 N. W. 835; Collins v. Wickwire, 162 Mass. 143, 38 N. E. 365; Dana v. Dana, 185 Mass. 156, 70 N. E. 49; Kemp v. Kemp, 223 Mass. 32, 111 N. E. 673; Dallinger v. Merrill, 224 Mass. 534, 113 N. E. 279; Homans v. Foster, 232 Mass. 4, 121 N. E. 417; Mansfield v. Shelton, 67 Conn. 390, 35 Atl. 271; In re Moor's Estate, 163 Mich. 353, 128 N. W. 198; Laberteaux v. Gale, 196 Mich. 150, 162 N. W. 968; In re Beatty's Estate, 172 Iowa, 714, 154 N. W. 1028; Buro v. Olson, 165 Wis. 409, 162 N. W.

429; Hovely v. Herrick, 152 Wis. 11, 139 N. W. 384; Loosing v. Loosing, 85 Neb. 66, 122 N. W. 707; Abbott v. Wagner (Neb.) 188 N. W. 113; Knost v. Knost, 178 Ky. 267, 198 S. W. 917; Makely v. Washington-Beaufort Land Co. (N. C.) 95 S. E. 53; 30 A. & E. Ency. of Law (2 ed.) 737; 40 Cyc. 1626; 21 R. C. L. 776; Woerner, Am. Law of Adm. (2 ed.) § 439; 6 L. R. A. (N. S.) 1186; 18 Id. 463; 39 Id. 805; 9 Ann. Cas. 943; Ann. Cas. 1912B, 424; Ann. Cas. 1916D, 401; 139 Am. St. Rep. 82.

³⁰ Hershey v. Meeker County Bank, 71 Minn. 255, 73 N. W. 967.

share and share alike." The will was duly probated, and thereafter the grantee of the power, the widow of the devisee, conveyed by deed containing full covenants of warranty and in the usual form a part of the premises to a railway company. In an action of ejectment, brought after the decease of the widow, by the heirs at law of a remainderman against the tenant of the company, it is held that under the provisions of G. S. 1894, §§ 4309, 4312, 4313, 4350, the grantee in the deed acquired a perfect and complete title to the property, and that the plaintiffs have no interest therein.⁸¹

433. Gift of the use and benefit of property—A gift of the use of property, without any restrictions or limitations, is an absolute bequest of personal property and a devise in fee of real property.⁸² A devise of the use of property for life is a devise of the property for such term if there is no limitation.⁸³ A gift of the use of money for life is a gift of the income only and the legatee must give security for the protection of the remainderman.⁸⁴ A testator devised certain land to trustees, in trust to permit his son-in-law "to use and occupy the same for and during the term of his natural life, and after his decease in trust," etc. There was no limitation on the use of the land by the son-in-law. He was not restrained from selling or incumbering his interest and was not subject to the control of the trustees in his use of the land. Held, that under the statute of uses (G. S. 1913, §§ 6703, 6704) the legal estate in the land for his life was vested in the son-in-law and his interest was assignable and subject to be sold for his debts.⁸⁵ Where a will gives to a wife all the property of the testator, for her use and benefit, including an absolute power of disposition, with a provision that at her death any residue shall go to children, it is often difficult to determine whether the testator intended to give her a fee or merely a life estate. Such wills are very common and they vary so much in the language used that no hard and fast rules can be laid down.⁸⁶ A will giving all the

⁸¹ *Ashton v. Great Northern Ry. Co.*, 78 Minn. 201, 80 N. W. 963.

⁸² *Chase v. Chase*, 132 Mass. 473; *Gallison v. Quinn*, 183 Mass. 241, 66 N. E. 961; *Hayward v. Rowe*, 190 Mass. 1, 76 N. E. 286; *Dallinger v. Merrill*, 224 Mass. 534, 113 N. E. 279; *Moore v. Moore*, 84 N. J. Eq. 39, 92 Atl. 948; 30 A. & E. Ency. of Law (2 ed.) 715; 40 Cyc. 1583, 1609.

⁸³ *Farmers Nat. Bank v. Moran*, 30 Minn. 165, 14 N. W. 805; *In re Oertle's Estate*, 34 Minn. 173, 181, 24 N. W. 924; *Semper v. Coates*, 93 Minn. 76, 100 N. W. 662; *Sorenson v. Carey*, 96 Minn. 202, 104 N. W. 958; *Worley v. Wimberley*, 90 Neb. 20, 154 N. W. 849; *Cross v. Bus-*

kirk-Rutledge Lumber Co., 139 Tenn. 79, 201 S. W. 141; *Allen v. Hunt*, 213 Mass. 276, 100 N. E. 552; 40 Cyc. 1516, 1627.

⁸⁴ *Tapley v. Douglass*, 113 Me. 392, 94 Atl. 486. See *In re Oertle's Estate*, 34 Minn. 173, 24 N. W. 924.

⁸⁵ *Farmers Nat. Bank v. Moran*, 30 Minn. 165, 14 N. W. 805.

⁸⁶ See cases under §§ 431, 432, 468; *White v. Grand Rapids etc. R. Co.*, 190 Mich. 1, 155 N. W. 719; *Laberteaux v. Gale*, 196 Mich. 150, 162 N. W. 968; *Sellick v. Sellick*, 207 Mich. 194, 173 N. W. 609; *Ironside v. Ironside*, 150 Iowa 628, 130 N. W. 414; *Kemp v. Kemp*, 223 Mass. 32, 111 N. E. 673.

property, after payment of debts and expenses, to testator's wife for her use and benefit during her life, and at her death giving to others all that given to her, "or so much thereof as may then remain unexpended," gives her the right to use from the corpus.³⁷

434. Devise of possession, rents and profits—Statute—A devise of the rents and profits of land is equivalent to a devise of the land itself and will convey the legal as well as the beneficial interest therein, unless the will limits the estate.³⁸ Every person who, by virtue of any grant, assignment, or devise, is entitled to the actual possession of lands, and the receipt of the rents and profits thereof, in law or equity, shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interests.³⁹ This statute does not mean that every person who is by will entitled to the possession of lands, and the receipts and profits thereof, shall be deemed to have a legal estate therein, but applies only where the will contains no limitations on the estate or interest of the devisee.⁴⁰ It does not apply to trusts arising by implication of law or authorized express trusts.⁴¹ This section of the statute refers exclusively to a class of passive trusts, where the immediate possession and whole beneficial use of the land is given directly to the cestui que trust, the trustee being made by the will or deed the depository of a mere naked title, with no active duties to perform in respect to the property. By this and other sections of the statute all naked, dry, nominal or passive trusts are abolished.⁴² An absolute gift of all income of property is a gift of the property itself.⁴³ A will contained the following provisions: "It is my wish and desire that my husband, John Poseng, shall have all the rents, profits and income derived from all my real estate and houses of which I shall die seized and possessed of, during his natural life provided, * * * that my husband, John Poseng, shall pay and continue to pay

³⁷ *Chamberlain v. Husel*, 178 Mich. 1, 144 N. W. 549.

³⁸ *Morrison v. St. Paul & N. P. Ry. Co.*, 63 Minn. 75; 80, 65 N. W. 141; *Scruggs v. Yancey*, 188 Ala. 682, 66 So. 23; *Jordan v. Walker* (Ala.) 77 So. 838 (rule inapplicable where will makes other disposition of the property); 30 A. & E. Ency. of Law (2 ed.) 743; 40 Cyc. 1583; 28 R. C. L. 239; 9 Ann. Cas. 247.

³⁹ G. S. 1913, § 6703; 49 McKinney's Consol. Laws (N. Y.) § 92; *Blakeley v. LeDuc*, 25 Minn. 448; *Farmers' Nat. Bank v. Moran*, 30 Minn. 165, 14 N. W. 805; *Thompson v. Conant*, 52 Minn. 208, 53 N. W. 1145; *Haaven v. Hoas*, 60 Minn. 313, 315, 62 N. W. 110; *Rosbach v. Wel-*

denbach, 95 Minn. 343, 104 N. W. 137.

⁴⁰ *Rosbach v. Weidenbach*, 95 Minn. 343, 104 N. W. 137.

⁴¹ G. S. 1913, § 6705; *Johnston v. Spicer*, 107 N. Y. 185, 13 N. E. 753.

⁴² *Trustees v. Froislie*, 37 Minn. 447, 452, 35 N. W. 260; *Whiting v. Whiting*, 42 Minn. 548, 44 N. W. 1030; *Thompson v. Conant*, 52 Minn. 208, 53 N. W. 1145; *Rogers v. Clark*, 104 Minn. 198, 222, 116 N. W. 739. See McKinney Consol. Laws (N. Y.) §§ 92, 93; *New York Dry Dock Co. v. Stillman*, 30 N. Y. 174; *Wendt v. Walsh*, 164 N. Y. 154, 58 N. E. 2; *Jacoby v. Jacoby*, 188 N. Y. 124, 80 N. E. 676; 39 Cyc. 220.

⁴³ *Birge v. Nucomb* (Conn.) 105 Atl. 335.

year after year all current expenses such as taxes, insurance, improvements and repairs on said real estate." Also: "It is my wish and desire, and this bequest herein is made upon the express condition that all my real estate, of which I shall die seized or possessed of, shall be kept free from any incumbrances by mortgages or otherwise, and that no such incumbrance shall be made upon the same by my husband, John Poseng, during his natural life." Held, upon the death of the testatrix her husband did not become vested with the legal estate, but the interest and profits thereof were devised to him during his natural life only.⁴⁴

435. Absolute estate with inconsistent or indefinite limitations—It is a general common-law rule that an absolute estate in either real or personal property clearly given cannot be cut down to a lesser estate by inconsistent or repugnant limitations thereon.⁴⁵ This general common-law rule is greatly restricted by our statutes relating to estates and powers derived from New York. Under our statutory system the tendency is against a construction destroying a clause in a will which limits or cuts down a prior absolute gift. To cut down a prior absolute gift a subsequent provision must be as clear as the provision creating the absolute gift, but if reasonably possible both provisions must be given effect.⁴⁶ All the provisions of a will must be read together and given effect so far as possible and a fee clearly granted may be cut down by subsequent provisions clearly showing an intention to give a lesser estate.⁴⁷ An absolute estate clearly granted cannot be cut down to one for life by subsequent indefinite provisions. But an absolute estate clearly granted may be cut down to a life estate by subsequent provisions clearly showing an intention to give the lesser estate.⁴⁸ The

⁴⁴ *Rosbach v. Weidenbach*, 95 Minn. 343, 104 N. W. 137.

⁴⁵ *Sherburne v. Littel*, 220 Mass. 385, 107 N. E. 962; *Kemp v. Kemp*, 223 Mass. 32, 111 N. E. 673; *Canaday v. Baysinger*, 170 Iowa, 414, 152 N. W. 562; 30 A. & E. Ency. of Law (2 ed.) 748; 40 Cyc. 1586, 1610; 28 R. C. L. 242.

⁴⁶ *Goodwin v. Coddington*, 154 N. Y. 283, 48 N. E. 729; *Trask v. Sturges*, 170 N. Y. 482, 63 N. E. 534; *In re Bearse*, 153 N. Y. S. 514.

⁴⁷ *Schnitter v. McManaman*, 85 Neb. 337, 123 N. W. 299; *Bennett v. Packer*, 70 Conn. 357, 30 Atl. 739; *Plaut v. Plaut*, 80 Conn. 673, 70 Atl. 52; *Clark v. Baker*, 91 Conn. 663, 101 Atl. 9; *Meriden Trust & Safe Deposit Co. v. Squire* (Conn.) 103 Atl. 269; *Scott v. Gillespie*, 103 Kan. 745, 176 Pac. 132; *Otis v. Otis* (Ky.) 177 Pac. 520; *Fecht v. Henze*, 162 Mich. 52,

127 N. W. 26; *Hollway v. Atherton* (Mich.) 171 N. W. 413; 30 A. & E. Ency. of Law (2 ed.) 748, 40 Cyc. 1611; 28 R. C. L. 241. See § 431.

⁴⁸ *Elberg v. Elberg*, 132 Minn. 15, 155 N. W. 751; *Long v. Willsey*, 132 Minn. 316, 156 N. W. 349; *Clark v. Baker*, 91 Conn. 663, 101 Atl. 9; *Clay v. Wood*, 153 N. Y. 134, 47 N. E. 274; *Trask v. Sturges*, 170 N. Y. 482, 63 N. E. 534; *Tillman v. Ogren*, 227 N. Y. 495, 125 N. E. 821; *Fecht v. Henze*, 162 Mich. 52, 127 N. W. 26; *Wheeler v. Long*, 128 Iowa 643, 105 N. W. 161; *Grieves v. Grieves* (Md.) 103 Atl. 572; *McClintock v. Meehan*, 273 Ill. 434, 113 N. E. 43; *Pattison v. Farley*, 130 Md. 408, 100 Atl. 634; *Scott v. Gillespie*, 103 Kan. 745, 176 Pac. 132; *Otis v. Otis* (Kan.) 177 Pac. 520; *Grant v. Hover* (Neb.) 174 N. W. 317; *Meins v. Meins*, 288 Ill. 463, 123 N. E. 554; 30 A.

general rule that a fee clearly granted cannot be cut down by a subsequent inconsistent provision is subject to the exception of an executory devise, whereby, upon the happening of some contingency, such as the death of the first devisee without issue, the estate first granted is cut down to a base or determinable fee.⁴⁹ Where there is an absolute gift of property, real or personal, with full power of disposition, a gift over is void at common law, being inconsistent with the first gift.⁵⁰ This rule rests on no solid foundation and has been abrogated by statute in this state.⁵¹ It does not apply unless there is a full power of disposition given. There may be a remainder over in the form of an executory devise after an absolute fee.⁵² The principle stated above does not apply where the will purports to give only a life estate to the first taker, with merely a power of disposition of the remainder as a separate interest. In such a case, if the power is executed, the property passes under the original will, through the execution of the power, to the person designated, and if it is not executed it remains to be affected by the other provisions of the will, or to pass as undevised estate of the testator.⁵³ Where an absolute fee is given subsequent provisions limiting or postponing the control or enjoyment of the property for a limited time are not necessarily repugnant and void.⁵⁴ An absolute title in fee cannot be cut down by a condition against alienation by the devisee within a certain number of years, or during his life.⁵⁵

436. Joint tenancy and tenancy in common—Statute—All grants and devises of lands, made to two or more persons, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy. This does not apply to mortgages, or

& E. Ency. of Law (2 ed.) 687, 748; 40 Cyc. 1577, 1586; 28 R. C. L. 241; Woerner, Am. Law of Adm. (2 ed.) § 416; 3 Ann. Cas. 615; 10 Id. 176; 11 Id. 470. See § 431.

⁴⁹ In re Peavey's Estate, 144 Minn. 208, 175 N. W. 105; Defrees v. Brydon, 275 Ill. 530, 114 N. E. 336; Gullford v. Gardner, 180 Iowa 1210, 162 N. W. 261; Meriden Trust & Safe Deposit Co. v. Squire (Conn.) 103 Atl. 269. See § 430.

⁵⁰ Ide v. Ide, 5 Mass. 500; Collins v. Wickwire, 162 Mass. 143, 38 N. E. 365; Bassett v. Nickerson, 184 Mass. 169, 68 N. E. 25; Galligan v. McDonald, 200 Mass. 299, 86 N. E. 304; Sherburne v. Littell, 220 Mass. 385, 107 N. E. 962; Kemp v. Kemp, 223 Mass. 32, 111 N. E. 673; Davis v. Davis, 225 Mass. 311, 114 N. E. 309; Law v. Douglass, 107 Iowa 606, 78 N. W. 212; In re Ithaca Trust

Co., 220 N. Y. 437, 116 N. E. 102; Spencer v. Scovill, 70 Neb. 87, 96 N. W. 1016; In re Condon's Estate, 167 Iowa 215, 149 N. W. 264; Morrill v. Morrill, 116 Me. 154, 100 Atl. 756; Moran v. Moran, 143 Mich. 322, 106 N. W. 206; Barry v. Austin (Me.) 105 Atl. 806; 24 A. & E. Ency. of Law (2 ed.) 446; 30 Id. 749; 40 Cyc. 1587; Woerner, Am. Law of Adm. (2 ed.) § 439; 5 L. R. A. (N. S.) 323. See § 439.

⁵¹ See § 439.

⁵² See § 437.

⁵³ Collins v. Wickwire, 162 Mass. 143, 38 N. E. 365.

⁵⁴ Elberts v. Elberts, 159 Iowa 332, 141 N. W. 57; Williams v. Williams, 73 Cal. 99, 14 Pac. 394.

⁵⁵ Hause v. O'Leary, 136 Minn. 126, 161 N. W. 392; Gishell v. Ballman, 131 Md. 260, 101 Atl. 698. See § 407.

to devises or grants made in trust, or to executors.⁵⁶ In New York the statute applies to personalty as well as realty, to legacies as well as devises. While our statute is limited to realty the same rule is probably applicable to personalty.⁵⁷ There may be a joint tenancy of personalty as well as of realty, with the right of survivorship.⁵⁸ An estate in joint tenancy can only be created by language clearly declaring the estate to be in joint tenancy. Such an estate is disfavored and every presumption is against its creation. Even the use of the word "jointly" is not decisive of an intention to create such an estate.⁵⁹ To create a joint tenancy, however, it is not necessary that the words "joint tenancy" should be used. Any other expression is sufficient if it clearly expresses an intention to create such a tenancy and negatives the presumption arising from the statute.⁶⁰ A gift to a man and his wife creates a tenancy in common unless a joint tenancy is expressly declared.⁶¹ A gift to A and his children is a gift to them concurrently as tenants in common unless the will provides otherwise. At common law they took as joint tenants, but under G. S. 1913, § 6694, they take as tenants in common, unless the will expressly provides that they shall take as joint tenants. The context may show that it was the intention of the testator to give the parent a life estate with remainder to the children. The same rules apply to a gift to A and B and their children.⁶² The statute does not apply to mortgages and a mortgage to two or more makes them joint tenants as at common law, unless a contrary intention is expressed by the instru-

⁵⁶ G. S. 1913, § 6694; 49 McKinney's Consol. Laws, N. Y. § 66; 23 Cyc. 486; 40 Cyc. 1636; 17 A. & E. Ency. of Law (2 ed.) 657; 7 R. C. L. 813; Ann. Cas. 1914C, 233; Ann. Cas. 1917B, 57.

⁵⁷ Mills v. Husson, 140 N. Y. 99, 35 N. E. 422; Commercial Bank v. Sherwood, 162 N. Y. 310, 56 N. E. 834; Overheiser v. Lackey, 207 N. Y. 229, 100 N. E. 138; Stetson v. Eastman, 84 Me. 366, 24 Atl. 868; Ann. Cas. 1917B, 57, 97; 49 McKinney's Consol. Laws, N. Y. § 66. See contra, Farr v. Grand Lodge, 83 Wis. 446, 53 N. W. 738; Dupont v. Jonet, 165 Wis. 554, 162 N. W. 664; Hart v. Hart, 201 Mich. 207, 167 N. W. 337; In re Grote's Estate, 203 Ill. App. 50.

⁵⁸ Attorney General v. Clark, 222 Mass. 291, 110 N. E. 299; Overheiser v. Lackey, 207 N. Y. 229, 100 N. E. 738; In re McKelway's Estate, 221 N. Y. 15, 116 N. E. 348; In re Reynold's Estate, 163 N. Y. S. 803; In re Harris' Estate, 169 Cal. 725, 147 Pac. 967; Dupont v. Jonet, 165 Wis. 554, 162 N. W. 664. Contra, Hart v. Hart, 201 Mich. 207, 167 N. W. 337.

⁵⁹ Overheiser v. Lackey, 207 N. Y. 229, 100 N. E. 738; In re Haddock's Will, 155 N. Y. S. 630; Allen v. Almy, 87 Conn. 517, 89 Atl. 205; Hart v. Hart, 201 Mich. 207, 167 N. W. 337; Bassler v. Rewodlinski, 130 Wis. 26, 109 N. W. 1032.

⁶⁰ Coster v. Lorillard, 14 Wend. (N. Y.) 342; Purdy v. Hayt, 92 N. Y. 446; Overheiser v. Lackey, 207 N. Y. 229, 100 N. E. 738; Mustain v. Gardner, 203 Ill. 284, 67 N. E. 779; Roaf v. Champlin (N. H.) 107 Atl. 339.

⁶¹ Wilson v. Wilson, 43 Minn. 398, 45 N. W. 710; In re Klatzl's Estate, 216 N. Y. 83, 110 N. E. 181. See Dorsey v. Dorsey, 142 Minn. 279, 171 N. W. 933.

⁶² In re Utz' Estate, 43 Cal. 200; Whitefield v. Means, 140 Ga. 430, 78 S. E. 1067; In re Russell, 168 N. Y. 169, 61 N. E. 166; Colby v. Wortley (Mich.) 172 N. W. 561; Hutchens v. Denton (W. Va.) 98 S. E. 808; 30 A. & E. Ency. of Law (2 ed.) 754; 40 Cyc. 1638; L. R. A. 1917D, 49.

ment. A mortgage with covenants which are several, not joint, creates a tenancy in common in the mortgagees.⁶³ Joint ownership of personal property may be severed by the act of one of the joint owners in disposing of his interest, and if the interest of one passes to a third party, he and the other joint tenant become tenants in common.⁶⁴

437. Executory devises—An executory devise of lands is such a disposition of them by will that thereby no estate vests at the death of the devisor, but only on some future contingency.⁶⁵ In its most common form an executory devise is a limitation over after a fee, to take effect upon a contingency.⁶⁶ Strictly, executory devises, as such, are abolished by statute in this state. Under our statutes they are a form of future or expectant estates, and are not distinguished from remainders.⁶⁷ At common law and under our statutes an executory devise may be limited on a fee. At common law it was always competent to create by devise an estate in one and his heirs, and yet so limit it that upon the happening of some condition or contingent event his estate should cease and go to another. An executory devise differed from a remainder, among other things, in that it did not need a particular estate to precede and support it and might be limited on a fee.⁶⁸ An executory devise may be limited on a base or conditional fee.⁶⁹ At common law the contingency on which an executory devise was based might happen within a life or lives in being and twenty-one years thereafter. Our statute reduces the number of lives to two and cuts off the twenty-one years of additional suspense.⁷⁰ There may be a devise of a fee with a conditional limitation over in the event of the first devisee dying without issue, or without heirs, or without heirs of his body, or without children. In such case the first devisee takes a base or defeasible fee and the limitation over is valid as an executory devise.⁷¹ It is generally held that an executory devise limited on a prior devise of a fee, with absolute power of disposition in the prior devisee, is void on the ground of inconsistency with the prior devise. This doctrine has been very justly criticised and probably does not prevail in this state because of

⁶³ *Fielder v. Howard*, 99 Wis. 388, 75 N. W. 163; *Cooley v. Kinney*, 109 Mich. 34, 66 N. W. 674. See Ann. Cas. 1917B, 87.

⁶⁴ *In re McKelway's Estate*, 221 N. Y. 15, 116 N. E. 348; *Attorney General v. Clark*, 222 Mass. 291, 110 N. E. 299.

⁶⁵ *Bristol v. Atwater*, 50 Conn. 402; *Starr v. Minister*, 112 Md. 171, 76 Atl. 595; 24 A. & E. Ency. of Law (2 ed.) 428; 40 Cyc. 1644; 11 R. C. L. 466.

⁶⁶ *Whiting v. Whiting*, 42 Minn. 548, 44 N. W. 1030. See 40 Cyc. 1646.

⁶⁷ *Whiting v. Whiting*, 42 Minn. 548, 44 N. W. 1030; *Tilden v. Green*, 130 N. Y. 29, 28 N. E. 880; *Doctor v. Hughes*, 225 N. Y. 305, 122 N. E. 221.

⁶⁸ *Whiting v. Whiting*, 42 Minn. 548, 44 N. W. 1030. See 24 A. & E. Ency. of Law (2 ed.) 428; 40 Cyc. 1646; 11 R. C. L. 465.

⁶⁹ *Fulton v. Teager* (Ky.) 209 S. W. 535.

⁷⁰ *Simpson v. Cook*, 24 Minn. 180, 184; *Whiting v. Whiting*, 42 Minn. 548, 44 N. W. 1030.

⁷¹ See § 430.

G. S. 1913, § 6683.⁷² It is also generally held that a gift over after a fee, if the first taker does not dispose of his interest or dies intestate, or a gift over of what remains at the death of the first taker, is void and cannot be sustained as an executory devise. This rule does not rest on a solid foundation and is probably abrogated by G. S. 1913, § 6683.⁷³ A testator devised property to A in fee with a gift over to B of all that remained at A's death. A predeceased the testator. Held, that B took the property.⁷⁴ There may be a devise of a life estate with a power of disposition and a gift over of what remains undisposed of by the life tenant.⁷⁵ A will held valid as an executory devise to a corporation to be organized in the future to furnish relief and charity to the worthy poor of the city of St. Paul.⁷⁶

438. Remainders—Definition—A remainder is a future estate dependent upon a precedent estate.⁷⁷ At common law a remainder is a remnant of an estate in land, depending upon a particular prior estate, created in the same land at the same time and by the same instrument, and limited to arise immediately on the determination of that estate and not in abridgement of it.⁷⁸ A remainder is a form of expectant estates, that is, estates where the right to the possession is postponed to a future period. At common law estates in real property, with respect to the time of their enjoyment, were either in possession or in expectancy. The person who had the present enjoyment of that out of which the enjoyment arose had an estate in possession. The person whose enjoyment was postponed had an estate in expectancy, which, however, was

⁷² *In re Wescott*, 16 N. Y. St. Rep. 286; *In re Briggs' Estate*, 167 N. Y. S. 632; *Van Horne v. Campbell*, 100 N. Y. 287, 3 N. E. 316, 771; *Williams v. Elliott*, 246 Ill. 548, 92 N. E. 960; *Bradley v. Jenkins*, 276 Ill. 161, 114 N. E. 582; 24 A. & E. Ency. of Law (2 ed.) 446; 40 Cyc. 1646; 11 R. C. L. 477; *Tiffany*, Real Property, § 140; *Gray*, Restraints on Alienation, (2 ed.) § 69; 14 Harv. L. Rev. 595; 16 Id. 458; 7 Ann. Cas. 953; 32 Am. L. Reg. (N. S.) 1039; 1 Mich. L. Rev. 435; 5 L. R. A. (N. S.) 323. See § 439.

⁷³ *Terry v. Wiggins*, 47 N. Y. 512; *Thomas v. Wolford*, 1 N. Y. S. 610; *Colt v. Heard*, 10 Hun (N. Y.) 189; *In re Briggs' Will*, 167 N. Y. S. 632; *In re Ithaca Trust Co.*, 220 N. Y. 437, 116 N. E. 102; *Park v. Powledge* (Ala.) 73 So. 483; *Morrill v. Morrill*, 116 Me. 154, 100 Atl. 756; *Bernstein v. Bramble*, 81 Ark. 480, 99 S. W. 682; 24 A. & E. Ency. of Law (2 ed.) 445; 40 Cyc. 1587; *Tiffany*,

Real Property, § 140; *Gray*, Restraints on Alienation, (2 ed.) § 57, et seq.; 32 Am. L. Reg. (N. S.) 1035; 5 L. R. A. (N. S.) 323; 32 Harv. L. Rev. 437. See § 439.

⁷⁴ *In re Dunstan*, 2 Ch. 304. See 32 Harv. L. Rev. 437.

⁷⁵ *In re Oertle's Estate*, 34 Minn. 173, 24 N. W. 924.

⁷⁶ *Watkins v. Bigelow*, 93 Minn. 210, 100 N. W. 1104.

⁷⁷ G. S. 1913, § 6661; *Whiting v. Whiting*, 42 Minn. 548, 44 N. W. 1030; *State v. Probate Court*, 102 Minn. 268, 291, 113 N. W. 888.

⁷⁸ *Whiting v. Whiting*, 42 Minn. 548, 44 N. W. 1030; *Sabledowsky v. Arbuckle*, 50 Minn. 475, 52 N. W. 920; *Morris v. Phillips*, 287 Ill. 633, 122 N. E. 831; 24 A. & E. Ency. of Law (2 ed.) 377; 16 Cyc. 648; 4 Kent, Comm. 197; *Tiffany*, Real Property, § 118; 25 L. R. A. (N. S.) 889; 15 Col. L. Rev. 680.

created at the same time as that upon which it was expectant. Expectant estates were either in remainder, limited to take effect and to be enjoyed after the particular estate, or in reversion, the residue of the estate left in the grantor or his heirs, to commence in possession after the determination of the particular estate. These distinctions are preserved in our statutes.⁷⁹ There may be a devise for life with remainder to heirs or next of kin, including the life tenant, and such remainder may be a vested one. The fact that a life tenant can never come into possession does not change the time when the title to the remainder vests.⁸⁰

439. Same—Necessity of precedent estate—Limited on a fee—Executory devises—At common law a remainder in fee cannot be limited on a fee. This rule has been abolished in this state by G. S. 1913, § 6660. Under our statutes, as at common law, a fee may be limited on a fee by way of executory devise.⁸¹ It is generally held, even in states having statutes like ours, that a remainder cannot be limited upon an absolute estate in fee, and where a gift intended to be absolute is provided by will, a gift over must be treated as a mere expression of a wish regarding the distribution of such part of the gift as may remain undisposed of at the death of the donee.⁸² This rule does not apply unless a fee is unequivocally granted.⁸³ A remainder may be limited after a life estate with an absolute power of disposition.⁸⁴ A contingent remainder in fee may be limited on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age.⁸⁵

⁷⁹ G. S. 1913, §§ 6658-6662; *State v. Probate Court*, 102 Minn. 268, 290, 113 N. W. 888.

⁸⁰ *In re Shumway's Estate*, 194 Mich. 245, 160 N. W. 595; *Cushman v. Arnold*, 185 Mass. 165, 70 N. E. 43; 24 A. & E. Ency. of Law (2 ed.) 394; 40 Cyc. 1668.

⁸¹ *Whiting v. Whiting*, 42 Minn. 548, 44 N. W. 1030; *Sabledowsky v. Arbuckle*, 50 Minn. 475, 52 N. W. 920; *Bradford v. Mackenzie*, 131 Md. 330, 101 Atl. 774; *Pitzer v. Morrison*, 272 Ill. 291, 111 N. E. 1017; 24 A. & E. Ency. of Law (2 ed.) 378; 16 Cyc. 649; 40 Id. 1641; *Woerner, Am. Law of Adm.* (2 ed.) § 439. See § 437.

⁸² *Moran v. Moran*, 143 Mich. 322, 106 N. W. 206; *In re Ithaca Trust Co.*, 220 N. Y. 437, 116 N. E. 102; *Bradford v. Mackenzie*, 131 Md. 330, 101 Atl. 774; *In*

re Condon's Estate, 167 Iowa, 215, 149 N. W. 264; *Spencer v. Scovil*, 70 Neb. 87, 96 N. W. 1016; 24 A. & E. Ency. of Law (2 ed.) 380; 40 Cyc. 1641; *Woerner, Am. Law of Adm.* (2 ed.) § 439; 5 L. R. A. (N. S.) 323.

⁸³ *Loosing v. Loosing*, 85 Neb. 66, 122 N. W. 707; *Schminke v. Sinclair*, 100 Neb. 101, 158 N. W. 458.

⁸⁴ *In re Oertle's Estate*, 34 Minn. 173, 24 N. W. 924; *Semper v. Oates*, 93 Minn. 76, 100 N. W. 662; *Burke v. Burke*, 259 Ill. 262, 102 N. E. 293; *Steff v. Seibert*, 128 Iowa 746, 105 N. W. 328; 24 A. & E. Ency. of Law (2 ed.) 448; 40 Cyc. 1642; 6 L. R. A. (N. S.) 1186; 39 Id. 805; 7 Ann. Cas. 953; 32 Harv. L. Rev. 437. See § 432.

⁸⁵ G. S. 1913, § 6666.

440. Same—When vested—When contingent—Statutes—Remainders are vested when there is a person in being who would have an immediate right to the possession upon the ceasing of the intermediate or precedent estate.⁸⁶ Remainders are contingent while the person to whom, or the event upon which, they are limited to take effect remains uncertain.⁸⁷ The object of our statutes was to abolish the technical distinctions between contingent remainders, springing and secondary uses, and executory devises, and to bring all these various executory interests nearer together, and to resolve them into a few plain principles, and to render all expectant estates equally secure from being defeated by the subtle refinements of the common law, contrary to the intention of the grantor or testator.⁸⁸ Our statutes are derived from New York and make many remainders vested which would be deemed contingent at common law. The cases in New York are not harmonious.⁸⁹ Our statutes are not expressly applicable to personalty, but the tendency in this state is to assimilate the law of real and personal property so far as possible.⁹⁰ The law favors the early vesting of estates. If there is any reasonable doubt whether a remainder is vested or contingent it will be construed as vested.⁹¹ Courts are especially inclined to construe a remainder as vested when it is to a descendant of the testator or other person having a strong claim on his bounty.⁹² An estate will be deemed vested unless a condition precedent thereto is so clearly expressed that it cannot be deemed vested without doing vio-

⁸⁶ G. S. 1913, § 6663; *State v. Willrich*, 72 Minn. 165, 75 N. W. 123; *Minnesota Debenture Co. v. Dean*, 85 Minn. 473, 89 N. W. 848; *Johrden v. Pond*, 126 Minn. 247, 148 N. W. 112; *In re Meldrum's Estate*, 149 Minn. 342, 183 N. W. 835; *In re Freeman's Estate* (Minn.) 187 N. W. 411; *Ashbaugh v. Wright* (Minn.) 188 N. W. 157. See *Cowles v. Henry*, 61 Minn. 459, 63 N. W. 1028.

⁸⁷ G. S. 1913, § 6663; *Armstrong v. Armstrong*, 54 Minn. 248, 55 N. W. 971; *Minnesota Debenture Co. v. Dean*, 85 Minn. 473, 89 N. W. 848; *Savela v. Erickson*, 138 Minn. 93, 163 N. W. 1029; *In re Freeman's Estate* (Minn.) 187 N. W. 411.

⁸⁸ *Whiting v. Whiting*, 42 Minn. 548, 44 N. W. 1030; *Minnesota Debenture Co. v. Dean*, 85 Minn. 473, 89 N. W. 848.

⁸⁹ See *Birdsall v. Birdsall*, 157 Iowa 363, 132 N. W. 809; 49 McKinney's Consol. Laws, N. Y. § 40; 24 A. & E. Ency. of Law (2 ed.) 388, 400; *Gray, Perpetuities*, (2 ed.) § 107; *Tiffany, Real Property*, § 120; 25 L. R. A. (N. S.) 888; L.

R. A. 1917D, 603; L. R. A. 1918E, 1097; 1 Col. L. Rev. 279, 347; 9 Id. 687.

⁹⁰ See *Stringer v. Young*, 191 N. Y. 157, 83 N. E. 690; *In re Gurnee*, 147 N. Y. S. 396; *State v. Probate Court*, 102 Minn. 268, 113 N. W. 888.

⁹¹ *Connelly v. O'Brien*, 166 N. Y. 406, 60 N. E. 20; *Camann v. Bailey*, 210 N. Y. 19, 103 N. E. 824; *In re Shumway's Estate*, 194 Mich. 245, 160 N. W. 595; *Whitman v. Huefner*, 221 Mass. 265, 108 N. E. 1054; *Atchison v. Francis*, 182 Iowa 37, 165 N. W. 587; *McArthur v. Scott*, 113 U. S. 340; *In re Owen's Will*, 164 Wis. 260, 159 N. W. 906; *Blaine v. Dow*, 111 Me. 480, 89 N. E. 1126; 24 A. & E. Ency. of Law (2 ed.) 392; 40 Cyc. 1650; *Tiffany, Real Property*, § 121. See *Kottmann v. Gazett*, 66 Minn. 88, 68 N. W. 732; *In re Freeman's Estate* (Minn.) 187 N. W. 411.

⁹² *Whitman v. Huefner*, 221 Mass. 265, 108 N. E. 1054; *Atchison v. Francis*, 182 Iowa 37, 165 N. W. 587; *Woodard v. Woodard*, 184 Iowa 1178, 169 N. W. 464.

lence to the language used. Words of seeming condition are, if reasonably possible, to be construed as postponing the time of enjoyment and not the time of vesting.⁹³ A remainder after a life estate to the "heirs" or "next of kin" of the testator is a vested remainder on the death of the testator unless a contrary intention is manifested by the will. The mere fact that the life tenant is an heir or next of kin does not affect the rule. The same rule applies to a remainder to the children or grandchildren of the testator.⁹⁴ A remainder after a life estate to the heirs, next of kin, children, and the like, of the life tenant is a vested remainder, under our statute, if there is a person in being who would have an immediate right to possession upon the ceasing of the life estate.⁹⁵ If such a remainder is made conditional on the remainderman surviving the life tenant it is of course contingent. Thus, on a devise to A for life, remainder to such of his children, heirs, next of kin, and the like, as survive him, the remainder is contingent. This is true both at common law and under the New York statute.⁹⁶ But words of survivorship in a devise of a remainder often relate to the time of the enjoyment of the remainder rather than to the time of its vesting, or relate to the divesting of a vested interest, or create a condition subsequent, and do not render the remainder contingent.⁹⁷ In a devise of a remainder limited upon a life estate adverbs of time, such as "after," "on," "at," "then," "from and after," the death of the life tenant are construed as merely relating to the time of the enjoyment of the estate and not to the time of its vesting. Such remainders are deemed vested unless the will provides otherwise.⁹⁸ Where a life estate is devised with

⁹³ *Lingo v. Smith*, 174 Iowa 461, 156 N. W. 402.

⁹⁴ *In re Shumway's Estate*, 194 Mich. 245, 160 N. W. 595; *Hersee v. Simpson*, 154 N. Y. 496, 48 N. E. 890; *Whiman v. Huefner*, 221 Mass. 265, 108 N. E. 1054; *Norton v. Mortenson*, 88 Conn. 28, 89 Atl. 882; 40 Cyc. 1677; 33 L. R. A. (N. S.) 1; *Ann. Cas.* 1917A, 859; *Gray, Perpetuities*, (2 ed.) § 110; *Tiffany, Real Property*, § 122.

⁹⁵ *Minnesota Debenture Co. v. Dean*, 85 Minn. 473, 89 N. W. 848; *Moore v. Little*, 41 N. Y. 66; *Clowe v. Seavey*, 208 N. Y. 496, 502, 102 N. E. 521; *Doctor v. Hughes*, 225 N. Y. 305, 122 N. E. 221. This is contrary to the common-law rule. *Walcott v. Robinson*, 214 Mass. 172, 100 N. E. 1109; *Bailey v. Smith*, 222 Mass. 600, 111 N. E. 684; *Gray, Perpetuities*, (2 ed.) § 107. See 40 Cyc. 1678.

⁹⁶ *Birdsall v. Birdsall*, 157 Iowa 363, 132 N. W. 809; *Horner v. Haase*, 177 Iowa 115, 158 N. W. 548; *Baker v. Hibbs*,

167 Iowa 174, 149 N. W. 85; *Hall v. La France Fire Engine Co.*, 158 N. Y. 570, 53 N. E. 513; *McGillis v. McGillis*, 154 N. Y. 532, 49 N. E. 145; *Benedict v. Levi*, 163 N. Y. S. 846; *In re Petheran*, 162 N. Y. S. 952; *Betz v. Farling*, 274 Ill. 107, 113 N. E. 40; *Spatz v. Paulus*, 285 Ill. 82, 120 N. E. 503; *Mullaney v. Monahan*, 232 Mass. 279, 122 N. E. 387; *Henkins v. Henkins*, 287 Ill. 62, 122 N. E. 88; *Purl v. Purl* (Kan.) 197 Pac. 185; *Bingham v. Sumner* (Ala.) 89 So. 479; 40 Cyc. 1674; *Gray, Perpetuities*, (2 ed.) § 108; *Tiffany, Real Property*, § 120; 25 L. R. A. (N. S.) 888; L. R. A. 1917D, 601.

⁹⁷ 40 Cyc. 1674; *Gray, Perpetuities*, (2 ed.) § 108; *Tiffany, Real Property*, § 120; L. R. A. 1917D, 601; *Ann. Cas.* 1917A, 863.

⁹⁸ *Johrden v. Pond*, 126 Minn. 247, 148 N. W. 112; *People v. Camp*, 286 N. Y. 511, 122 N. E. 43; *Hersee v. Simpson*, 154 N. Y. 496, 48 N. E. 890; *Connelly v. O'Brien*, 166 N. Y. 408, 60 N. E. 20; *Lin-*

a provision that upon the death of the life tenant the property shall be divided or sold and the proceeds divided among named persons or members of a class of persons the latter beneficiaries take vested remainders upon the death of the testator unless the will clearly makes their interests contingent.⁹⁹ A direction that a child of a deceased remainderman shall take his parents' share does not necessarily make the remainder contingent.¹ A remainder is not necessarily contingent because the enjoyment of the estate is postponed until the remainderman reaches a certain age.² A bequest of a remainder after a life estate generally vests upon the death of the testator though its payment is postponed until after that event.³ A devise to a wife for life with remainder to the legal heirs of the testator has been held to create a vested remainder in the wife as one of the heirs.⁴ Where a life estate is given to a parent, remainder to his children, the character of the remainder as a vested estate is not affected by a power granted to the life tenant to sell for the benefit of the children.⁵ A contingent remainder is an "estate."⁶ Under G. S. 1913, § 6682, a remainder after a life estate, which is granted upon condition, is not, as at common law, defeated by the forfeiture of the life estate before the death of the life tenant.⁷

441. Conditional limitation—A condition, followed by a limitation over to a third person if the condition is not fulfilled or there is a breach of it, is termed a conditional limitation, or a limitation over dependent on a condition. For example, if property is given to A so long as she remains unmarried, provided that in case she marries it shall go to B, the proviso is a conditional limitation.⁸ A will has been construed as a devise in fee, with a conditional limitation to the issue of

go v. Smith, 174 Iowa 461, 156 N. W. 402; L. R. A. 1918E, 1098. See Mullaney v. Monahan, 232 Mass. 279, 122 N. E. 387.

⁹⁹ Johrden v. Pond, 126 Minn. 247, 148 N. W. 112; Atchison v. Francis, 182 Iowa 37, 165 N. W. 587; Whitman v. Huefner, 221 Mass. 265, 108 N. E. 1054; Fulton Trust Co. v. Phillips, 218 N. Y. 573, 113 N. E. 558; In re McQueen's Will, 163 N. Y. S. 287; Blaine v. Dow, 111 Me. 480, 89 N. E. 1126; White v. Smith, 87 Conn. 663, 89 Atl. 272; 40 Cyc. 1670; L. R. A. 1918E, 1105, 1108, 1145. See In re Pulls, 220 N. Y. 196, 115 N. E. 516; Cashman v. Ross, 155 Wis. 558, 145 N. W. 199; In re Freeman's Estate (Minn.) 187 N. W. 411.

¹ Callison v. Morris, 123 Iowa 297, 98 N. W. 780. See 40 Cyc. 1670; 37 L. R. A. (N. S.) 728.

² Dexter v. Attorney General, 224 Mass. 215, 112 N. E. 946; Fulton Trust Co. v. Phillips, 218 N. Y. 573, 113 N. E. 558; In re Peters' Estate, 161 N. Y. 847; 40 Cyc. 1680; L. R. A. 1915C, 1012; L. R. A. 1918E, 1097. See Simpson v. Cook, 24 Minn. 180; Armstrong v. Armstrong, 54 Minn. 248, 55 N. W. 971.

³ Cook v. Hayward, 172 Mass. 195, 51 N. E. 1075.

⁴ In re Shumway's Estate, 194 Mich. 245, 160 N. W. 595.

⁵ Ashbaugh v. Wright (Minn.) 188 N. W. 157.

⁶ Minnesota Debenture Co. v. Dean, 85 Minn. 473, 89 N. W. 848.

⁷ In re Merrigan's Estate, 34 S. D. 644, 150 N. W. 285.

⁸ G. S. 1913, § 6677; Brattle Square Church v. Grant, 3 Gray (Mass.) 146. See 6 A. & E. Ency. of Law (2 ed.) 514; 40 Cyc. 1671.

the devisee in case of his death within ten years of the death of the testator.⁹

442. Gift to spouse of statutory interest—When a testator gives to his wife such portion of his estate as she would be entitled to under the statute she takes under the will and not under the statute, unless she elects to take under the statute.¹⁰

443. Title of devisee—A devisee takes only such title as the testator had. He is not entitled to protection as a bona fide purchaser. If the testator held the land subject to a trust the devisee takes it subject to the trust.¹¹

LAPSED LEGACIES AND DEVISES

444. Death of devisee or legatee before testator—When gift lapses—**Statute**—If a devise or legacy be made to a child or other relative of the testator, who dies before the testator, but leaves issue who survive the testator, such issue, unless a different disposition be made or required by the will, shall take the same estate which such devisee or legatee would have taken if he had survived.¹² At common law a devise or bequest to one who dies before the testator lapses upon his death and the property passes under a residuary clause, or if there is none, to the testator's heirs, unless the will shows a clear intention that the devise or bequest shall pass to the heirs of the deceased devisee or legatee. The rule applies where the devisee or legatee was dead when the will was made. It is immaterial whether the testator knew of the death or whether the legatee or devisee died testate or intestate.¹³ Our statute abolishes this common-law rule in certain cases and provides that the property shall go to the issue of the deceased devisee or legatee "unless a different disposition be made or required by the will." It does not apply where a contrary intention is clearly manifested by the will.¹⁴ The object of the statute is not to defeat the testator's in-

⁹ *Whiting v. Whiting*, 42 Minn. 548, 44 N. W. 1030.

¹⁰ *Johnson v. Johnson*, 32 Minn. 513, 21 N. W. 725; *In re Gotzian's Estate*, 34 Minn. 159, 165, 24 N. W. 920. See *Blakeman v. Blakeman*, 64 Minn. 315, 67 N. W. 69; *Johnson v. Linstrom*, 92 Minn. 8, 99 N. W. 212.

¹¹ *Wellendorf v. Wellendorf*, 120 Minn. 435, 139 N. W. 812; *Irvine v. Campbell*, 121 Minn. 192, 141 N. W. 108; *Colby v. Street*, 146 Minn. 290, 178 N. W. 599; *Phillis v. Gross*, 32 S. D. 438, 143 N. W. 373.

¹² G. S. 1913, § 7262.

¹³ *In re Peavey's Estate*, 144 Minn. 208, 213, 175 N. W. 105; *In re Freeman's*

Estate, 146 Iowa 38, 124 N. W. 804; *Thompson v. Pew*, 214 Mass. 520, 102 N. E. 122; *Manke v. Miller*, 220 N. Y. 225, 115 N. E. 462; *Patterson v. Fuller*, 168 Wis. 361; 170 N. W. 254; 18 A. & E. Ency. of Law (2 ed.) 748; 40 Cyc. 1925; 28 R. C. L. 336; *Woerner*, Am. Law of Adm. (2 ed.) § 434.

¹⁴ *In re Bell's Will*, 147 Minn. 62, 179 N. W. 650; *In re Freeman's Estate*, 146 Iowa 38, 124 N. W. 804; *In re Phelps's Estate*, 147 Iowa 323, 126 N. W. 328; *Hay v. Dole (Me.)* 111 Atl. 713; *Tennant v. Smith*, 173 Iowa 264, 155 N. W. 267; 18 A. & E. Ency. of Law (2 ed.) 758; 40 Cyc. 1936; 28 R. C. L. 343; *Woerner*, Am. Law of Adm. (2 ed.) § 435.

tention, or to change the rules of construction by which the intention is determined, but to provide that if by reason of a legatee's or devisee's death in the testator's lifetime the gift cannot take effect as intended, it shall go to the lineal descendants of the legatee or devisee, rather than to the testator's heirs at law or residuary legatee. It only applies where the intended donee dies before the testator and where the property in that event is not disposed of by will otherwise than by a residuary clause.¹⁵ The statute applies only where a child or relative of the testator dies leaving issue. If there is no issue the gift lapses.¹⁶ It applies to an adopted child of the testator;¹⁷ to an adopted child of a donee;¹⁸ to the issue of deceased brothers and sisters of the testator;¹⁹ to an illegitimate child of a female donee;²⁰ to the issue of a cousin.²¹ It does not apply to relatives by marriage.²² It does not apply to a husband or wife of the testator;²³ nor to a sister-in-law of the testator;²⁴ nor to a brother-in-law of the testator;²⁵ nor to a stepson of the testator;²⁶ nor to illegitimate children of a male donee who have not been legitimated as provided by law.²⁷ It applies to a testamentary gift made in the exercise of a power of appointment where the devisee or legatee is a relative of the testator but not of the donor of the power.²⁸ It applies to a named devisee or legatee who is dead at the time of the making of the will.²⁹ It is generally held, at least in the case of immediate gifts, that the statute applies to members of a class living at the time of the making of the will, though the individuals of the class are not named in the will. Thus, under a gift to brothers and sisters of the decedent, without naming them, a child of a brother or sister dying before the testator will take under the statute. Under a gift to the children of the testator, not naming them, issue of a child

¹⁵ *Campbell v. Clark*, 64 N. H. 328, 10 Atl. 702; *Galloway v. Babb*, 77 N. H. 239, 90 Atl. 968.

¹⁶ *Johnson v. Johnson*, 32 Minn. 513, 21 N. W. 725; *Boston Safe Deposit & Trust Co. v. Reed*, 229 Mass. 267, 118 N. E. 333.

¹⁷ See 8 A. L. R. 1012.

¹⁸ *Warren v. Prescott*, 84 Me. 483, 24 Atl. 948.

¹⁹ *Strong v. Smith*, 84 Mich. 567, 48 N. W. 183; *Thompson v. Pew*, 214 Mass. 520, 102 N. E. 122.

²⁰ *Goodwin v. Colby*, 64 N. H. 401, 13 Atl. 866.

²¹ *Howland v. Slade*, 155 Mass. 415, 29 N. W. 631.

²² *Kimball v. Story*, 108 Mass. 382; *Schaefer v. Bernhardt*, 76 Ohio St. 443, 81 N. E. 640; *Cleaver v. Cleaver*, 39 Wis. 96.

²³ *Esty v. Clark*, 101 Mass. 36; *Curley v. Lynch*, 206 Mass. 289, 92 N. E. 429; *Farnsworth v. Whiting*, 102 Me. 296, 66 Atl. 831; *Canfield v. Canfield*, 62 N. J. Eq. 578, 50 Atl. 471; *Schaefer v. Bernhardt*, 76 Ohio St. 443, 81 N. E. 640; *McAllister v. McAllister*, 183 Iowa 245, 167 N. W. 78.

²⁴ *Worcester Trust Co. v. Turner*, 210 Mass. 115, 96 N. E. 132; *Mann v. Hyde*, 71 Mich. 278, 39 N. W. 78.

²⁵ *Horton v. Earle*, 162 Mass. 448, 38 N. E. 1135.

²⁶ *Kimball v. Story*, 108 Mass. 382.

²⁷ *Wettlach v. Horn*, 201 Pa. St. 201, 50 Atl. 1001; *Hargraft v. Keegan*, 10 Ont. 272.

²⁸ *Thompson v. Pew*, 214 Mass. 520, 102 N. E. 122.

²⁹ *Brookhouse v. Pray*, 92 Minn. 448, 100 N. W. 235. See 3 A. L. R. 1684.

of the testator dying before him will take under the statute.³⁰ The statute probably applies to a member of a class named in the will who is dead at the time the will is made. Whether it applies to a member of a class not named in the will who is dead at the time the will is made is an open question in this state and there is great diversity of opinion elsewhere.³¹ The statute does not apply where the devise is limited to the children or their issue surviving a life tenant. Where there is a devise to a class, as to the children of the testator, and the gift is postponed pending the termination of a particular estate which intervenes between the death of the testator and the period of distribution, those members of the class, and those only, will take who are in existence at the time of distribution or at the death of the life tenant, unless there is language in the will showing a different intention.³² The parent of a deceased donee cannot take under the statute.³³ A devise to a grandchild lapses if the grandchild dies in the lifetime of the testator without leaving lineal descendants.³⁴ A clause in a will bequeathing the remainder of an estate after the death of the testator's wife to his "next of kin then living in equal shares" indicates an intention to dispose of the property to a definite class composed of living persons, rather than to provide for its distribution according to the statutes relating to intestate estates; and such remainder is divisible among the surviving brothers of the testator, to the exclusion of the representatives of a deceased brother and sister.³⁵ One taking under the statute as a lineal descendant of a deceased legatee or devisee takes as a purchaser from the testator and not as an heir of the deceased legatee or devisee. The gift forms no part of the estate of the deceased legatee or devisee, does not pass by his will, and is not subject to the claims of his creditors other than the testator. The gift passes subject to any conditions or limitations in the will.³⁶ A legatee probably takes under the statute subject to the right of the representative to set off or retain any debt due the estate of the testator from the deceased legatee.³⁷ Since, under the statute, a devise to a predeceased devisee does

³⁰ *Strong v. Smith*, 84 Mich. 567, 48 N. W. 183; *Stockbridge v. Estate of Stockbridge*, 145 Mass. 517, 14 N. E. 928; *Kehl v. Taylor*, 275 Ill. 346, 114 N. E. 125; *Downing v. Nicholson*, 115 Iowa 493, 88 N. W. 1064. See 3 A. L. R. 1688; 16 Mich. L. Rev. 429.

³¹ See 18 A. & E. Ency. of Law (2 ed.) 758; 40 Cyc. 1939; 5 Ann. Cas. 239; Ann. Cas. 1918D, 953; 73 Am. St. Rep. 413; 17 Col. L. Rev. 257; 3 A. L. R. 1691; 16 Mich. L. Rev. 429.

³² *Brewick v. Anderson*, 267 Ill. 169, 107 N. E. 878. See § 349.

³³ *Morse v. Hayden*, 82 Me. 227, 19 Atl. 443.

³⁴ *Ballard v. Ballard*, 18 Pick. (Mass.) 41; *Hooper v. Hooper*, 9 Cush. (Mass.) 122; *Fisher v. Hill*, 7 Mass. 86.

³⁵ *Galloway v. Babb*, 77 N. H. 259, 90 Atl. 968.

³⁶ *Brookhouse v. Pray*, 92 Minn. 448, 100 N. W. 235; *McLaughlin v. McGee*, 131 Md. 156, 131 Atl. 682; *In re McKeller*, 114 Me. 421, 96 Atl. 734; 18 A. & E. Ency. of Law (2 ed.) 757; 40 Cyc. 1938. See *Anderson v. Anderson*, 181 Iowa 578, 164 N. W. 1042.

³⁷ *Tilton v. Tilton*, 196 Mass. 562, 82 N. E. 704; *Denise v. Denise*, 37 N. J. Eq. 163; *Baker v. Carpenter*, 69 Ohio St. 15, 68 N. E. 577. See *Brookhouse v. Pray*,

not lapse and become intestate property, but is taken by heirs of such devisee under the will, a widow of such a devisee, by electing to take under the will, is not estopped from claiming as such heir of her husband, since such claim is under the will, precisely as she has elected to claim.³⁸ The statute has been held inapplicable where a legatee died leaving issue after the making of a will and before the testator and before the execution of a codicil which in effect republished the will. It was held that the gift to the legatee through the republication of the will by the codicil was void because the legatee was then dead.³⁹

445. Death of devisee or legatee before probate of will—Where there is no provision in a will to the contrary a devise or legacy vests as of the date of the testator's death and does not lapse by death of the devisee or legatee before probate of the will.⁴⁰

446. Death of devisee or legatee after vesting of gift—As a general rule a legacy or devise will not lapse by the death of the donee after it has once vested, and this is true though the death occurs before the gift is payable.⁴¹ Where a testator directs his executors to sell his real estate, and divide the proceeds equally among his children, with the provision that, if any of the children shall have died leaving no issue, his share shall be divided among the others, the interest of a daughter, according to both the natural construction of the will and the well-established rules of testamentary construction, vested at the death of the testator, and is not lost by reason of her death thereafter without issue prior to the time of distribution.⁴²

447. Death of devisee or legatee after testator but before vesting of gift—If a devisee or legatee dies after the testator but before the vesting of the gift it lapses.⁴³

448. Gift to a class—It is the general rule at common law that where there is a gift to a class there is no lapse because of the death of one or more of the class, but the gift goes to the survivor or survivors, to the exclusion of the issue or heirs of the deceased member.⁴⁴ If a gift

92 Minn. 448, 100 N. W. 235. There are cases contra. See 1 A. L. R. 1038; 21 Harv. L. Rev. 291.

³⁸ *McAllister v. McAllister*, 183 Iowa 245, 167 N. W. 78. See *Mechling v. McAllister*, 135 Minn. 357, 160 N. W. 1016.

³⁹ *In re Matthews' Estate*, 176 Cal. 576, 169 Pac. 233. For a criticism of this case see 31 Harv. L. Rev. 901.

⁴⁰ *Jersey v. Jersey*, 146 Mich. 660, 110 N. W. 54; *Tillson v. Holloway*, 90 Neb. 481, 134 N. W. 232. See Ann. Cas. 1913B, 81.

⁴¹ *Fox v. Hicks*, 81 Minn. 197, 83 N. W. 538; 18 A. & E. Ency. of Law (2 ed.) 749; 40 Cyc. 1927; *Woerner, Am. Law*

of Adm. (2 ed.) § 436; Ann. Cas. 1913B, 81.

⁴² *Blain v. Dean*, 160 Iowa 708, 142 N. W. 418.

⁴³ *Pollock v. Farnham*, 156 Mass. 388, 31 N. E. 298; 18 A. & E. Ency. of Law (2 ed.) 749; 40 Cyc. 1927; 28 R. O. L. 337.

⁴⁴ *In re Bell's Will*, 147 Minn. 62, 179 N. W. 650; *Boston Safe Deposit & Trust Co. v. Reed*, 229 Mass. 267, 118 N. E. 333; 18 A. & E. Ency. of Law (2 ed.) 751; 30 Id. 718; 40 Cyc. 1930; 28 R. O. L. 266; *Woerner, Am. Law of Adm.* (2 ed.) § 434.

is to children as a class, on the death of one without issue the survivors take the whole, while, if the gift is to them as named individuals, the share of a deceased child without issue lapses, and, the gift being in the residuary clause, with no gift over, such share becomes intestate property.⁴⁵

449. Property not owned by testator at his death—It has been held that a bequest of a certain amount of money for the purpose of keeping up a homestead lapsed and became inoperative because of the fact that the homestead was not owned by the testator at the time of his death.⁴⁶

450. Gifts over after life estate—Where there is a devise of a life estate with a gift over the death of the life tenant before the testator does not cause the gift over to lapse. There is simply an acceleration of the time when the gift over becomes operative.⁴⁷

451. Gift to several as tenants in common—Where there is a legacy or devise to several persons as tenants in common, each taking distributively, the gift to any one will lapse upon his death before the testator or before his interest has vested.⁴⁸ Where there is a gift to several legatees described by name of an aggregate sum to be equally divided among them, if one dies before the testator his share will lapse. This rule will not be enforced when it is clear that the testator intended that the persons named were to take the fund bequeathed as a class and not as individuals and that the survivors of the legatees named should take the whole fund bequeathed.⁴⁹

452. Devolution of lapsed gifts—If there is no general residuary clause lapsed gifts, whether of real or personal property, pass as intestate property, in the absence of a contrary provision in the will.⁵⁰ Lapsed gifts of either real or personal property pass under a general residuary clause unless they are to a residuary legatee or devisee or the will clearly expresses a contrary intention.⁵¹ Lapsed gifts to a residuary legatee or

⁴⁵ *Smith v. Haynes*, 202 Mass. 531, 89 N. E. 158. See 32 Harv. L. Rev. 863.

⁴⁶ *Appleby v. Appleby*, 100 Minn. 408, 111 N. W. 305.

⁴⁷ *Thompson v. Thornton*, 197 Mass. 273, 83 N. E. 880; 18 A. & E. Ency. of Law (2 ed.) 752; 40 Cyc. 1928; 23 R. C. L. 556; *Woerner*, Am. Law of Adm. (2 ed.) § 434. See 5 A. L. R. 460, 473, 1632.

⁴⁸ *Best v. Berry*, 189 Mass. 510, 75 N. E. 743; *Boston Safe Deposit & Trust Co. v. Reed*, 229 Mass. 267, 118 N. E. 333; 18 A. & E. Ency. of Law (2 ed.) 751; 40 Cyc. 1029.

⁴⁹ *Boston Safe Deposit & Trust Co. v. Reed*, 229 Mass. 267, 118 N. E. 333; *In re Watterbury's Will*, 163 Wis. 510, 158 N. W. 340.

⁵⁰ *Johnson v. Johnson*, 32 Minn. 513, 21 N. W. 725 (widow of testator held entitled to one-third of a devise and legacy which lapsed by reason of the death of a child without issue during the lifetime of the testator); *Mechling v. McAllister*, 135 Minn. 357, 160 N. W. 1016 (widow electing to take under will held estopped from taking lapsed devise); 18 A. & E. Ency. of Law (2 ed.) 760, 764; 40 Cyc. 1941; 28 R. C. L. 340; *Woerner*, Am. Law of Adm. (2 ed.) § 437; 44 L. R. A. (N. S.) 789.

⁵¹ *Dunn v. Kearney*, 288 Ill. 49, 123 N. E. 105; *Clark v. Mack*, 161 Mich. 545, 126 N. W. 632; *Albany Hospital v. Albany Guardian Soc.*, 214 N. Y. 435, 108 N. E. 812; *Galloway v. Darby*, 105 Ark.

devisee pass an intestate property, unless a contrary intention is clearly manifested by the will.⁵² It has even been held that where a residuary legatee is also given a specific legacy and the specific legacy lapses, it passes as intestate property though the will expressly provides that the residue shall include lapsed bequests, but this is questionable.⁵³ Where by the residuary clause of a will certain persons are given the residue in proportions named, and one of them dies before the testator, leaving no issue, so that the legacy to him lapses, his share, being a part of the residuum itself, does not pass to the remaining residuary legatees but passes as intestate property.⁵⁴

453. Conflict of laws—Whether a legacy lapses by the death of the legatee during the lifetime of the testator is to be determined by the law of the domicile of the testator at the time of his death, unless a contrary intention is clearly manifested by the will.⁵⁵

POWERS

454. Definition—Statute—A power is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform.⁵⁶ For some purposes, including a transfer or inheritance tax, the execution of a power is considered a source of title.⁵⁷ When a donor gives to another power of appointment over property, the donee of the power does not thereby become the owner of the property. The donee has no title whatever to the property. The power is simply a delegation to the donee of authority to act for the donor in the disposition of the latter's property. The appointee named by exercise of

558, 151 S. W. 1014; 18 A. & E. Ency. of Law (2 ed.) 761, 764; 40 Cyc. 1569; 28 R. C. L. 340; Woerner, Am. Law of Adm. (2 ed.) § 437; 44 L. R. A. (N. S.) 789; Ann. Cas. 1914D, 719 (no distinction between devise and legacy); 6 Minn. L. Rev. 532.

⁵² Bowden v. Brown, 200 Mass. 269, 86 N. E. 351; Ketchum v. Corse, 65 Conn. 85, 31 Atl. 486; In re Hoffman, 201 N. Y. 247, 94 N. E. 990; Wright v. Wright, 225 N. Y. 329, 122 N. E. 213; Aitken v. Sharp (N. J.) 115 Atl. 912; 18 A. & E. Ency. of Law (2 ed.) 765; 40 Cyc. 1951; 29 Harv. L. Rev. 109; 44 L. R. A. (N. S.) 789; Ann. Cas. 1914C, 812.

⁵³ Dickinson v. Belden, 268 Ill. 105, 108 N. E. 1011. See 29 Harv. L. Rev. 109; Aitkin v. Sharp (N. J.) 115 Atl. 912.

⁵⁴ Dresel v. King, 198 Mass. 546, 85 N. E. 77; Smith v. Haynes, 202 Mass. 531, 89 N. E. 158; Worcester Trust Co. v. Turner, 210 Mass. 115, 96 N. E. 132; Hard v. Ashley, 117 N. Y. 606, 23 N. E. 177; 18 A. & E. Ency. of Law (2 ed.) 765; 40 Cyc. 1951; Woerner, Am. Law of Adm. (2 ed.) § 437; 44 L. R. A. (N. S.) 811; Ann. Cas. 1914C, 813; 32 Harv. L. Rev. 863.

⁵⁵ Lowndes v. Cooch, 87 Md. 478, 39 Atl. 1045.

⁵⁶ G. S. 1913, § 6728; Carson v. Cochran, 52 Minn. 67, 72, 53 N. W. 1130. See 49 McKinney's Consol. Laws, N. Y. § 131.

⁵⁷ State v. Probate Court, 124 Minn. 508, 145 N. W. 390; In re Delano, 176 N. Y. 486, 68 N. E. 871; Chanler v. Kelsey, 205 U. S. 466. See 33 L. R. A. (N. S.) 263; L. R. A. 1918D, 339.

this delegated authority takes as recipient of the bounty of the donor and not as legatee of the donee. The right to exercise the power is not property and cannot be reached by creditors of the donee, except as authorized by statute.⁵⁸

455. Statutory regulation—The creation, construction and execution of powers is regulated exclusively by G. S. 1913, §§ 6727–6787. These sections constitute a complete and exclusive code on the subject of powers. All powers not therein authorized are abolished. The common-law rules on the subject are important only as aids to construction. Our statutes are derived from New York.⁵⁹ While the statutes regulate powers they do not create them.⁶⁰ The general statutes relating to powers do not apply to simple powers of attorney to convey lands in the name and for the benefit of the owner.⁶¹ In New York they apply to personalty as well as realty.⁶²

456. How granted—Statute—A power may be granted: 1. By a suitable clause contained in a conveyance of some estate in the lands to which the power relates. 2. By a devise in a last will and testament.⁶³ To the valid creation of powers, it is essential that there should be, first, sufficient words to denote the intention; secondly, an apt instrument; and thirdly, a proper object.⁶⁴ In order to create a valid power, either beneficial or in trust, the object or objects to be accomplished by its execution must be specified in or clearly ascertainable from the instrument by which the power is attempted to be created.⁶⁵ An object is an essential of a power but this object need not be specified in terms in the instrument creating the power. An instrument creating a power of sale need not specify in terms what shall be done with the proceeds of the sale, or who shall be benefited by the sale.⁶⁶ No particular form of words is necessary to create a power. An attempt in a will to create a power will be liberally construed.⁶⁷

457. When irrevocable—Statute—Every power, beneficial or in trust, is irrevocable, unless an authority to revoke it is reserved or granted in

⁵⁸ *Shattuck v. Burrage*, 229 Mass. 448, 118 N. E. 889. See § 461.

⁵⁹ G. S. 1913, § 6727; *Hershey v. Meeker County Bank*, 71 Minn. 255, 264, 73 N. W. 967; *Ashton v. Great Northern Ry. Co.*, 78 Minn. 201, 80 N. W. 963. See 31 Cyc. 1040; 49 McKinney's Consol. Laws, N. Y. § 130.

⁶⁰ *Webb v. Lewis*, 45 Minn. 285, 288, 47 N. W. 803.

⁶¹ G. S. 1913, § 6786; 49 McKinney's Consol. Laws, N. Y. § 130.

⁶² See *Hutton v. Benkard*, 92 N. Y. 295; *In re Moehring*, 154 N. Y. 423, 48

N. E. 818; *In re Cooksey*, 182 N. Y. 92, 74 N. E. 880.

⁶³ G. S. 1913, § 6760; *St. Paul Trust Co. v. Mintzer*, 65 Minn. 124, 131, 67 N. W. 657. See 49 McKinney, Consol. Laws, N. Y. § 140.

⁶⁴ *Jennings v. Conboy*, 73 N. Y. 230.

⁶⁵ *Sweeney v. Warren*, 127 N. Y. 426, 28 N. E. 413.

⁶⁶ *Jennings v. Conboy*, 73 N. Y. 230.

⁶⁷ *Freeborn v. Wagner*, 49 Barb. 43; *Jennings v. Conboy*, 73 N. Y. 230. See 31 Cyc. 1046.

the instrument creating the power.⁶⁸ A power of sale in a trust deed or mortgage is probably irrevocable.⁶⁹

458. Construction—Where a power is given by will the general rules governing the construction of wills apply to its construction.⁷⁰ This is subject to the qualification, however, that powers must be construed according to the statutes and the intention of the testator cannot override the statutes.⁷¹

459. General powers—Definition—Statute—A power is general when it authorizes the alienation in fee, by means of a conveyance, will, or charge, of the lands embraced in the power, to any alienee whatever.⁷² A power may be general and beneficial though it authorizes a disposition only by will.⁷³

460. Beneficial powers—Definition—Statute—A general or special power is beneficial when no person other than the grantee has, by the terms of its creation, any interest in its execution.⁷⁴ A power to dispose of property by will only may be beneficial. A power to devise to any one whomsoever, when not a power in trust, is a beneficial power.⁷⁵ A power to an executor is not beneficial unless the will clearly makes it so. It is not beneficial merely because the will is silent as to the persons to be benefited by the exercise of the power.⁷⁶ A power to one who is not a trustee is beneficial if it is silent as to the person or persons to be benefited by its execution.⁷⁷ A residuary gift to an executor to be distributed by him in his discretion confers a general, beneficial power.⁷⁸

461. Beneficial power subject to claims of creditors—Statute—Every special and beneficial power is liable, in equity, to the claims of cred-

⁶⁸ G. S. 1913, § 6762; *American Loan & Trust Co. v. Billings*, 58 Minn. 187, 190, 59 N. W. 998; *Rogers v. Clark*, 104 Minn. 198, 220, 116 N. W. 739; 22 A. & E. Ency. of Law (2 ed.) 1133; 31 Cyc. 1051; 21 R. C. L. 774; 49 McKinney's Consol. Laws, N. Y. § 148.

⁶⁹ *Cleveland v. Bateman*, 21 N. M. 675, 158 Pac. 648; *Reilly v. Phillips*, 4 S. D. 604, 57 N. W. 780; *Grandin v. Emons*, 10 N. D. 223, 86 N. W. 723. See Ann. Cas. 1918E, 1021; 21 R. C. L. 775.

⁷⁰ *Hamilton v. Hamilton*, 149 Iowa 321, 128 N. W. 380; *Tilden v. Green*, 130 N. Y. 29, 28 N. E. 880.

⁷¹ *Cutting v. Cutting*, 86 N. Y. 522; *Farmers Loan & Trust Co. v. Kip*, 192 N. Y. 266, 85 N. E. 59. See § 455.

⁷² G. S. 1913, § 6731; *Hershey v. Meeker County Bank*, 71 Minn. 255, 265, 73 N. W. 967; 22 A. & E. Ency. of Law

(2 ed.) 1092; 31 Cyc. 1040; 49 McKinney's Consol. Laws, N. Y. § 134.

⁷³ *Farmers Loan & Trust Co. v. Mortimer*, 219 N. Y. 290, 114 N. E. 389.

⁷⁴ G. S. 1913, § 6733; *Ness v. Davidson*, 45 Minn. 424, 426, 48 N. W. 10; *Hershey v. Meeker County Bank*, 71 Minn. 255, 265, 73 N. W. 967; *Rogers v. Clark*, 104 Minn. 198, 220, 116 N. W. 739; 22 A. & E. Ency. of Law (2 ed.) 1092; 31 Cyc. 1041; 49 McKinney's Consol. Laws, N. Y. § 136.

⁷⁵ *Cutting v. Cutting*, 86 N. Y. 522; *Hershey v. Meeker County Bank*, 71 Minn. 255, 73 N. W. 967.

⁷⁶ *Sweeney v. Warren*, 127 N. Y. 426, 28 N. E. 413; *Ness v. Davidson*, 45 Minn. 424, 48 N. W. 10.

⁷⁷ *Jennings v. Conboy*, 73 N. Y. 230; *Sweeney v. Warren*, 127 N. Y. 426, 28 N. E. 413.

⁷⁸ *Hill v. Fiske*, 125 N. Y. S. 1026.

itors, in the same manner as other interests that cannot be reached by an execution at law; and the execution of the power may be decreed for the benefit of the creditors entitled.⁷⁹ Except as authorized by statute powers are not subject to the claims of creditors of the donees of the power. The common-law rules are abolished.⁸⁰

462. Absolute power of disposition—What constitutes—Statutes—It is provided by G. S. 1913, § 6739, that "every power of disposition shall be deemed absolute, by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit." This provision is not an exclusive definition of an absolute power of disposition and is not a limitation on the preceding sections of the statute, but is added as an independent provision applicable to a case not included in or covered by those which precede, namely, where the general power of disposition is not annexed to a previous estate for life or years in the grantee of the power. A general and beneficial power to devise the inheritance annexed to a previous estate for life or years is an absolute power of disposition. A power to dispose by will only may be absolute.⁸¹ It is provided by G. S. 1913, § 6738, that "when a general and beneficial power to devise the inheritance is given to a tenant for life or for years, such tenant shall be deemed to possess an absolute power of disposition, within the meaning and subject to the provisions of §§ 6735-6737."⁸² An absolute power of sale may be implied. It may be implied from language disposing of any part of the estate that may be left undisposed of by a life tenant. Thus it may be implied from, "and which, or any part of the estate and property then left by her, shall be divided among my children."⁸³ In New York the statute applies to personalty as well as realty.⁸⁴

463. General powers in trust—Definition—Statute—A general power is in trust when any person or class of persons, other than the grantee of such power, is designated as entitled to the proceeds, or any portion of the proceeds, or other benefits, to arise from the alienation of the lands according to the power.⁸⁵

⁷⁹ G. S. 1913, § 6747; 49 McKinney's Consol. Laws, N. Y. § 159; *Hershey v. Meeker County Bank*, 71 Minn. 255, 73 N. W. 967.

⁸⁰ *Cutting v. Cutting*, 86 N. Y. 522. See, for common-law rules, *Hershey v. Meeker County Bank*, 71 Minn. 255, 73 N. W. 937; *Shattuck v. Burrage*, 229 Mass. 448, 118 N. E. 889; *United States v. Field*, 235 U. S. 257; 31 Cyc. 1093; 21 R. C. L. 785; 21 L. R. A. 1918D, 346.

⁸¹ *Hershey v. Meeker County Bank*, 71 Minn. 255, 267, 73 N. W. 967. See 49 McKinney's Consol. Laws, N. Y. § 153.

⁸² *Hershey v. Meeker County Bank*, 71 Minn. 255, 73 N. W. 967; *Ashton v. Great Northern Ry. Co.*, 78 Minn. 201, 80 N. W. 963. See 49 McKinney's Consol. Laws, N. Y. § 152.

⁸³ *In re Oertle's Estate*, 34 Minn. 173, 24 N. W. 924. See § 468.

⁸⁴ See *Cutting v. Cutting*, 86 N. Y. 522; *Seaward v. Tasker*, 143 N. Y. S. 257.

⁸⁵ G. S. 1913, § 6748; *Simpson v. Cook*, 24 Minn. 180; *Officer v. Simpson*, 27 Minn. 147, 6 N. W. 488; *In re Oertle's Estate*, 34 Minn. 173, 24 N. W. 924; *Ness v. Davidson*, 45 Minn. 424, 48 N. W. 10;

464. Powers in trust imperative—Right to select beneficiaries—Statute—Every trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative, and imposes a duty on the grantee, the performance of which may be compelled in equity, for the benefit of the parties interested. A trust power does not cease to be imperative when the grantee has the right to select any, and exclude others, of the persons designated as objects of the trust.⁸⁶ Trust powers are imperative and their execution may be decreed in equity unless their execution or non-execution is made expressly to depend on the will of the grantees.⁸⁷ A power in trust may be imperative though the language creating it is permissive. If the disposing power is given and it is not coupled with words expressly or by necessary implication making the donee of the power the final arbiter of its exercise, its execution must be decreed.⁸⁸ A power of sale may be imperative though a discretion is given an executor as to the time of sale, and the court, upon proof of unreasonable delay, will compel him to act.⁸⁹ When the donee of an imperative power in trust dies without executing it, equity will decree the title in those persons for whose benefit the power was created.⁹⁰

465. Beneficiaries of power in trust—Shares—Statute—When a disposition under a power is directed to be made to or among several persons, without any specification of the share or sum to be allotted to each, all the persons designated shall be entitled to an equal proportion. But when the terms of the power import that the estate or fund is to be distributed among the persons so designated, in such manner or proportion as the trustee of the power may think proper, the trustee may allot the whole to any one or more of such persons, in exclusion of the others.⁹¹

466. Discretionary powers—A power is discretionary if its exercise is left to the discretion of the grantee of the power.⁹²

467. Devise in general terms with absolute power of disposition—Statutes—At common law, if an estate is given to a person generally or

Smith v. Glover, 50 Minn. 58, 68, 52 N. W. 210, 912; 22 A. & E. Ency. of Law (2 ed.) 1092; 31 Cyc. 1041; 21 R. C. L. 773; 49 McKinney's Consol. Laws, N. Y. § 137.

⁸⁶ G. S. 1913, §§ 6750, 6751; Atwater v. Russell, 49 Minn. 57, 84, 51 N. W. 629; 22 A. & E. Ency. of Law (2 ed.) 1093; 31 Cyc. 1094; 49 McKinney's Consol. Laws, N. Y. § 157.

⁸⁷ Tilden v. Green, 130 N. Y. 29, 28 N. E. 880.

⁸⁸ Smith v. Floyd, 140 N. Y. 337, 35 N. E. 606.

⁸⁹ Haight v. Brisbin, 96 N. Y. 132; Walbridge v. Brooklyn Trust Co., 128 N. Y. S. 686.

⁹⁰ Towler v. Towler, 142 N. Y. 371, 36 N. E. 869; Smith v. Floyd, 140 N. Y. 337, 35 N. E. 606.

⁹¹ G. S. 1913, §§ 6752, 6753; St. Paul Trust Co. v. Mintzer, 65 Minn. 124, 131, 67 N. W. 657; Faloon v. Flannery, 74 Minn. 38, 76 N. W. 954; 49 McKinney's Consol. Laws, N. Y. § 158.

⁹² Ness v. Wood, 42 Minn. 427, 44 N. W. 313; Ness v. Davidson, 49 Minn. 469, 479, 52 N. W. 46.

indefinitely, with an absolute power of disposition, it carries a fee, unless the testator gives to the first taker an estate for life only, and annexes to it a power of disposition of the reversion. In that case the express limitation for life will control the operation of the power, and prevent it from enlarging the estate into a fee.⁹³ It is provided by statute that when an absolute power of disposition, not accompanied by any trust, is given to any person to whom no particular estate is limited, such person shall take a fee, subject to any future estate that may be limited thereon, but absolute in respect to creditors and purchasers.⁹⁴ In such cases, if no remainder is limited on the estate of the grantee of the power of disposition such grantee is entitled to an absolute fee.⁹⁵

468. Testamentary powers to sell and convey realty—No particular form of words is necessary to create a testamentary power to sell and convey realty.⁹⁶ A power of sale need not be express, but may be implied from the general scope and tenor of the will or from a direction to sell.⁹⁷ It may be implied from a limitation over after a life estate of "whatever remains," "whatever remains undisposed of," and like phrases.⁹⁸ It is not implied from a bare direction to pay debts and legacies.⁹⁹

⁹³ In re Oertle's Estate, 34 Minn. 173, 178, 24 N. W. 924; Ogilvie v. Wright, 140 Tenn. 114, 203 S. W. 753; 30 A. & E. Ency. of Law (2 ed.) 736, 750; 40 Cyc. 1580. See § 432. The power of disposition must be absolute. If it is limited to the use and benefit of the devisee for his life a different rule applies. See § 431.

⁹⁴ G. S. 1913, § 6736; Hershey v. Meeker County Bank, 71 Minn. 255, 265, 73 N. W. 967; 30 A. & E. Ency. of Law (2 ed.) 736; 40 Cyc. 1580; 49 McKinney's Consol. Laws, N. Y. § 150. See § 432.

⁹⁵ G. S. 1913, § 6737; 30 A. & E. Ency. of Law (2 ed.) 736; 40 Cyc. 1580; 49 McKinney's Consol. Laws, N. Y. § 151. See § 432.

⁹⁶ See Simpson v. Cook, 24 Minn. 180; Officer v. Simpson, 27 Minn. 147, 6 N. W. 488; Greenwood v. Murray, 28 Minn. 120, 125, 9 N. W. 629; In re Oertle's Estate, 34 Minn. 173, 177, 24 N. W. 924; Cheever v. Converse, 35 Minn. 179, 28 N. W. 217; Townshend v. Goodfellow, 40 Minn. 312, 41 N. W. 1056; Ness v. Wood, 42 Minn. 427, 44 N. W. 313; Brown v. Morrill, 45 Minn. 483, 491, 48 N. W. 328; Atwater v. Russell, 49 Minn. 22, 51 N. W. 624; Ness v. Davidson, 49 Minn. 469, 479, 52 N. W. 46; Lovejoy v. McDonald, 59 Minn. 393, 61 N. W. 320;

Babcock v. Collins, 60 Minn. 73, 61 N. W. 1020; St. Paul Trust Co. v. Mintzer, 65 Minn. 124, 131, 67 N. W. 657; Hershey v. Meeker County Bank, 71 Minn. 255, 73 N. W. 967; Merriam v. Wagener, 74 Minn. 215, 77 N. W. 44; Ashton v. Great Northern Ry. Co., 78 Minn. 201, 80 N. W. 963; Semper v. Coates, 93 Minn. 76, 100 N. W. 662; Long v. Willsey, 132 Minn. 316, 320, 156 N. W. 349; Whitaker v. Meeds, 146 Minn. 160, 178 N. W. 597; In re Meldrum's Estate, 149 Minn. 342, 183 N. W. 835; 22 A. & E. Ency. of Law (2 ed.) 1155; 18 Cyc. 320; 31 Id. 1044; 40 Id. 1823; 24 C. J. 155; 11 R. C. L. 398; 32 L. R. A. (N. S.) 676.

⁹⁷ In re Oertle's Estate, 34 Minn. 173, 24 N. W. 924; Greenman v. McVey, 126 Minn. 21, 147 N. W. 812; 11 A. & E. Ency. of Law (2 ed.) 1043; 18 Cyc. 320; 31 Cyc. 1044; 40 Cyc. 1823; 24 C. J. 156; 11 R. C. L. 398; 32 L. R. A. (N. S.) 676; Ann. Cas. 1916D, 410; 4 Probate Reports Ann. 395.

⁹⁸ In re Oertle's Estate, 34 Minn. 173, 24 N. W. 924; Webb v. Webb, 130 Iowa 457, 104 N. W. 438; 30 A. & E. Ency. of Law (2 ed.) 736; 40 Cyc. 1824; Woerner, Am. Law of Adm. (2 ed.) § 343. See Southwick v. Southwick, 184 Iowa 336, 168 N. W. 807.

⁹⁹ Hill v. Den, 54 Cal. 6; Owen v. El-

It is not implied from a bare charge of debts or legacies on the realty.¹ But a power of sale is implied where the testator directs the payment of debts and legacies out of the proceeds of realty or otherwise manifests an intention that they should be paid from such a source.² Where the will treats the entire estate as personalty and directs all gifts to be paid in money there is implied power to sell.³ A power to sell is often implied from such phrases as "divide," "gather and divide," "manage and divide," "divide and pay," "divide and invest," "manage and pay over," "collect and pay over," "invest," "lend," "hold and invest," "loan," "put at interest."⁴ A power of sale is implied where there is a direction that the realty be sold, without stating by whom it shall be sold, if the executor has charge of the application of the proceeds.⁵ A charge of debts and a charge of legacies stand on the same footing as regards an implication of power to sell.⁶ A power to a tenant for life to sell or devise the remainder in fee is a general, beneficial power and not a power in trust. It gives to the holder of the power the absolute legal title in fee by virtue of the statute, so far as creditors and purchasers are concerned.⁷ Where a will gives to executors a power to sell and convey, an administrator with the will annexed has the same power.⁸ Where executors are given a naked power of sale the title passes to the devisee subject to the exercise of such power.⁹ The execution of a power in a will does not stand on the same footing as the execution of a power given by law. The power in a will is contractual, not statutory. When a power in a will is defectively executed equity will decree its proper execution.¹⁰ Giving a power of sale does not amount to a direction to sell, nor does it have any bearing on the question of the testator's intention to direct by implication a conversion of realty into

lis, 64 Mo. 77; 11 A. & E. Ency. of Law (2 ed.) 1043; 31 Cyc. 1046; 24 C. J. 158; 32 L. R. A. (N. S.) 687; Ann. Cas. 1916D, 421.

¹ In re Fox, 52 N. Y. 530; Worley v. Taylor, 21 Or. 589, 28 Pac. 903; Potter v. Brown, 11 R. I. 232; 11 A. & E. Ency. of Law (2 ed.) 1045; 18 Cyc. 320; 31 Cyc. 1046; 24 C. J. 159; 32 L. R. A. (N. S.) 687; Ann. Cas. 1916D, 426.

² 11 A. & E. Ency. of Law (2 ed.) 1043; 31 Cyc. 1047; 24 C. J. 158; 32 L. R. A. (N. S.) 694; Ann. Cas. 1916D, 419.

³ Webster v. Morris, 66 Wis. 366, 28 N. W. 353. See 32 L. R. A. (N. S.) 684.

⁴ 11 A. & E. Ency. of Law (2 ed.) 1046; 31 Cyc. 1047; 24 C. J. 159; 32 L. R. A. (N. S.) 680-694; Ann. Cas. 1916D, 428-440.

⁵ Hale v. Hale, 137 Mass. 168; Lippincott v. Lippincott, 19 N. J. Eq. 121; 11

A. & E. Ency. of Law (2 ed.) 1046; 31 Cyc. 1047; 24 C. J. 156; Woerner, Am. Law of Adm. (2 ed.) § 339; 32 L. R. A. (N. S.) 679; Ann. Cas. 1916D, 440.

⁶ Potter v. Brown, 11 R. I. 232.

⁷ Hershey v. Meeker County Bank, 71 Minn. 255, 73 N. W. 967; Ashton v. Great Northern Ry. Co., 78 Minn. 201, 80 N. W. 963. See Semper v. Coates, 93 Minn. 76, 100 N. W. 662; and § 432.

⁸ Cheever v. Converse, 35 Minn. 179, 28 N. W. 217. See §§ 1162, 1163.

⁹ In re Oertle's Estate, 34 Minn. 173, 177, 24 N. W. 924; Ness v. Davidson, 45 Minn. 424, 48 N. W. 10. See Ness v. Wood, 42 Minn. 427, 44 N. W. 313; Whitaker v. Meeds, 146 Minn. 160, 178 N. W. 597.

¹⁰ Babcock v. Collins, 60 Minn. 73, 61 N. W. 1020. See § 480.

personalty. Where a will contains a power of sale, not mandatory in terms, but it is apparent from the general scope and tenor of the will, that the testator intended all his property to be sold, the power of sale will be deemed imperative and the doctrine of equitable conversion applied.¹¹ A will contained a provision authorizing the executors to sell real estate as follows: "And they may sell or mortgage any of my real estate at any time it may become necessary to do so, to pay any expenses or bequests herein provided for, or for the purpose of saving or improving any other portion of my said property, while the same is undistributed." Held, that the power was not absolute or unconditional, but could only be exercised for the purposes specified; that if the conditions existed calling for an exercise of the power the executors had a reasonable discretion as to the mode and circumstances of its exercise, though they must act in good faith and reasonable prudence; that whether the conditions specified for the exercise of the power existed was a question of fact and not of discretion; that no estate in the lands was granted to the executors, in trust or otherwise, but merely a naked power of sale; that if there was a necessity for making a sale they were not authorized to sell property of an amount and value grossly in excess of that necessary to realize the amount needed.¹² A power of disposition may be restricted to the lifetime and not include a power to dispose of by will.¹³ Devisees cannot encumber the real estate so that grantees of a power of sale in the will would have to sell subject to such incumbrance. To permit that would enable them to obstruct and perhaps defeat the execution of the power.¹⁴ It is not necessary that the clause creating a power of sale shall designate the person or class of persons entitled to the proceeds of sales. The entire will may be referred to in order to ascertain who, according to the intention of the testator, is the person or class of persons entitled to the proceeds. If the will does not direct that the proceeds of a sale shall be paid to or used for the benefit of any one but the devisees whose lands are made subject to the power they are entitled to the benefits derived from an exercise of the power. In such case the devise comes to them in a substituted form. They receive the proceeds of the sale in lieu of the land itself. The question is one of intention and not of the mode of expressing it.¹⁵ A power to executors read, "I hereby authorize and empower them, or the survivor or successors of them, to sell and convey to any person or persons, and upon such terms as to them may seem advisable, any real estate that may come into their possession and control under this will, and to give proper deeds of conveyance thereof,"

¹¹ *Greenman v. McVey*, 126 Minn. 21, 147 N. W. 812.

¹² *Townshend v. Goodfellow*, 40 Minn. 312, 41 N. W. 1056.

¹³ *In re Ithaca Trust Co.*, 220 N. Y. 437, 116 N. E. 102.

¹⁴ *Ness v. Davidson*, 45 Minn. 424, 48 N. W. 10.

¹⁵ *Ness v. Davidson*, 45 Minn. 424, 48 N. W. 10.

with a similar power with respect to personal property. Held, that the power applied to all the testator's real estate; that it was a valid power in trust, that it was not a beneficial power; that the will not directing any other disposition of the proceeds of the alienation of the real estate, the devisees are to be regarded as designated as the persons entitled to such proceeds; that certain instruments executed by the executors under the power did not show that they conveyed the real estate subject to mechanics' liens upon the interest of one of the devisees.¹⁶ It is sometimes uncertain whether a power of sale is to a wife as legatee or devisee or as executrix. In either event the court will carry it into effect.¹⁷ Where a wife is given a life estate with a power of disposition, and the executor is also given a power of sale, the latter power may operate as a restraint on the former, but the several clauses of the will must be construed together and in subordination to the purpose of the testator as manifested by the will as a whole, and the power given to the executor must be exercised so as to secure to the widow the benefit of the estate as provided by the will.¹⁸ Wills frequently give a life estate to the wife of the testator, with a power of disposition for her use and benefit during life, remainder to the children of the testator. In such case the wife can convey a good title to bona fide purchasers, but she cannot invade and consume the corpus beyond what is necessary for her reasonable support. The proceeds of a sale belong to the children subject to the life interest of the wife, who occupies a fiduciary relation toward the children. The rights of the children will be protected by the courts.¹⁹ A power given to an executor to sell realty and distribute the proceeds does not authorize him to exchange it for other land.²⁰

469. Death of donee of power before testator—A power created by will lapses if the donee of the power dies before the testator.²¹

470. Power to mortgage realty—Wills frequently contain an express power to mortgage realty.²² A mere naked power to sell given to an agent or attorney or to the trustee of an ordinary trust does not include a power to mortgage by implication. Such a power is to be strictly construed. But a testamentary power in favor of the beneficiaries of the will is to be liberally construed to carry out the intentions of the

¹⁶ *Ness v. Davidson*, 45 Minn. 424, 48 N. W. 10.

¹⁷ *Chamberlain v. Husel*, 178 Mich. 1, 144 N. W. 549.

¹⁸ *In re Oertle's Estate*, 34 Minn. 173, 24 N. W. 924.

¹⁹ *In re Oertle's Estate*, 34 Minn. 173, 24 N. W. 924; *In re Meldrum's Estate*, 149 Minn. 342, 183 N. W. 835; *Abbott v. Wagner* (Neb.) 188 N. W. 113.

²⁰ *Trimboli v. Kinkel*, 226 N. Y. 147, 123 N. E. 205.

²¹ *Curley v. Lynch*, 206 Mass. 289, 92 N. E. 429; *Smith v. Browne*, 222 N. Y. 222, 118 N. E. 611.

²² *Townshend v. Goodfellow*, 40 Minn. 312, 317, 41 N. W. 1056; *Brown v. Morrill*, 45 Minn. 483, 48 N. W. 328; *Merriam v. Wagener*, 74 Minn. 215, 77 N. W. 44; *In re Meldrum's Estate*, 149 Minn. 342, 183 N. W. 835.

testator and such a power of sale may be so worded as to carry a power to mortgage by implication.²³ A devise for life with power to sell, transfer, and dispose of the property, or as much thereof as may from time to time be needed for the support of the devisee for life, with gift over of what remains at his death, gives to the devisee the right to mortgage the property for the purpose specified, especially where the property devised was incumbered by an outstanding mortgage so that its payment or renewal might become essential.²⁴ It has been held, however, that a power to "dispose" of property does not authorize the devisee to mortgage it.²⁵

471. Power to divide property between children—A testator by his will directed his widow to divide his real estate between his children, "to the best advantage as she sees fit and proper." In its decree of distribution the probate court assigned the real estate to the widow, "subject to the conditions and provisions of the will." Held, that she did not, by the terms of the decree, take the real estate for her own use and benefit, but was required to divide it between the children and in doing so could not exclude any of them.²⁶

472. Power of tenant for life to make leases—Statute—The power of a tenant for life to make leases is not assignable as a separate interest, and will pass, unless specially excepted, by any conveyance of such estate. And if specially excepted in any such conveyance, it is extinguished.²⁷

473. Power to do what the law does—A power is nugatory and inoperative where it directs to be done only what the law itself does.²⁸

474. How power executed—Statute—No power can be executed except by some instrument in writing, which would be sufficient in law to pass the estate or interest intended to pass under the power, if the person executing the power were the actual owner.²⁹ If the instrument creating the power prescribes the mode of its execution such mode must be followed.³⁰ Where a power to dispose of property is given generally,

²³ *Morris v. Watson*, 15 Minn. 212 (165); *Kent v. Morrison*, 153 Mass. 137, 26 N. E. 427; *Hamilton v. Hamilton*, 149 Iowa 321, 128 N. W. 380; *Lardner v. Williams*, 98 Wis. 514, 74 N. W. 346; 22 A. & E. Ency. of Law (2 ed.) 1156; 31 Cyc. 1080; 7 Probate Reports Ann. 687; Ann. Cas. 1916C, 601.

²⁴ *Hamilton v. Hamilton*, 149 Iowa 321, 128 N. W. 380.

²⁵ *Beakey v. Knutson*, 90 Or. 574, 174 Pac. 1149, 177 Pac. 955.

²⁶ *Faloon v. Flannery*, 74 Minn. 38, 76 N. W. 954.

²⁷ G. S. 1913, § 6742. See *Rogers v. Clark*, 104 Minn. 198, 220, 116 N. W. 739; 22 A. & E. Ency. of Law (2 ed.) 1157; 31 Cyc. 1084; 49 McKinney's Consol. Laws, N. Y. § 155.

²⁸ *Ness v. Davidson*, 45 Minn. 424, 48 N. W. 10.

²⁹ G. S. 1913, § 6766; 49 McKinney's Consol. Laws, N. Y. § 165. See 22 A. & E. Ency. of Law (2 ed.) 1106; 31 Cyc. 1120; 21 R. C. L. 792.

³⁰ *Wainwright v. Low*, 132 N. Y. 313, 30 N. E. 747. See 31 Cyc. 1120.

without specifying the mode of its exercise, it may be exercised by deed or will.³¹

475. General devise as execution of power—Statute—Lands embraced in a power to devise pass by a will purporting to convey all the real property of the testator, unless the intent that the will shall not operate as an execution of the power appears expressly or by necessary implication.³² In New York this statute is applicable to personalty as well as realty.³³ By virtue of the statute a general residuary clause will operate as an execution of the power though no reference is made to the power, unless a contrary intention affirmatively appears.³⁴ This statute does not abrogate the common-law rule that where a donee of a power of appointment or sale also has a life estate or other interest in the subject-matter of the power, a will which makes no reference to the power will pass only the individual interest of the donee, unless there is something to show an intention to execute the power.³⁵

476. Execution of power on death of trustee—Statute—If the trustee of a power, with the right of selection, dies, leaving the power unexecuted, its execution shall be decreed in the district court, for the benefit equally, of all the persons designated as objects of the trust.³⁶ This is a declaration of a general rule applicable to all trust powers and probably governs trusts of personal as well as real property.³⁷

477. Execution of power by survivors—Statute—When a power is vested in several persons, all must unite in its execution; but if, previous to such execution, one or more of such persons shall die, the power may be executed by the survivors.³⁸

478. Execution of power by will—Statute—When a power to dispose of lands is confined to a disposition by devise or will, the instrument of execution must be a will duly executed according to the provisions of law relating to wills of real and personal estate.³⁹ A power to dispose

³¹ 22 A. & E. Ency. of Law (2 ed.) 1107; 31 Cyc. 1117; 21 R. C. L. 792; L. R. A. 1916C, 1048.

³² G. S. 1913, § 6778. See Thomson v. Fidelity Trust Co. (Pa.) 110 Atl. 770; 31 Cyc. 1128; 21 R. C. L. 796; 49 McKinney's Consol. Laws, N. Y. § 176; 64 L. R. A. 849; 16 Ann. Cas. 206; Ann. Cas. 1914D, 586; 32 Harv. L. Rev. 437.

³³ See Hutton v. Benkard, 92 N. Y. 295; Lockwood v. Mildeberger, 159 N. Y. 181, 53 N. E. 803.

³⁴ Lockwood v. Mildeberger, 159 N. Y. 181, 53 N. E. 803; McLean v. McLean, 160 N. Y. S. 949; Rhode Island Hospital Trust Co. v. Dunnell, 34 R. I. 394, 83 Atl. 858. See Hassam v. Hazen, 156 Mass. 93, 30 N. E. 469; Russell v. Joys,

227 Mass. 263, 116 N. E. 549; 64 L. R. A. 849; 16 Ann. Cas. 206.

³⁵ See § 482.

³⁶ G. S. 1913, § 6754; 49 McKinney's Consol. Laws, N. Y. § 160.

³⁷ See Holland v. Alcock, 108 N. Y. 312, 16 N. E. 305.

³⁸ G. S. 1913, § 6765; Illinois Steel Co. v. Konkell, 146 Wis. 556, 131 N. W. 842. See 22 A. & E. Ency. of Law (2 ed.) 1103; 31 Cyc. 1108; 49 McKinney's Consol. Laws, N. Y. § 166; 50 L. R. A. (N. S.) 626.

³⁹ G. S. 1913, § 6768; 49 McKinney's Consol. Laws, N. Y. § 167; Nabors v. Woolsey, 174 Ala. 289, 56 So. 533; 31 Cyc. 1120; 21 R. C. L. 793; 64 L. R. A. 849.

of property by will only is limited to that mode of disposition and cannot be executed by grant. Equity will not specifically enforce a contract to exercise a power of appointment by will in favor of one who advanced money to the donee of the power. The donee of a power to dispose of property by will cannot bargain away the right.⁴⁰

479. Excess of power in execution—Statute—No disposition by virtue of a power shall be void, in law or equity, on the ground that it is more extensive than was authorized by the power; but every estate or interest so created, so far as embraced by the terms of the power, shall be good and valid.⁴¹ A devise of a life estate may be made under a power to devise a fee.⁴²

480. Defective execution remedied in equity—Statute—When the execution of a power in trust is defective, in whole or in part, its proper execution may be decreed in equity, in favor of the person designated as the object of the trust.⁴³ The power of a court of equity to remedy a defective execution of a power is limited to matters of form. It cannot supply omissions of statutory requirements.⁴⁴ To relieve against the defective execution of a power, it must appear that there was a fixed intent to execute the power on a sufficient consideration, and an attempt to execute that intent, partial in its nature, and falling short of accomplishing the purpose by reason of some defect in the instrument by which the attempt was made.⁴⁵

481. When execution of power devolves on court—Statute—When a power in trust is created by will, and the testator has omitted to designate by whom the power is to be executed, its execution shall devolve on the district court.⁴⁶ This statute does not require the designation to be by express words. A designation by necessary implication takes the case out of the statute. Cases where an executor has an implied power of sale do not fall within the statute.⁴⁷ It may be applicable to trusts in personalty as well as realty.⁴⁸

482. Deed under power need not recite or refer to it—Statute—Every instrument executed by the grantee of a power, conveying an estate or

⁴⁰ *Farmers Loan & Trust Co. v. Mortimer*, 219 N. Y. 290, 114 N. E. 389. See *Ann. Cas.* 1918E, 1161.

⁴¹ G. S. 1913, § 6775. See *Thomas v. Joslyn*, 30 Minn. 388, 15 N. W. 675; *Hillen v. Iselin*, 144 N. Y. 365, 39 N. E. 368; 31 Cyc. 1146; 49 McKinney's *Consol. Laws*, N. Y. § 177; 4 *Ann. Cas.* 1191.

⁴² *McLean v. McLean*, 160 N. Y. S. 949.

⁴³ G. S. 1913, § 6783; *Babcock v. Collins*, 60 Minn. 73, 79, 61 N. W. 1020; 22 A. & E. *Ency. of Law* (2 ed.) 1129; 31

Cyc. 1143; 21 R. C. L. 810; 49 McKinney's *Consol. Laws*, N. Y. § 163.

⁴⁴ *Watkins v. Watkins*, 82 N. J. Eq. 483, 89 Atl. 253.

⁴⁵ *Coates v. Lunt*, 210 Mass. 314, 96 N. E. 685.

⁴⁶ G. S. 1913, § 6755; 49 McKinney's *Consol. Laws*, N. Y. § 161. See 31 Cyc. 1100; 5 *Probate Reports Ann.* 546.

⁴⁷ *Meakings v. Cromwell*, 5 N. Y. 136.

⁴⁸ *Holland v. Alcock*, 108 N. Y. 312, 16 N. E. 305.

creating a charge which such grantee is authorized by the power to convey or create, but which he would have no right to convey or create unless by virtue of his power, shall be deemed a valid execution of the power, although such power is not recited or referred to therein.⁴⁹ When a representative executes a deed under a power in a will it is not necessary, even in the absence of statute, that the intention to execute the power should appear by express terms or recitals in the deed.⁵⁰ Where the donee of a power of appointment or sale also has a life estate or other interest in the subject-matter of the power, the general rule is that a deed or other instrument which makes no reference to the power will pass only the individual interest of the donee, unless there is something to show an intention to execute the power. The statute has no application.⁵¹ This rule does not apply to a deed by a life tenant with an absolute power of disposition whose title is changed into a fee by G. S. 1913, § 6735.⁵² Where the donee of a power to sell land has an interest in the land, a general warranty deed executed by him for a consideration equal to the value of the entire estate will be deemed an exercise of the power and a conveyance of the entire estate, though there is no reference to the power in the deed, unless a contrary intention is manifested.⁵³

483. Conflict of laws—The execution of a testamentary power is governed by the law of the domicile of the testator in case of personalty, and by the *lex rei sitæ* in case of realty.⁵⁴

⁴⁹ G. S. 1913, § 6776; *Babcock v. Collins*, 60 Minn. 73, 81, 61 N. W. 1020; *Ashton v. Great Northern Ry. Co.*, 78 Minn. 201, 80 N. W. 963; 22 A. & E. Ency. of Law (2 ed.) 1119; 31 Cyc. 1122; 21 R. C. L. 795; 49 McKinney's Consol. Laws, N. Y. § 175.

⁵⁰ *Warner v. Connecticut Mutual Life Ins. Co.*, 109 U. S. 357; *Willier v. Cummings*, 91 Neb. 571, 136 N. W. 559. See 31 Cyc. 1123; 22 A. & E. Ency. of Law (2 ed.) 1112; 21 R. C. L. 795; Ann. Cas. 1913D, 288.

⁵¹ *Mutual Life Ins. Co. v. Shipman*, 119 N. Y. 324, 24 N. E. 177; *Weinstein v. Weber*, 178 N. Y. 94, 70 N. E. 115; *Pepper v. Cutler*, 139 N. Y. S. 976; *Lardner v. Williams*, 98 Wis. 514, 74 N. W. 346; *Auer v. Brown*, 121 Wis. 115, 98 N.

W. 966; 22 A. & E. Ency. of Law (2 ed.) 1118; 31 Cyc. 1123; 21 R. C. L. 798; Ann. Cas. 1913D, 291.

⁵² *Auer v. Brown*, 121 Wis. 115, 98 N. W. 966.

⁵³ *Vines v. Clarke*, 97 N. Y. S. 532. See Ann. Cas. 1913D, 293.

⁵⁴ *In re New York Life Ins. & Trust Co.*, 209 N. Y. 585, 103 N. E. 315; *Farnam v. Penn. Co.*, 87 N. J. Eq. 652, 99 Atl. 145, 101 Atl. 1053; *Hollister v. Hollister*, 85 Or. 316, 166 Pac. 940; *Walker v. Mansfield*, 221 Mass. 600, 109 N. E. 647; *Russell v. Joys*, 227 Mass. 263, 116 N. E. 549; *Rhode Island Hospital Trust Co. v. Dunnell*, 34 R. I. 394, 83 Atl. 858; *Security Trust & Safe Deposit Co. v. Ward*, 10 Del. Ch. 408, 93 Atl. 385; 31 Cyc. 1135.

EQUITABLE CONVERSION

484. Definition and nature—Equitable conversion is a constructive change of realty into personalty or of personalty into realty; a transformation of a fund from real to personal or from personal to real, assumed in equity to have been made in order to secure the application to the succession to or the administration of that fund of the principles which the intention of a testator or the rights of parties interested require. Thus, where a will imperatively directs real property to be sold and distributed as money, the court may treat the fund as equitably converted from the testator's death, though the executors neglect to make an actual conversion into money. The doctrine is based on the maxim that equity regards that as done which ought to have been done.⁵⁵

485. Power or order of sale in will—Where a power of sale in a will is discretionary in the grantee of the power there is no conversion until the power is actually exercised.⁵⁶ As a general rule, where a testator directs the sale of a specific tract of land for the purpose of paying certain bequests from the proceeds, a court of equity will consider that the conversion of the land into personalty has taken place. The fact that the time of the sale is postponed for a definite term is not material, and the conversion will be held to have been made at the time of the testator's death.⁵⁷ The doctrine of conversion in this connection rests on the intention of the testator. In order to work a conversion while the property remains unchanged in form, there must be a clear and imperative direction to convert it. The direction must be absolute and not conditional, but it need not be express. An implied direction is sufficient if the implication is necessary. When a will contains a power of sale, not mandatory in terms, but it is apparent from the general

⁵⁵ Century Dict.; Langdell, *Equity Jurisdiction* (2 ed.) 260; Bigelow, *Wills*, 331; 7 A. & E. Ency. of Law (2 ed.) 464; 9 Cyc. 824; 13 C. J. 852; 6 R. C. L. 1064. See *Brown v. Crookston Agr. Assn.*, 34 Minn. 545, 26 N. W. 907; *Cuillerier v. Brunelle*, 37 Minn. 71, 73, 33 N. W. 123; *Ness v. Davidson*, 49 Minn. 469, 52 N. W. 46; *Young Men's Christian Assn. v. Horn*, 120 Minn. 404, 421, 139 N. W. 805; *Greenman v. McVey*, 126 Minn. 21, 147 N. W. 812; *Johrden v. Pond*, 126 Minn. 247, 148 N. W. 112; *Imperial Elevator Co. v. Bennett*, 127 Minn. 256, 149 N. W. 372; *In re Evans' Estate*, 145 Minn. 252, 258, 177 N. W. 126.

⁵⁶ *Ness v. Davidson*, 49 Minn. 469, 52

N. W. 46; *In re Chamberlain's Estate*, 257 Pa. 113, 101 Atl. 314; 7 A. & E. Ency. of Law (2 ed.) 467; 13 C. J. 868; 9 Cyc. 839; *Woerner, Am. Law of Adm.* (2 ed.) § 342.

⁵⁷ *Greenman v. McVey*, 126 Minn. 21, 147 N. W. 812; *Johrden v. Pond*, 126 Minn. 247, 148 N. W. 112; *Coyne v. Davis*, 98 Neb. 763, 154 N. W. 547; *In re Hawgood's Estate*, 37 S. D. 565, 159 N. W. 117; *Blain v. Dean*, 160 Iowa 708, 142 N. W. 418; *Wood v. Pehrsson*, 21 N. D. 357, 130 N. W. 1010; 7 A. & E. Ency. of Law (2 ed.) 468; 9 Cyc. 838; 13 C. J. 869; 6 R. C. L. 1074; *Woerner, Am. Law of Adm.* (2 ed.) § 342; 20 L. R. A. (N. S.) 65; *Ann. Cas.* 1915D, 434.

scope and tenor of the will that the testator intended all his realty to be sold, the power of sale will be held imperative, and the doctrine of conversion applied. The direction to sell is not implied from the power, but rather from the fact that the execution of the scheme of the testator is impossible without a conversion.⁵⁸ Where a will, either expressly or by necessary implication, directs land to be sold at, within, or after a definite future time, or the time of sale is left indefinite, the land will be deemed converted into personalty as of the time of the testator's death, and not as of the time of the actual conversion, even as against the rights of intervening creditors of devisees.⁵⁹ A testator by his will devised and bequeathed to his wife his real estate and personal property, and, "after her death and within two years thereafter," gave and bequeathed to each of his children a specific sum of money, the total bequests to such children amounting to \$5,200, approximately equal to the total value of his real and personal property, which personal property was worth \$800 at the time the will was made, and \$300 at the time the testator died. After the testator's death, and before the death of his widow, a creditor of a son of the testator obtained a judgment, levied an execution on the son's interest in the real estate, and purchased such interest at the execution sale. After the death of the widow, the real estate was sold under a license of the probate court to pay debts and legacies, and this action was brought by the creditor to recover of the administrator the son's interest in the proceeds of such sale. Held, that though there is no express direction in the will to sell the real estate of testator and convert it into personalty, where it appears that the testator must have contemplated that it would be necessary to sell the real estate in order to carry out the provisions of the will, the direction is implied, and there is an equitable conversion of the realty into personalty. Where the sale is directed, expressly or by implication, at a specified time in the future, in this case after the death of the life tenant, the conversion takes place in equity as of the date of the testator's death. Between that time and the actual sale, the legatees of the testator had no interest in the land that could be levied upon or sold on execution.⁶⁰ A testator devised a life estate in all his property, real and personal, to his wife. The will provided that after her death the property should be converted into money and specific sums should go to three daughters named, and the balance to a fourth daughter named. The fourth daughter outlived her father, was married after his death, and predeceased her mother, leaving no issue. Her husband survived her. Held, that the provision in the will for a sale and division of the property amounted to an equitable conversion as

⁵⁸ *Greenman v. McVey*, 126 Minn. 21, 147 N. W. 812; *Whalley v. Lawrence's Estate* (Vt.) 108 Atl. 387.

⁵⁹ *Greenman v. McVey*, 126 Minn. 21, 147 N. W. 812.

⁶⁰ *Greenman v. McVey*, 126 Minn. 21, 147 N. W. 812.

of the date of the testator's death.⁶¹ Where a will gives real and personal property in trust and directs the trustee to convert it into money and invest it in interest-bearing securities the corpus of the trust will be treated as personalty.⁶² To convert realty into personalty by will, there must either be a positive direction to sell the land, an absolute necessity to sell it in order to execute the will or such a blending of the two kinds of property in the will as to clearly show that testator intended to create a fund out of the realty and personalty, and bequeath it as money.⁶³

486. Conflict of laws—Whether there is a conversion of personalty into realty by will is determined by the law of the domicile of the testator. Whether there is a conversion of realty into personalty is determined by the *lex rei sitæ*.⁶⁴

ELECTION

IN GENERAL

487. Duty of election—**In general**—The duty of election in this connection is the duty imposed by law on a person to choose between two inconsistent or alternative rights or claims, where there is a clear intention on the part of the person from whom he derives one that he should not enjoy both. It is sometimes defined as a choice which a party is compelled to make between the acceptance of a benefit under an instrument and the retention of some property, already his own, which is attempted to be disposed of in favor of a third party by virtue of the same instrument. It has been said that a person shall not claim an interest under an instrument without giving full effect to that instrument, as far as he can. If, therefore, a testator, intending to dispose of his property, and making all his arrangements under the impression that he has the power to dispose of all that is the subject of his will, mixes in his disposition property that belongs to another person, or property as to which another person has a right to defeat his disposition, giving to that person an interest by his will, that person shall not be permitted to defeat the disposition where it is in his power, and yet take under the will. The reason is, the implied condition that he shall not take both; and the consequence follows that there must be an election. The principle of election is plain and intelligible—that if a person, being about to dispose of his own property, includes in his disposition, either from mistake or not, property of another, an implication arises that the benefit under the will shall be taken upon the terms

⁶¹ *Johrden v. Pond*, 126 Minn. 247, 148 N. W. 112.

⁶² *Mangan v. Shea*, 158 Wis. 619, 149 N. W. 378.

⁶³ *Hanson v. Hanson*, 149 Iowa 82, 127 N. W. 1032.

⁶⁴ *Clarke v. Clarke*, 178 U. S. 186; *Butler v. Green*, 19 N. Y. S. 890; *In re Loyd's Estate*, 175 Cal. 699, 167 Pac. 157. See 2 L. R. A. (N. S.) 457; 22 A. & E. Ency. of Law (2 ed.) 1370; 13 C. J. 872.

of giving effect to the whole disposition. The ground upon which the doctrine rests is to be found in the intention of the author of the instrument of donation,—an intention which, extending to the whole disposition, is frustrated by the failure of any part. The intention being assumed, the conscience of the donee is affected by the condition, (although it is destitute of legal validity,) not express, but implied, which is annexed to the benefit proposed to him. For the donee to accept the benefit, while he declines the burden, is to defraud the design of the donor. The case usually stated to illustrate the rule is that of a testator conveying to A by will certain property, real or personal, and in the same instrument giving to a third party certain property belonging to A—it may be real or personal. In this case A must elect whether he will retain his own property, or take that given him by the will. In the latter event he will be held to confirm the gift of his own property to the third party. The occasion for the enforcement of the rule most frequently arises in the administration of estates under wills, and particularly in cases involving a claim of dower, where the obligation is upon the widow to elect as between her dower in lands devised by her husband and some provision made in her behalf by the will, in case it clearly appears that she cannot take both the testamentary provision and her dower without violating the intention of the testator. It has not, however, been confined to wills, but applies as well to deeds and other instruments. The authorities with substantial unanimity go to sustain the proposition that a case for an election arises when there is, first, an intention of a donor or grantor, clearly and unequivocally expressed in the instrument of donation or grant, to dispose of that which belongs to another, and over which he has no disposing power as against such owner; second, a donation by the same instrument to that person of something to which he otherwise has no right; unless, perhaps, in case the attempted disposition of the property of the donee is inoperative and void for some other reason than the defect of title in the donor. Whenever these conditions are recognized as existing, the duty of election seems to have been almost uniformly asserted.⁶⁵ The doctrine rests upon the ground that one who asserts a claim to property under a will must acknowledge the equitable rights of all others under the same will.⁶⁶ A person cannot take a benefit under a will and at the same time assert a right that will defeat its full effect

⁶⁵ *Washburn v. Van Steenwyk*, 32 Minn. 336, 20 N. W. 324; *Mechling v. McAllister*, 135 Minn. 357, 160 N. W. 1016; *Kelleher v. Kelleher*, 140 Minn. 409, 168 N. W. 586; 11 A. & E. Ency. of Law (2 ed.) 57; 40 Cyc. 1959; 28 R. C. L. 328, 9 Ann. Cas. 953; 21 Ann. Cas. 547. It is doubtful whether the rule should be based on the presumed inten-

tion of the testator. It seems better to base it on equitable principles independent of such intention. See *Kelleher v. Kelleher*, 140 Minn. 409, 168 N. W. 586; 30 Harv. L. Rev. 649; 32 Id. 288; 11 A. & E. Ency. of Law (2 ed.) 61.

⁶⁶ *Kelleher v. Kelleher*, 140 Minn. 409, 168 N. W. 586.

and operation.⁶⁷ A person taking under a will in ignorance of a material fact cannot later assert a title against the will unless he makes restitution.⁶⁸ Where a testator bequeathed to four of his children the proceeds of an insurance policy on his life, payable at his death to his wife, the latter was held to relinquish her interest in the proceeds of the policy by accepting another provision in the will for her benefit.⁶⁹

488. Devise to grantee of testator—A testator, who had been the owner of one entire city lot, conveyed by deed one-quarter thereof to one of his sons. Afterwards, by will, he devised the entire lot, including that portion thereof previously conveyed by him, to his three sons, including the grantee in the deed referred to, share and share alike. Upon the probate of the will, it was held that such grantee was required to elect whether he would relinquish his own property and take under the will; and that, if he elected to retain his own property and against the will, he was not entitled to a partition of the remaining three-fourths of the lot, but equity would appropriate the gift made by the will to him, to compensate the other beneficiaries under it.⁷⁰

489. Devise conditional on ownership in testator—Testatrix devised to her husband certain property which constituted the homestead of her mother. The devise was conditional on the testatrix owning the property at the time of her death. The will contained bequests to the mother which she accepted and retained. Held, that the mother was not put to an election between such bequests and retaining her own home.⁷¹

490. Effect on other beneficiaries of renouncing will—In case of a devise to a grantee of testator of the property granted, if the grantee elects to retain his own property, and against the will, he will be entitled to no benefits under the will, unless the share given him by it exceeds the value of his own property which the testator undertook to give to the other beneficiaries, and equity will appropriate the gift to him to compensate them.⁷²

491. What constitutes—No general rule can be formulated defining what acts of acceptance or acquiescence shall be sufficient to constitute an "election" between a devise in a will and a right inconsistent with the will. There must be an intention to make an election, or some de-

⁶⁷ *Kelleher v. Kelleher*, 140 Minn. 409, 168 N. W. 586; *Crawford v. Bloss' Estate*, 114 Mich. 204, 72 N. W. 148; *Whalley v. Lawrence's Estate* (Vt.) 108 Atl. 387.

⁶⁸ *Farmington Sav. Bank v. Curran*, 72 Conn. 342, 44 Atl. 473; *Watson v. Watson*, 128 Mass. 152.

⁶⁹ *Kelleher v. Kelleher*, 140 Minn. 409, 168 N. W. 586.

⁷⁰ *Brown v. Brown*, 42 Minn. 270, 44 N. W. 250. See *Sorenson v. Carey*, 96 Minn. 202, 104 N. W. 958; 5 A. L. R. 1628.

⁷¹ *Appleby v. Appleby*, 100 Minn. 408, 111 N. W. 305.

⁷² *Brown v. Brown*, 42 Minn. 270, 44 N. W. 250. See 5 A. L. R. 1628.

cisive act, that will prevent restoring the parties affected to the same situation as if such act had not been performed. An attempt to take both the property given by the will and the right inconsistent with the will does not constitute an "election." When one is taken and the other rejected there is an election. If one is taken, and the situation of the parties affected is so changed with reference to the property or rights involved that they cannot be restored to their former situation, the election is complete.⁷³ An election may arise from the acceptance of a share of an estate assigned in ancillary administration contrary to the terms of a will.⁷¹

ELECTION TO TAKE UNDER WILL OR STATUTE

492. When statute inapplicable—When the statute regulating election by a surviving spouse is inapplicable the equitable doctrine of election applies.⁷⁴

493. By surviving spouse—When a testator by will bequeaths to his wife something to which she has no right, except by force of the will, and by the same instrument disposes of all his lands in which she is by law entitled to dower, or to an estate of inheritance, it being apparent that the testator intended the bequest to be in lieu of her legal estate, and the devise being valid except for the legal rights of the wife in the property, a case for an election arises on the part of the widow, as to whether she will take under the will or against it. If she elects to take the bequest, she will be held to have confirmed the devise, and to have relinquished her legal estate.⁷⁵ At common law a widow cannot be put to an election between her paramount right of dower and a devise or bequest of something else, unless the intention to exclude the former is disclosed either by express words, or her right of dower is inconsistent with or repugnant to the provisions of the will, so as to disturb or disappoint them. The question in each case is whether it can be gathered from the will that it was the testator's intention that the provisions therein made for her should be in satisfaction of her dower, or a bounty in addition thereto. It is a question of intent, and such intent must be shown by the will, and may be manifested by the clauses of donation, or may appear from the entire frame of the will. And unless the contrary appear from the will, the presumption is that a legacy is intended

⁷³ *Cobb v. Macfarland*, 87 Neb. 408, 127 N. W. 377.

⁷¹ *Whalley v. Lawrence's Estate* (Vt.) 108 Atl. 387.

⁷⁴ *State v. Probate Court*, 129 Minn. 442, 152 N. W. 845; *Mechling v. McAllister*, 135 Minn. 357, 160 N. W. 1016.

⁷⁵ *Washburn v. Van Steenwyk*, 32 Minn. 336, 20 N. W. 324; *In re Gotzlan's Estate*, 34 Minn. 159, 24 N. W. 920; *Fair-*

child v. Marshall, 42 Minn. 14, 43 N. W. 563; *Sherman v. Lewis*, 44 Minn. 107, 46 N. W. 318; *McGowan v. Baldwin*, 46 Minn. 477, 49 N. W. 251; *Sorenson v. Carey*, 96 Minn. 202, 104 N. W. 958; *State v. Probate Court*, 129 Minn. 442, 152 N. W. 845; *Mechling v. McAllister*, 135 Minn. 357, 160 N. W. 1016. See, for a criticism of the *McAllister Case*, 30 Harv. L. Rev. 649.

as a bounty, and not as a purchase or satisfaction of the dower interest of the wife. These general principles are not disputed. So, also, where the terms of the donation are general, and the testator has not the absolute and exclusive ownership, but his interest is qualified, partial, or undivided in the property, and he uses general words of disposition, as "all my estate," "all my lands," etc., *prima facie* the rule is that he must be taken to intend to dispose only of what he had the power to dispose of; and in order to raise a case of election it must be apparent that he intended to dispose of what he had not the power or right to dispose of. In such cases the testator's interest in the property is deemed presumptively sufficient to satisfy the terms of the devise; otherwise, however, where particular property is specifically devised. It must be added, however, as will be readily suggested, that notwithstanding the general words in a devise, it may otherwise appear from the provisions of the will and the scheme of testamentary disposition that the testator intended to dispose of the entire estate or property, including interests not his own, so as to put the widow or heir to an election. It is manifest that the general rule referred to may be extended too far, and some of the English cases, which have been followed in several of the states, have adopted a construction so technical and restricted as to defeat the obvious purpose of the testator. The presumption that, by the use of general words of donation, he intends strictly to dispose only of what is capable of being disposed of, may be rebutted by the character and terms of the will, and it is therefore a fair question of construction in what sense the words "estate" or "lands" or "property" are used by the testator, whether it is limited to the partial or undivided interest which, in contemplation of law, will be subject to be disposed of under the will after his decease, or is intended to include the entire property owned, possessed, and enjoyed by him in his lifetime. Where a testator, as is not unfrequently done, bequeaths to his wife such portion of his estate as she would be entitled to under the statutes of distribution or descent, she takes, as legatee or devisee under the will, such share of his property as she would receive if he had died intestate; and she is not entitled to dower in addition thereto, but is put to an election.⁷⁶ Unless the contrary appears from the will, the presumption is that a legacy or devise is intended as a bounty, and not as a purchase or in lieu of statutory provisions in the nature of dower. A gift or devise by a testator to his wife as follows, "one-half of all I own," is not to be construed as intended to include the estate or interest of the wife in the homestead, which is incapable of being disposed of by him by will. She is not, therefore, in such case, put to an election between

⁷⁶ *In re Gotzlan's Estate*, 34 Minn. 159, 24 N. W. 920; *McGowan v. Baldwin*, 46 Minn. 477, 49 N. W. 251; 11 A. & E. Ency. of Law (2 ed.) 81; 40 Cyc.

1963; 92 Am. St. Rep. 695. See, as to what constitutes an election to take under or against a will, 49 L. R. A. (N. S.) 1072.

the statutory and testamentary provisions made for her, but is entitled to both.⁷⁷ In order to raise a case for an election by a beneficiary under a will on the ground that the testator assumes thereby to dispose of property which he had previously given to the same beneficiary by another instrument, it must very clearly and satisfactorily appear that the testator has intentionally assumed to dispose of the property of the beneficiary, who is required on that account to give up his own gift; and this intention must appear from the words of the will itself, and cannot be proved by evidence dehors the instrument.⁷⁸ By the last will and testament of the husband he devised a life estate in lands belonging to his wife to her, together with certain personal property in value and amount exceeding that which she would have been entitled to under the statute, and directed that after the death of his wife the land and remaining personal property should be disposed of by his executor, and the proceeds divided equally between his brothers and sisters and the brothers and sisters of his wife. There were no children. The wife expressly assented to the terms and provisions of the will by indorsement thereon at the time it was executed. Held, that upon the death of the husband the wife was required to elect whether to accept or reject the provisions of the will, and that if she elected to abide thereby the will was effective as a transfer and disposal of her land; and held, further, that her express assent to the terms of the will at the time it was made, coupled with the fact that after the death of her husband she appropriated all his personal property to her own use, amounted in contemplation of law to an election to abide by the will.⁷⁹ In case of partial intestacy a widow may be put to an election between her share under the will and her share of the intestate property.⁸⁰

494. Contract of widow for annuity in place of statutory interest—Where a widow accepts a provision for an annual income on consideration of a deed of her inheritance rights, at the request of the testator, such provision becomes contractual between her and the estate, and binds the estate to a fulfilment of the conditions upon which her acceptance was made.⁸¹

UNDER STATUTE

495. Statute—If the will of a deceased parent makes provision for a surviving spouse in lieu of the rights in his estate secured by statute, unless such survivor, by an instrument in writing filed in the probate court in which such will is proved within six months after the probate thereof, shall renounce and refuse to accept the provisions of such will,

⁷⁷ *McGowan v. Baldwin*, 46 Minn. 477, 49 N. W. 251.

⁷⁸ *Sherman v. Lewis*, 44 Minn. 107, 46 N. W. 318. See Ann. Cas. 1915B, 55.

⁷⁹ *Sorenson v. Carey*, 96 Minn. 202, 104 N. W. 958.

⁸⁰ *Mechling v. McAllister*, 135 Minn. 357, 160 N. W. 1016, distinguishing *Johnson v. Johnson*, 32 Minn. 513, 21 N. W. 725. See § 515.

⁸¹ *Merriam v. Merriam*, 80 Minn. 254, 83 N. W. 162.

such spouse shall be deemed to have elected to take thereunder. And no devise or bequest to a surviving spouse shall be treated as adding to the right or interest secured to such survivor by statute, unless it clearly appears from the contents of the will that such was the testator's intent: Provided, that if the title to the homestead be in litigation, and the same be not determined within the six months aforesaid, then said spouse may so elect within thirty days after said litigation is concluded.⁸³

496. History of statute—Until the enactment of Laws 1875, c. 40, abolishing dower and providing estates of inheritance in lieu thereof, the statute required a surviving wife to elect between a devise of lands, or other provisions made for her by the will of her husband, and her dower in his lands, and she was not entitled to both unless it plainly appeared by the will to have been so intended by the testator. From the enactment of Laws 1875, c. 40, until the adoption of the probate code in 1889, there was no statute relating to an election by a surviving spouse. The probate code (Laws 1889, c. 46, § 65) made provision for an election substantially in the language of the first sentence of the present statute. Laws 1893, c. 116, § 5, added a proviso "that no devise or bequest in any last will or testament to a surviving husband or wife, shall be taken to be in addition to the right or interest secured to such survivor by statute in the estate of such deceased person, unless such clearly appears from the contents of the will to have been the intention of the testator or testatrix." Laws 1897, c. 240, added the proviso as to litigation of the title to a homestead. The revision of 1905 changed the phraseology of the statute slightly but not the effect, and there has been no change since.⁸³

497. Statute reverses common-law rule—At common law a devise or bequest to a widow was presumed to be in addition to dower unless it clearly appeared from the will that it was the intention of the testator that it should be in lieu of dower. Our statute provides that "no devise or bequest to a surviving spouse shall be treated as adding to the right or interest secured to such survivor by statute, unless it clearly appears from the contents of the will that such was the testator's intent." The statute simply reverses the common-law rule.⁸⁴

498. Objects of statute—The primary object of the statute is to reverse the common-law rule that a devise or bequest to a surviving spouse

⁸³ G. S. 1913, § 7239. See 11 A. & E. Ency. of Law (2 ed.) 82; 40 Cyc. 1966; Woerner, Am. Law of Adm. (2 ed.) § 119; 49 L. R. A. (N. S.) 1083.

⁸³ In re Gotzian's Estate, 34 Minn. 159, 24 N. W. 920; McGowan v. Baldwin, 46 Minn. 477, 49 N. W. 251; In re Evans' Estate, 145 Minn. 252, 177 N. W. 126.

⁸⁴ In re Gotzian's Estate, 34 Minn. 159, 24 N. W. 920; Howe Lumber Co. v. Parker, 105 Minn. 310, 117 N. W. 518; In re Evans' Estate, 145 Minn. 252, 177 N. W. 126; Reed v. Dickerman, 12 Pick. (Mass.) 146; Hardy v. Scales, 54 Wis. 452, 11 N. W. 590.

is to be deemed in addition to dower unless a contrary intention clearly appears from the will.⁸⁵ One of the objects of the statute is to provide a statutory estoppel to set at rest, after the expiration of the prescribed period, all question as to whether the survivor has elected to take under the will or under the statute.⁸⁶ Another object of the statute is to avoid by a doubtful construction a taking by a surviving spouse in part under the will and in part under the statute.⁸⁷ The statute does not create new substantive rights.⁸⁸

499. Taking under will and under statute—The general policy of the law contemplates that the wife shall take either as widow under the statute or as devisee or legatee under the will. A condition by which she takes in part under the will and in part under the statute is anomalous, but nevertheless permissible, if such is the intention of the testator. It is one of the objects of the statute to avoid this result by a doubtful construction.⁸⁹ A testator had conveyed lands by warranty deed, his wife not joining. His will gave her one-third of all the estate, both real and personal, and provided that she should also share in that part of the estate given to any child who died without issue living before the testator. A construction of the will which would allow the widow to take under the will, and yet retain her statutory interest in the lands conveyed during the lifetime of the testator, would render the estate liable for breach of the covenants of the deed, and thus affect the scheme of distribution provided for by the will. Held, that such an intention did not clearly appear from the contents of the will as required by statute.⁹⁰

500. Consent to will bars election to take under statute—If a wife consents to the will of her husband at the time of its execution freely and with full knowledge of all the facts she cannot thereafter elect to take under the statute.⁹¹

501. Statute limited to testators leaving children—The statute is limited to the wills of testators leaving children. No very satisfactory reason can be given for this limitation except that the existence of children whose rights may be affected increases the desirability of having a definite and reasonable period fixed for exercising the right of election.⁹²

⁸⁵ See § 497.

⁸⁶ *Boeing v. Owsley*, 122 Minn. 190, 200, 142 N. W. 129; *State v. Probate Court*, 129 Minn. 442, 152 N. W. 845.

⁸⁷ *Howe Lumber Co. v. Parker*, 105 Minn. 310, 117 N. W. 518. See § 499.

⁸⁸ *Boeing v. Owsley*, 122 Minn. 190, 200, 142 N. W. 129; *State v. Probate Court*, 129 Minn. 442, 152 N. W. 845.

⁸⁹ *Howe Lumber Co. v. Parker*, 105 Minn. 310, 117 N. W. 518. See *Johnson v. Johnson*, 32 Minn. 513, 21 N. W. 725;

Mechling v. McAllister, 135 Minn. 357, 160 N. W. 1016.

⁹⁰ *Howe Lumber Co. v. Parker*, 105 Minn. 310, 117 N. W. 518.

⁹¹ *State v. Probate Court*, 129 Minn. 442, 152 N. W. 845. See § 493.

⁹² *Radl v. Radl*, 72 Minn. 81, 75 N. W. 111; *Tracy v. Tracy*, 79 Minn. 267, 82 N. W. 635; *Mechling v. McAllister*, 135 Minn. 357, 160 N. W. 1016; *In re Evans' Estate*, 145 Minn. 252, 177 N. W. 126.

502. Applicable to devise of homestead—The statute is applicable to a will devising a homestead, if the testator left children.⁹³ If a widow renounces a will devising the homestead to her the homestead descends to her and her children under the statute unaffected by the will.⁹⁴ The election of a surviving spouse to take a homestead under a will does not render it subject to the debts of the testator.⁹⁵

503. Right of election personal—Does not descend to heirs or personal representatives—Not assignable—The right given by the statute to the surviving husband or wife to renounce the testamentary disposition of property made by the deceased spouse, is personal to the survivor, and does not pass to his or her personal representative or heirs. Such a renunciation not having been made by the surviving wife during her lifetime, though at all times subsequent to the death of her husband insane, cannot be made on her death by the administrator of her estate, though it might, perhaps, during her life, and within the time prescribed by statute, have been made by her guardian, or by the probate court for her.⁹⁶ The right of election is personal and not assignable.⁹⁷ A widow made, and the probate court recorded, her election to take under the law, instead of under the will of her deceased husband. She did so under a mistake as to her right to take under the law, but she took no valid steps in her lifetime to have her election set aside. After her death her administrator brought an action to recover some of the provisions made for her benefit in the will. Held, that he had no power to make an election for her, and that the court could not ignore the election made in her lifetime of which there was a judicial record.⁹⁸

504. Gift to spouse an offer—A devise or bequest to a surviving spouse is in the nature of an offer in lieu of statutory rights and is not effectual until an election.⁹⁹

505. What constitutes a provision requiring an election—Any provision in a will for a surviving spouse, however inadequate, puts the surviving spouse to an election, unless a contrary intention clearly appears from the will. Our statute expressly provides that "no devise or bequest to a surviving spouse shall be treated as adding to the right or interest se-

⁹³ *Radl v. Radl*, 72 Minn. 81, 75 N. W. 111; *Eckstein v. Radl*, 72 Minn. 95, 75 N. W. 112; *Jones v. Jones*, 75 Minn. 53, 77 N. W. 551; *Tracy v. Tracy*, 79 Minn. 267, 82 N. W. 635; *Schacht v. Schacht*, 86 Minn. 91, 90 N. W. 127; *Connelly v. McMahon*, 122 Minn. 113, 142 N. W. 16; *Hawkinson v. Oleson*, 140 Minn. 298, 168 N. W. 13.

⁹⁴ *Schacht v. Schacht*, 86 Minn. 91, 90 N. W. 127; *Hawkinson v. Oleson*, 140 Minn. 298, 168 N. W. 13.

⁹⁵ *Eckstein v. Radl*, 72 Minn. 95, 75 N. W. 112.

⁹⁶ *Nordquist v. Sahlbom*, 114 Minn. 329, 131 N. W. 323; *Fergus v. Schiable*, 91 Neb. 180, 135 N. W. 448; *State v. Hunt*, 88 Minn. 404, 410, 93 N. W. 314. See 11 L. R. A. (N. S.) 379.

⁹⁷ *In re Service's Estate*, 155 Mich. 179, 118 N. W. 948.

⁹⁸ *Fergus v. Schiable*, 91 Neb. 180, 135 N. W. 448.

⁹⁹ *Arnold v. Livingston*, 157 Iowa 677, 139 N. W. 927.

cured to such survivor by statute, unless it clearly appears from the contents of the will that such was the testator's intent."¹ If there is no provision whatever in a will for a surviving spouse no election is required to take under the statute.² Where a widow was given certain articles of personal property and in addition the same interest that she would be entitled to under the statute, and there was a lapse of a gift to a child, it was held that the widow was not put to an election between her share under the will and her share of the lapsed estate under the statute, the testator dying intestate as to such lapsed estate.³ A widow is put to an election by a provision in the will for her though it is apparent that such provision is not all the testator intended she should have.⁴ A direction to executors in a will to set aside, use, and expend for the testator's widow whatever sums may be necessary, without limit, makes a "provision" for her and puts her to an election.⁵ A condition attached to a devise in trust, that the devisee shall give bond to support testator's widow during life, followed by the filing of such bond by him, and his performance of the conditions thereof, puts the widow to an election.⁶ A devise to a trustee, for the benefit of a surviving spouse, not intended by the testator to be in addition to the statutory right, puts the spouse to an election.⁷

506. Ignorance of law no excuse—It is no excuse for not making a statutory election that the surviving spouse was ignorant of her right and duty to make the election.⁸

507. Time of election—The statutory limitation of six months is a statute of limitations, and when it has fully run against a widow it extinguishes her statutory rights beyond the power of legal or equitable remedies to relieve her, in the absence of fraud entitling her to relief on the ground of equitable estoppel.⁹ The statutory limitation does not run against an insane person.¹⁰ It applies only where the testator died leaving children.¹¹ Where a married man dies without leaving chil-

¹ *Reed v. Dickerman*, 12 Pick. (Mass.) 146; *Hardy v. Scales*, 54 Wis. 452, 11 N. W. 590; *Corry v. Lamb*, 45 Ohio St. 203, 12 N. E. 660; *Hilliard v. Binford*, 10 Ala. 977; 11 A. & E. Ency. of Law (2 ed.) 84; 40 Cyc. 1966.

² *Hawkinson v. Oleson*, 140 Minn. 298, 168 N. W. 13; *Burrall v. Bender*, 61 Mich. 608, 28 N. W. 731; *Symmons' Administrator v. Suninos*, 150 Ky. 85, 150 S. W. 59; 11 A. & E. Ency. of Law (2 ed.) 83; 40 Cyc. 1971. *Contra*, *Watrous v. Watrous*, 180 Iowa 884, 163 N. W. 439.

³ *Johnson v. Johnson*, 32 Minn. 513, 21 N. W. 725. See *Mechling v. McAllister*, 155 Minn. 357, 160 N. W. 1016.

⁴ *Willey v. Lewis*, 113 Wis. 618, 88 N. W. 1021.

⁵ *Van Steenwyck v. Washburn*, 59 Wis. 483, 17 N. W. 289.

⁶ *Turner v. Oberheu*, 89 Wis. 1, 61 N. W. 280.

⁷ *In re Evans' Estate*, 145 Minn. 252, 177 N. W. 126.

⁸ *Schubert v. Barnholt*, 177 Iowa 232, 158 N. W. 662.

⁹ *Ludington v. Patton*, 111 Wis. 208, 86 N. W. 571.

¹⁰ *Gaster v. Gaster's Estate*, 90 Neb. 529, 134 N. W. 235.

¹¹ *Tracy v. Tracy*, 79 Minn. 267, 82 N. W. 635.

dren it is an open question whether his widow is bound to make an election within a reasonable time. Evidence held not to show any unreasonable delay on the part of a widow in such a case.¹² The election may probably be made before the probate of the will.¹³ The period of "six months after the probate of the will" is not extended by an appeal from such probate.¹⁴

508. Sufficiency of election—No formal or technical words are required in making the statutory election. It is sufficient if it appears from the writing that the surviving spouse desires to take either under the will or the statute.¹⁵ A paper filed by a widow, requesting the court to set off to her in her own name her legal share of the realty owned by her deceased husband and described in his will, held an election to take under the statute.¹⁶

509. Failure to renounce will equivalent to election to take thereunder—A failure to renounce a will as provided by the statute is deemed an election to take under the will.¹⁷

510. Must be absolute and extend to whole will—The election must be absolute and cannot be conditional on the construction placed on the will.¹⁸ Where a will gives the spouse both real and personal property an election cannot be limited to one form only.¹⁹

511. Parol evidence—Parol evidence is inadmissible to prove that the testator intended a gift as in addition to what the beneficiary would receive under the statute. The statute provides that such intention must appear "from the contents of the will." In other words the declarations of the testator are inadmissible to prove such intent. But parol evidence in the sense of evidence of the surrounding circumstances and the condition of testator's property is admissible as in other cases.²⁰

512. Election by probate court for incompetents—A probate court having jurisdiction of an insane or otherwise incompetent person may make an election for him or direct his guardian to make it under in-

¹² *Tracy v. Tracy*, 79 Minn. 267, 82 N. W. 635.

¹³ See *Atherton v. Corliss*, 101 Mass. 40; *Stone v. Vandermark*, 146 Ill. 312, 34 N. E. 150; *Hutchins v. Dante*, 40 D. C. App. 262.

¹⁴ See *Bunker v. Murray*, 182 Mass. 335, 65 N. E. 420; *Albright v. Albright*, 70 Wis. 528, 36 N. E. 254.

¹⁵ *Richardson v. Johnson*, 97 Neb. 749, 151 N. W. 314. See, as to what constitutes an election, 49 L. R. A. (N. S.) 1072.

¹⁶ *Shedenhelm v. Cafferty*, 174 Iowa 195, 156 N. W. 340.

¹⁷ *Eddy v. Kelly*, 72 Minn. 32, 74 N. W. 1020; *Jones v. Jones*, 75 Minn. 53, 77 N. W. 551; *Schacht v. Schacht*, 86 Minn. 91, 90 N. W. 127; *Nordquist v. Sahlbom*, 114 Minn. 329, 131 N. W. 323; *Boeing v. Owsley*, 122 Minn. 190, 200, 142 N. W. 129.

¹⁸ *Stearns v. Bemis*, 185 Mass. 196, 70 N. E. 44.

¹⁹ *Crawford v. Bloss' Estate*, 114 Mich. 204, 72 N. W. 148; *In re Powell's Estate*, 225 Pa. 518, 74 Atl. 421.

²⁰ *Sherman v. Lewis*, 44 Minn. 107, 46 N. W. 318. See § 515.

structions from the court.²¹ In making the election the court should take into account not only the value of the property, but also the circumstances and condition of the parties, the contents of the will, and the probabilities as to what the survivor would do if able to select for himself.²² When the facts are brought to the attention of the proper probate court it is its duty to make or order an election and its failure to do so will not prejudice the rights of the incompetent though the statutory time for an election has expired.²³

513. Election construed in connection with will—The election of a surviving spouse to take under a will must be construed with reference to the intention of the testator as expressed in the will.²⁴

514. Withdrawal of election—Under the provisions of G. S. 1913, §§ 7237, 7238, 7239, 7243, the surviving spouse who has consented to her husband's will, and codicils added thereto, cannot arbitrarily withdraw her consent and elect to take under the statute instead of under the will. Where the husband procures his wife to consent in writing to his will and to codicils added thereto, there is cast upon him the affirmative duty of making a fair disclosure of his property so that she may have knowledge of the effect of the will upon her rights and intelligently determine whether she will consent; and, if such disclosure is not made, the surviving wife, not being guilty of laches, and not being precluded from doing so by contract or estoppel, may, after his death, rescind her consent and elect to take under the statute.²⁵

515. Waiver and estoppel—If a widow elects to take under a will she is estopped from claiming any statutory interest in her husband's realty conveyed by him during coverture without her joining in the deed.²⁶ The above rule has been held to apply where the will provided that the portion allotted to the wife by the will should be in lieu of her dower and statutory right.²⁷ If a widow elects to take under a will she is estopped from taking any of her husband's property under the statute as to

²¹ *State v. Ueland*, 30 Minn. 277, 15 N. W. 245; *Washburn v. Van Steenwyk*, 32 Minn. 336, 20 N. W. 324; *Culver v. Hardenbergh*, 37 Minn. 225, 233, 33 N. W. 792; *Fairchild v. Marshall*, 42 Minn. 14, 43 N. W. 563; *State v. Hunt*, 88 Minn. 404, 93 N. W. 314; *Nordquist v. Sahlbom*, 114 Minn. 329, 131 N. W. 323. See 49 L. R. A. (N. S.) 1108.

²² *State v. Hunt*, 88 Minn. 404, 93 N. W. 314. See *In re Stevens' Estate*, 163 Iowa 364, 144 N. W. 644 (court may consider what is for the best interest of the heirs of the widow).

²³ *Gaster v. Gaster's Estate*, 90 Neb. 529, 134 N. W. 235.

²⁴ *Baldwin v. Zlen*, 117 Minn. 178, 134 N. W. 498; *Connelly v. McMahon*, 122 Minn. 113, 142 N. W. 16.

²⁵ *State v. Probate Court*, 129 Minn. 442, 152 N. W. 845; *Lindquist v. Security Loan & Trust Co.*, 142 Minn. 271, 172 N. W. 121. See *Minnesota Loan & Trust Co. v. Douglas*, 135 Minn. 413, 418, 161 N. W. 158; *Rogers v. Benz*, 136 Minn. 83, 161 N. W. 395, 1056.

²⁶ *Fairchild v. Marshall*, 42 Minn. 14, 43 N. W. 563; *Howe Lumber Co. v. Parker*, 105 Minn. 310, 117 N. W. 518.

²⁷ *Howe Lumber Co. v. Parker*, 105 Minn. 310, 117 N. W. 518.

which he dies intestate.²⁸ Merely accepting rents of land devised to her by a will does not estop a widow from claiming under the statute.²⁹ The fact that a widow acts as executrix of the will does not constitute an election to take thereunder or estop her from claiming under the statute.³⁰ A contract between husband and wife during coverture cannot estop the wife from claiming under the statute. Such contracts are forbidden by G. S. 1913, § 7147.³¹ The right of election cannot be taken from a widow either by the will or by a deed of release executed by her to her husband during coverture.³² Where a widow accepts a provision for an annual income on consideration of a deed of her inheritance rights, at the request of the testator, such provision becomes contractual between her and the estate, and binds the estate to a fulfillment of the conditions upon which her acceptance was made.³³ A widow has been held not estopped from electing to take under the statute by permitting the recording of a deed to her by her husband in connection with his will, made in pursuance of a void antenuptial agreement.³⁴ The question of waiver is one of fact and is not lightly to be inferred.³⁵ The fact that a widow accepts the provisions made for her in a will does not estop her from attacking other devises or legacies.³⁶ The fact that one took a legacy under the will of testator does not estop her from taking under the will of the testator's widow property which the latter received by renouncing her claim under testator's will, and taking under the statute.³⁷ A spouse does not waive his rights by consenting to the probate of a will.³⁸ If a claim of waiver is based on a writing parol evidence is admissible to show the intention of the spouse not to waive his rights.³⁹

516. Right to inherit from beneficiaries of will unaffected—An election not to take under a will does not affect the right to inherit as heir of a legatee or devisee in the will.⁴⁰ Conversely an election to take un-

²⁸ *Mechling v. McAllister*, 135 Minn. 357, 160 N. W. 1016. See *Johnson v. Johnson*, 32 Minn. 513, 21 N. W. 725; *McAllister v. McAllister*, 183 Iowa 245, 167 N. W. 78; 30 Harv. L. Rev. 649; Ann. Cas. 1918B, 986.

²⁹ *Pring v. Swarm*, 176 Iowa 153, 157 N. W. 734.

³⁰ *Thorpe v. Lyones*, 160 Iowa 415, 142 N. W. 82; *Shedenhelm v. Cafferty*, 174 Iowa 195, 156 N. W. 340.

³¹ *Berry v. Donald*, 168 Iowa 744, 150 N. W. 1048. See *Merriam v. Merriam*, 80 Minn. 254, 83 N. W. 162; *Erickson v. Robertson*, 116 Minn. 90, 133 N. W. 164.

³² *Wilber v. Wilber*, 52 Wis. 298, 9 N. W. 163.

³³ *Merriam v. Merriam*, 80 Minn. 254, 83 N. W. 162.

³⁴ *Rowell v. Barber*, 142 Wis. 304, 125 N. W. 937.

³⁵ *McGrath v. Quinn*, 218 Mass. 27, 105 N. E. 555.

³⁶ *Trustees v. Denmark*, 141 Ga. 390, 81 S. E. 238.

³⁷ *Been v. Kimberly*, 72 Wis. 343, 39 N. W. 542.

³⁸ *McGrath v. Quinn*, 218 Mass. 27, 105 N. E. 555.

³⁹ *McGrath v. Quinn*, 218 Mass. 27, 105 N. E. 555.

⁴⁰ *Upham v. Parker*, 220 Mass. 454, 107 N. E. 994.

der a will does not affect the right to inherit as heir of a legatee or devisee in the will.⁴¹

517. Effect on judgment liens—Prior to the statute making a judgment against a husband a lien on his wife's statutory interest in his land it was held that the failure of a widow to elect under the statute did not give the creditor a lien on the land which would descend to her under the statute.⁴²

518. On whom binding—A widow's election to take under a will is binding on her devisees.⁴³ An election is binding on the heirs of the electing spouse.⁴⁴

519. Effect on other beneficiaries of renouncing will—An election of a surviving spouse to renounce the will does not render the will wholly inoperative as to the other beneficiaries. As to them it will be enforced as nearly as possible in accordance with the intention of the testator.⁴⁵

520. Loss from election to take against will—Upon whom falls—Sequestration and compensation—It is the general rule that if an election of a widow to take against the will results in loss to general or specific devisees or legatees the property given to the widow by the will should be sequestered and used to compensate such devisees and legatees, unless the will directs otherwise. If there must be a loss to some of the beneficiaries, it should ordinarily fall on the residuary devisees or legatees rather than on general or specific devisees or legatees. Such loss may be apportioned. The doctrine of compensation is flexible and will be applied so as best to carry out the intention of the testator, who is presumed to have had in mind the possibility that his wife would elect to take against the will.⁴⁶ Where the will provides for the disposition of the entire residue caused by the election of the widow against the will, the principle of equitable compensation to disappointed beneficiaries is not applied.⁴⁷

⁴¹ *Rice v. Saxon*, 28 Neb. 380, 44 N. W. 456.

⁴² *New Hampshire Savings Bank v. Barrows*, 77 Minn. 138, 79 N. W. 660.

⁴³ *Arnold v. Livingston*, 157 Iowa 677, 139 N. W. 927.

⁴⁴ *Martin v. Baltey*, 87 Kan. 582, 125 Pac. 88.

⁴⁵ *Brandenburg v. Thorndike*, 139 Mass. 102, 28 N. E. 575; *Shreve v. Shreve*, 176 Mass. 456, 57 N. E. 686; *Crocker v. Crocker*, 230 Mass. 478, 120 N. E. 110; *Allen v. Patee* (Kan.) 179 Pac. 333; *Pittman v. Pittman*, 81 Kan. 643, 107 Pac. 235; *In re Reynold's Will*, 151 Wis. 375, 138 N. W. 1019; *In re Grobe's Estate*, 101 Neb. 786, 165 N. W. 252; *Adams v. Le-groo*, 101 Me. 302, 89 Atl. 63. See *Brown*

v. Brown, 42 Minn. 270, 44 N. W. 250; 11 A. & E. Ency. of Law (2 ed.) 117; 40 Cyc. 1991; 27 L. R. A. (N. S.) 602; Ann. Cas. 1913E, 416; 1918C, 412; 32 Harv. L. Rev. 861.

⁴⁶ *Dunlap v. McCloud*, 84 Ohio St. 272, 95 N. E. 774; *Crocker v. Crocker*, 230 Mass. 478, 120 N. E. 110; *Hesseltine v. Partridge*, 236 Mass. 77, 127 N. E. 429; 11 A. & E. Ency. of Law (2 ed.) 117; 40 Cyc. 1993; 28 R. C. L. 335; *Woerner*, Am. Law of Adm. (2 ed.) § 119; 5 A. L. R. 1628; 27 L. R. A. (N. S.) 606; Ann. Cas. 1913E, 425; 32 Harv. L. Rev. 861. See § 521.

⁴⁷ *Crocker v. Crocker*, 230 Mass. 478, 120 N. E. 110.

521. Effect of renouncing life estate—Acceleration of remainder—Where a widow is given a life estate and she elects to take against the will the remainders are accelerated and vest in enjoyment immediately, as if she had died, unless a contrary intention is plainly manifested by the will or such acceleration would work an injustice to other beneficiaries. According to the weight of authority it is immaterial that the remainders are contingent. Contribution may be enforced between remaindermen to equalize their losses resulting from the election.⁴⁷ The general rule is that remainders after a life estate to a widow are accelerated by her waiver of the life estate, but this rule does not apply if it is obvious that the testator did not intend such result.⁴⁸ In case of a bequest of a balance of an estate to residuary legatees they will take the fund made available by the election of the widow to take against the will, in preference to acceleration of the remainder.⁴⁹ Where testator's wife, to whom a life use is bequeathed, elects to take under the statute, and her election results to the disadvantage of legatees other than the remaindermen, the doctrine of acceleration of remainders does not apply, as it would if all legatees were equally affected by the election, and the fund will be sequestered and the proceeds during the life of the widow applied to the benefit of the disappointed legatees, including residuary legatees.⁵⁰ Where a widow waived the life interest in a fund given her by a will, and in lieu thereof took one-half of the estate, it was held that the income of such fund should be applied to make up the loss of the legatees, whose shares were thereby decreased; it appearing that such course would most nearly carry out the purpose of the testator.⁵¹ Devises or bequests, subordinate to a life estate in a widow and contingent upon her death, or payment of which is postponed until then, become presently payable upon her election to take under the statutes of descent and distribution. In its effect on all claims under the will her election is equivalent to her death.⁵²

522. Contingent remainders—The rule that a contingent remainder requires a precedent estate to support it does not apply in case of an election of a widow to take under the statute.⁵³

⁴⁷ *Meek v. Trotter*, 133 Tenn. 145, 180 S. W. 176; *Davis v. Hilliard*, 129 Md. 348, 99 Atl. 420; *Sherman v. Flack*, 283 Ill. 457, 119 N. E. 293; *Rench v. Rench*, 184 Iowa 1372, 169 N. W. 667; *American Nat. Bank v. Chapin* (Va.) 107 S. E. 636; 11 A. & E. Ency. of Law (2 ed.) 118; 40 Cyc. 1992; 28 R. C. L. 333; 18 L. R. A. (N. S.) 272; L. R. A. 1915A, 671; Ann. Cas. 1913E, 416; Ann. Cas. 1918C, 412; 5 A. L. R. 1632; 17 A. L. R. 314; 32 Harv. L. Rev. 861.

⁴⁸ *Cotton v. Fletcher*, 77 N. H. 216, 90 Atl. 510; *In re Disston's Estate*, 257

Pa. 537, 101 Atl. 804; *Adams v. Legroo*, 111 Me. 302, 89 Atl. 63; *Swan v. Austell*, 253 Fed. 807. See 5 A. L. R. 1629.

⁴⁹ *Crocker v. Crocker*, 230 Mass. 478, 120 N. E. 110.

⁵⁰ *Sellick v. Sellick*, 207 Mich. 194, 173 N. W. 609. See § 520; 5 A. L. R. 1634.

⁵¹ *Cotton v. Fletcher*, 77 N. H. 216, 90 Atl. 510.

⁵² *In re Disston's Estate*, 257 Pa. 537, 101 Atl. 804.

⁵³ *Wakefield v. Wakefield*, 256 Ill. 296, 100 N. E. 275.

523. Conflict of laws—The surviving spouse of a non-resident testator may, though also a non-resident, renounce the will and claim as statutory heir. Such a renunciation, when properly made, will estop the survivor from thereafter claiming under the will in this state or elsewhere. The renunciation contemplated by G. S. 1913, § 7239, must be made in the probate court of this state in which the foreign will is proved, or, if already proved elsewhere, in which it is allowed and filed; and the existence or non-existence in other states of statutes relating to election can be material only upon a question of common-law estoppel.⁵⁴ Where a will covers lands lying in different states an election made at the domicil applies to lands in other states.⁵⁵ A resident of Iowa made his will, in which, after giving to his wife certain real and personal property in that state, he devised and bequeathed the residue of his estate in equal shares to his wife and his son. The son died before his father. The testator, at the time of his death, had no lineal descendants. His widow filed in the Iowa courts an election to accept the provisions of the will. The testator owned real estate in Minnesota which was a part of the residue so devised. Held, that the election in Iowa of the widow to accept the provisions of the will estops her from taking under the statutes of this state property of the testator as to which, by reason of the lapsing of the devise to the son, he died intestate.⁵⁶ An election made by a probate court in another state under a statute of that state for an insane widow has been held conclusive upon the courts of this state with reference to lands in this state.⁵⁷ A surviving spouse cannot claim under a will in one state and against it in another.⁵⁸ A probate court of this state with jurisdiction to administer upon the real estate here of a non-resident decedent has authority to make an election for an insane widow of such decedent if no election has already been made at the domicil of the decedent.⁵⁹ Where, after making his will, a

⁵⁴ *Boeing v. Owsley*, 122 Minn. 190, 142 N. W. 129; *Mechling v. McAllister*, 135 Minn. 357, 160 N. W. 1016. See Ann. Cas. 1914A, 446.

⁵⁵ *Washburn v. Van Steenwyk*, 32 Minn. 336, 20 N. W. 324; *Fairchild v. Marshall*, 42 Minn. 14, 43 N. W. 563; *Mechling v. McAllister*, 135 Minn. 357, 160 N. W. 1016; *Boeing v. Owsley*, 122 Minn. 190, 201, 142 N. W. 129; *Mettler v. Warner*, 98 Neb. 111, 152 N. W. 327. See *Stigg v. Atkinson*, 144 Mass. 564, 12 N. E. 354; Ann. Cas. 1914A, 446; 32 Harv. L. Rev. 288.

⁵⁶ *Mechling v. McAllister*, 135 Minn. 357, 160 N. W. 1016. See, for a criticism of this case, 30 Harv. L. Rev. 649.

⁵⁷ *Washburn v. Van Steenwyk*, 32 Minn. 336, 20 N. W. 324; *Fairchild v.*

Marshall, 42 Minn. 14, 43 N. W. 563. See *Mettler v. Warner*, 98 Neb. 111, 152 N. W. 327.

⁵⁸ *Washburn v. Van Steenwyk*, 32 Minn. 336, 357, 20 N. W. 336; *Boeing v. Owsley*, 122 Minn. 190, 201, 142 N. W. 129; *Lawrence's Appeal*, 49 Conn. 411; *Wood v. Conqueror Trust Co.*, 265 Mo. 511, 178 S. W. 201; *Martin v. Battey*, 87 Kan. 582, 125 Pac. 88; L. R. A. 1915F, 680; Ann. Cas. 1914A, 446. See *Evans v. Heilman*, 37 S. D. 499, 159 N. W. 55 (claim of widow renouncing will in another state held under a deed and not under the will); *Staigg v. Atkinson*, 144 Mass. 564, 12 N. E. 354.

⁵⁹ *Washburn v. Van Steenwyk*, 32 Minn. 336, 354, 20 N. W. 324.

testator changed his domicil, it was held that the law of the place where he made his will governed in determining whether he intended to put his wife to an election.⁶⁰

PARTICULAR WILLS CONSTRUED

524. Disinheriting subsequent-born child—After certain specific legacies and devises a will gave all the residue to the wife of the testator, with this provision: "And her rights under this residuary provision shall not be affected or changed by the birth of any child of mine, if any shall be born to me before or after my decease." Held, to manifest an intention not to provide for a child born after the execution of the will.⁶¹

525. Life estate to widow with remainder in fee to children—A will held to vest a life estate in the widow of the testator and a remainder in fee in his children.⁶²

526. Trust for support of widow and children—Suspension of power of sale until youngest child became of age—A testator, who died leaving five minor children, devised his real estate in trust to collect the rents and profits, and apply them to the support of his widow, and the support and education of his children, with power in the trustee to sell a designated part, the will containing these clauses: "It is my desire that no division of the balance of my real estate shall be made amongst my children until the youngest child shall become of lawful age. * * * When my youngest child shall become of lawful age, all the rest and residue of my real estate and personal property, where-soever situated, shall be equally divided between my said wife and our children, share and share alike," etc. Held, that by the words "youngest child," is meant not the youngest child which shall live to majority, but the youngest child living when the will took effect at the death of the testator; that the suspension of the power of alienation depended on the minority of such child, and would terminate on such child coming of age, or at his death before coming of age, and that such suspension is valid.⁶³

527. Mistake in description of lots disregarded—A testator devised to his widow "the house where we now live, with the grounds connected therewith, being lots 1, 2, and 3, and two-thirds of lot 4, in block 225, situate at the junction of Eighth and Helen streets, in the city of Minneapolis." The lots mentioned were not situated at the junction

⁶⁰ *Staigg v. Atkinson*, 144 Mass. 564, 12 N. E. 354. See § 158.

⁶¹ *Prentiss v. Prentiss*, 14 Minn. 18(5).

⁶² *Chemedlin v. Prince*, 15 Minn. 331 (263).

⁶³ *Simpson v. Cook*, 24 Minn. 180; *Officer v. Simpson*, 27 Minn. 147, 6 N. W. 488.

of Eighth and Helen streets, but at the junction of Eighth and Minnetonka streets. Those lots would take only a part of the house, which was situated on lots 4 and 5, at the junction of Eighth and Helen streets. The testator did not own lot 1, and had conveyed (subject to a condition of forfeiture, as is claimed,) the one-third of lot 2 next lot 1, but did own lots 3, 4, and 5, and the two-thirds of lot 2 next lot 3. Held, that the description by the numbers of the lots was a mistake, and must be rejected.⁶⁴

528. Trust in executor with power of sale after certain period—Meaning of "heirs"—A will gave a devise to the executor in trust with a power of sale five years after the death of the testatrix, unless her heirs should agree to postpone the sale for a longer period. Held, that the word "heirs" meant all the beneficiaries of the trust.⁶⁵

529. Trust in executors for benefit of son-in-law—Title held to vest in him under statute of uses—A will contained a devise to executors in trust to permit the testator's son-in-law "to use and occupy the same for and during the term of his natural life, and after his decease in trust" for another. Held, that the legal estate in the land for his life was vested in the son-in-law, by the statute of uses, and that his interest was assignable, and subject to be sold for his debts.⁶⁶

530. Gift to widow of statutory interest—Widow held entitled to share in lapsed devise—Election—On November 5, 1879, J. executed his last will and testament, bearing date of that day. The first clause provided as follows: "First, I give and bequeath to my beloved wife, Elizabeth S., in addition to the amount now allowed her by law out of my estate, and which it is my will she shall have on my decease, my gold watch and chain." By subsequent clauses he devised and bequeathed all the rest, residue, and remainder of his estate, real and personal, in certain specific shares and portions, to his four children. The testator died March 16, 1883, leaving surviving him his widow and three of the children named in the will, the fourth having died without issue in the lifetime of the testator. Held, first, that, under the will, the widow was entitled, in addition to the watch and chain, to the same share of the estate as she would have been entitled to under the law in force at the date of the will, had the testator died wholly intestate; second, that in addition thereto the widow was entitled, under the statutes of descent and distribution, to one-third of the devise and legacy which lapsed by reason of the death of the devisee and legatee without issue during the lifetime of the testator.⁶⁷

⁶⁴ *Butler v. Trustees*, 27 Minn. 355, 7 N. W. 363.

⁶⁵ *Greenwood v. Murray*, 28 Minn. 120, 9 N. W. 629.

⁶⁶ *Farmers Nat. Bank v. Moran*, 30 Minn. 165, 14 N. W. 805.

⁶⁷ *Johnson v. Johnson*, 32 Minn. 513, 21 N. W. 725. See § 515.

531. Residuary gift to children—Investment of funds for income until they became of age—A residuary gift to children with direction to executors to invest it in bonds, and to expend so much of the income as might be necessary for the maintenance and benefit of the children during their minority, as the necessities of each might require, and then pay over to each his share on his attaining the age of twenty-one years.⁶⁸

532. Gift to wife in lieu of statutory interest—Election—A testator provided for his wife as follows: "I direct my executors to bear constantly in mind the wants of my wife, and to set aside, use and expend whatever moneys may be necessary, consistently with her condition, to provide for her comfort and physical health; and I place no limit upon the sums which they may expend for the purposes indicated." The testator then created certain trusts, founded certain charities, made many bequests to his children and relatives, gave his executors power to manage and carry on his business until his estate should be settled, and finally disposed of the residue of his estate, one-half to his two daughters and one-half to his brothers. Held, that the will called for an election by the widow.⁶⁹

533. Residuary gift to wife—A gift to a wife of an undivided one-third of the residue "of all my estate and property," where the testator had a qualified, partial or undivided interest, construed.⁷⁰

534. Life estate to wife with remainder to children—Provision for support of children—Power of sale—A testator by his will devised and bequeathed all his real and personal property to his wife for life, and provided that at her death any and all of the property and estate so granted, "or any part of the same then left by her," should be divided among his children. The will also contained a provision, as follows: "I make this a condition that my said wife shall, out and from said property left her, provide for the maintenance and education of my children." A power to sell and convert the property is also given to the executors. Held, that upon his death a life-estate in the realty vested in the wife and a remainder in fee in the children, and in like manner similar interests were created in the personalty, and in case of sales the devisees or legatees would take similar interests in the proceeds. Held, also, that by the terms of the will an implied power of disposition is given to the widow of so much of the capital fund or corpus of the estate as may be reasonably necessary for her own support and the maintenance and education of the children after first applying the income thereto; that the provision for the widow is made in consideration that

⁶⁸ *Huntsman v. Hooper*, 32 Minn. 163, 20 N. W. 127.

⁶⁹ *Washburn v. Van Steenwyk*, 32 Minn. 336, 20 N. W. 324.

⁷⁰ *In re Gotzian's Estate*, 34 Minn. 159, 24 N. W. 920.

she shall so provide for the children from the property left her, and that for such purpose, as well as her own support, the income is the primary fund.⁷¹

535. Directions to executors to sell estate and invest proceeds in bonds—Power and direction to executors to sell all the residue of an estate and invest the proceeds in government bonds and to keep them so invested until a specified date, when residuary legacies were to be paid.⁷²

536. Direction to pay debts—A gift of all the testator's property to his wife "after my lawful debts are paid within a reasonable time."⁷³

537. Provision against division of lot—Proceeds of sale to be divided between three sons—A devise of a single lot to three sons with a provision that "said lot shall not be divided into separate parcels, but sold together, and the proceeds of the sale thereof divided between them."⁷⁴

538. Word "issue" construed as one of purchase—The word "issue" in a will held one of purchase and not of limitation.⁷⁵

539. Trust in executrix for use of son of testator—Son held to take fee under statute of uses—Conditional limitation—A gift of a farm to an executrix in trust for the use of a son of the testator, with a provision for a deed to the son in ten years after the death of the testator and a provision that the farm should go to the issue of the son in case of his death within the ten years or before the death of the testator. Held, that the attempted trust was void under the statute of uses and that the devise was one in fee, with a conditional limitation to the issue of the devisee in case of his death within ten years of the death of the testator.⁷⁶

540. Authority to executors to execute notes for firm debts—Authority to executors to join with partner of testator in the execution of notes or other contracts for renewing and continuing any firm indebtedness existing at the time of the death of the testator.⁷⁷

541. Residuary clause held not to cover interest under marriage settlement—A residuary clause concluding, "which shall remain to me at my death," held not to dispose of an interest under a marriage settlement.⁷⁸

⁷¹ In re Oertle's Estate, 34 Minn. 173, 24 N. W. 924.

⁷² Cheever v. Converse, 35 Minn. 179, 28 N. W. 217.

⁷³ Gates v. Shugrue, 35 Minn. 392, 29 N. W. 57.

⁷⁴ Brown v. Brown, 42 Minn. 270, 44 N. W. 250.

⁷⁵ Whiting v. Whiting, 42 Minn. 548, 44 N. W. 1030.

⁷⁶ Whiting v. Whiting, 42 Minn. 548, 44 N. W. 1030.

⁷⁷ Mattison v. Farnham, 44 Minn. 93, 46 N. W. 347; Brown v. Morrill, 45 Minn. 483, 48 N. W. 328; Lovejoy v. McDonald, 59 Minn. 393, 61 N. W. 320.

⁷⁸ Sherman v. Lewis, 44 Minn. 107, 46 N. W. 318.

542. Clause saving statutory interest of wife—A will devising and bequeathing, in terms, all the testator's real and personal property, contained this clause: "This disposition of my property is subject to, and not intended to interfere with, the right of dower or other legal right of my wife, Olive Redford, in and to my said property or any of the same." Held, that the clause qualifies the bequest so as to exclude from it that part of the personal property which, in the absence of a testamentary disposition, the statute gives to the widow.⁷⁹

543. Provision for continuing and closing up a firm business—Power given executors to contract, deed, mortgage, etc.—A will provided as follows: "I hereby authorize, empower, and direct the executors of my will to carry on my copartnership business in which I have been for years and now am engaged with Sumner W. Farnham, under the firm name of Farnham & Lovejoy, for such length of time as to my said executors may seem necessary and expedient, and for the best interests of my estate and my said copartnership business; I hereby giving full and complete authority to my said executors to join with my said copartner in the execution of any and all contracts, deeds, mortgages, leases, releases, notes, bonds, and all other papers and instruments that may become necessary for the proper conduct of said business, for the sale or mortgaging of firm's pine lands and stumpage, for the purpose of borrowing money for said business, and renewing and continuing any firm indebtedness that there may be at my decease, and for doing any and all other acts that may be deemed necessary and advisable by my said executors in and about said copartnership business. And further, in reference thereto, I desire and direct that my said copartnership business shall, by my said executors, be closed up and settled as soon as may be practicable after my decease, they first giving due consideration to my directions in this item contained, and avoiding, as far as may be practicable, all unnecessary loss, damage, or difficulty to my said copartner, to said business, and to my estate." Held, to authorize the executors to join with the surviving partner in the execution of a mortgage on real property of the firm, and also to join with him in a mortgage to correct a mistake of description in a like instrument executed by the testator and his partner in his lifetime, upon firm property. Held, also, to authorize the executors to sell and convey certain premises for the purpose of paying claims against the estate, which was insolvent.⁸⁰

⁷⁹ Redford v. Redford, 45 Minn. 48, 47 N. W. 308.

⁸⁰ Brown v. Morrill, 45 Minn. 483, 48 N. W. 328; Lovejoy v. McDonald, 59 Minn. 393, 61 N. W. 320.

544. General devise to wife held not to include interest of wife in homestead—A devise by a testator to his wife of "one-half of all I own" held not to include the estate or interest of the wife in a homestead.⁸¹

545. Trust for a charity—A trust for a charity, with a provision for the organization of a corporation to carry out the charity.⁸²

546. Charitable devise held void for indefiniteness—A devise describing the devisees only as "those members of the 'Society of the Most Precious Blood' who are under my control, and subject to my authority, at the time of my death," held void because not pointing out the beneficiaries with sufficient certainty.⁸³

547. Trust for benefit of wife and children—Contingent remainders in children—A will provided as follows: "I hereby give, bequeath and devise unto Thomas W. Coleman, John M. Armstrong and Albert Armstrong, all my property and estate, real, personal and mixed, of whatever kind or wherever situated, in trust to be by them held, for the benefit of my wife, Jane Armstrong, during her lifetime, and after her death for the benefit of my children (or their survivors) in the proportion that each would be entitled to under law, that is share and share alike, had this will not been executed, until my said children shall become of lawful age, and I hereby fully authorize and empower the trustees aforesaid to manage my said estate committed to their care in the manner that to them shall be deemed best for the interests of said estate and the beneficiaries thereof. It is my wish that my said trustees shall pay to my wife during her life, such monthly payment for the support of herself and my children, as will equal about the average net monthly income from my said estate, or as may be necessary for her and their reasonable support and comfort, and if there shall be a surplus of income over the expenses necessary for the support of my wife and children, then the said trustees will invest such surplus for the benefit of my legatees, in such a way as to them may seem advisable. In case of the death of my wife during the minority of my children, I direct the trustees aforesaid to pay to the guardian or guardians of my children such reasonable sum quarterly, as may be necessary for their support and education until they shall respectively become of age. And I hereby constitute and appoint my wife and my father-in-law, Thomas W. Coleman, guardians of my children. Held, to create contingent remainders in children.⁸⁴

⁸¹ *McGowan v. Baldwin*, 46 Minn. 477, 49 N. W. 251.

⁸² *Atwater v. Russell*, 49 Minn. 22, 51 N. W. 624; *Id.*, 49 Minn. 57, 51 N. W. 629.

⁸³ *Society of the Most Precious Blood v. Moll*, 51 Minn. 277, 53 N. W. 648.

⁸⁴ *Armstrong v. Armstrong*, 54 Minn. 248, 55 N. W. 971.

548. Trust for charitable purposes—Other legacies—Meaning of “net income” for payment of debts and legacies—Funds liable for payment of debts—A will disposing of a large estate provided for the estate being held in trust and administered during a possible period of twenty-five years, before final distribution to the residuary legatees and devisees. There were debts to a large amount, some of which greatly exceeded the yearly income of the estate. The testator gave to various persons and charities legacies of specific amounts, mostly payable in ten annual instalments. He then (in item 18) gave to two brothers and to his widow, each, for life, or during the trust term of twenty-five years, one-fourth of the “net income of my estate * * * subject to the payment of my debts and the legacies and instalments of legacies above mentioned as they shall fall due;” and (by item 19) he gave to certain other kindred the remaining one-fourth of “said net income subject to the payment of the debts and legacies aforesaid.” The above-recited provisions construed as subjecting the “income,” and not the “estate,” to the payment of the debts and fixed legacies; the remainder of the income, after such application, being the “net income” bequeathed by items 18 and 19 of the will. Will further construed (other important provisions being referred to) as contemplating that the administration of the estate during each year should be treated as an entirety, or by itself; each year’s income being used first to pay the annual instalments or the fixed legacies payable in that year, and the debts which may fall due in the same year, the remainder of that year’s income being payable to the legatees named in items 18 and 19. The will did not contemplate an accumulation or reservation of any year’s income to pay legacies or debts to fall due in any succeeding year. It did not contemplate that mortgaged real estate should be the primary fund for the payment of the mortgage debts.⁸⁸

549. Life estate to wife with remainder to heirs at law—Heirs at law held to mean next of kin—A will was made in the year 1884, by a married man. He had no children, and his wife and himself were so advanced in age that it could not be expected that children would thereafter be born, and none were born, to them. By the terms of this will he devised to his wife a life estate in all of his real property, and also gave to her a share of his personal estate. Subject to said life estate, he devised certain tracts of land to other persons, naming them. Then followed the following paragraphs: “Sixth. I give and bequeath all the rest of my personal property of every kind whatsoever, including notes, bonds, mortgages, and contracts, to my heirs at law, share and share alike. Seventh, I will, at the death of my said wife, Dortha Swenson, that all my said real estate not heretofore previously disposed of shall thereupon pass to and be vested in fee in my heirs at law, share and share alike.” He died in 1891, about two years after the Probate Code

⁸⁸ *Hale v. St. Paul*, 54 Minn. 421, 56 N. W. 63.

of 1889 took effect; his wife surviving. Held, that the words "heirs at law," as used in the sixth and seventh paragraphs of the will, meant "next of kin."⁸⁶

550. Life estate to father and mother with remainder to brother and sisters—Gift of absolute use of personal property to parents in addition to income therefrom—No vested remainder in brother and sisters—A will provided as follows: "All the rest, residue, and remainder of my property, real, personal, and mixed, and of every kind and nature, and wheresoever situate, I give, bequeath, and devise unto my father, J. W. G., and to my mother, H. A. G., and to the survivor of them, for and during the term of their natural lives and the natural life of such survivor, with right to use, in addition to the income, rents, and issues thereof, so much of the personal estate absolutely as may be necessary for their personal maintenance and comfort; and upon and at the death of the survivor of my parents, I give, bequeath, and devise all of the same property, of every kind, or so much thereof as may then remain, to my brother H. G., and to my sisters, J. H. C. and H. E. H., share and share alike, and to their heirs taking by representation, to have and to hold the same to my said brother and sisters, their heirs and assigns, to their own use, forever." Held, that the absolute title to the rents and income vested in the parents and the survivor, and, after their death, no vested remainder passed by the terms of the will to the other devisees.⁸⁷

551. Devise to wife in lieu of statutory interest—Election—A devise to a wife "in lieu of all her right and interest in my estate under the statutes of the state of Minnesota." The wife elected to take under the will. Held, that she was not entitled to a statutory allowance pending administration except as an advancement out of her share.⁸⁸

552. Gift of personal property held not to include real property—A gift of "all my personal property and estate" held not to cover any real estate.⁸⁹

553. After-acquired property held not to pass—Certain real estate acquired after the making of a will held not covered by the provisions thereof.⁹⁰

554. Charitable trust in favor of Salvation Army with provision for incorporation—A trust for the benefit of a branch of the Salvation Army, with a provision for incorporation, sustained.⁹¹

555. Gift to a church in aid of missions held an absolute gift and not a devise in trust—A will provided as follows: "All the rest, residue and

⁸⁶ In re Swenson's Estate, 55 Minn. 300, 56 N. W. 1115.

⁸⁷ Cowles v. Henry, 61 Minn. 459, 63 N. W. 1028.

⁸⁸ Blakeman v. Blakeman, 64 Minn. 315, 67 N. W. 69.

⁸⁹ Bedell v. Fradenburgh, 65 Minn. 361, 68 N. W. 41.

⁹⁰ Bedell v. Fradenburgh, 65 Minn. 361, 68 N. W. 41.

⁹¹ Lane v. Eaton, 69 Minn. 141, 71 N. W. 1031.

remainder * * * I give, devise and bequeath to the Central Park Methodist Episcopal Church of St. Paul, Minnesota, absolutely, to be used by such church or its trustees in aiding the cause of home and foreign missions, equally." Held, an absolute gift to the church, and not a devise in trust, and as such valid.⁹²

556. Devise for life with power to devise remainder in fee held to pass a fee absolute—Directions as to use of property by life tenant—A will provided in part as follows: "I give and bequeath all my real estate and personal property, of whatsoever kind or nature the same may be, in the state of Minnesota aforesaid to my son Reuben S. Hershey, in trust to lease out, farm and manage the same to the best advantage so put out, and keep at interest the moneys, rents and incomes accruing therefrom upon good security during the life of my said son, and of the rents, incomes, interests and profits of the said estate I authorize my son Reuben S. Hershey to take or retain for his use as much as he desires and needs during his life, as compensation for so managing and taking care of said real and personal estates and moneys; and upon the death of my said son, Reuben S. Hershey, I direct the same to go to such persons and in such manner as my said son may direct in his last will, if he leaves a will, but in case my said son shall die intestate, then I give and bequeath the same to the children of my said son, Reuben S. Hershey (including such children, or issue as he has or may have with Maria Stoner), then being the issue of any of them then dead in equal shares per stirpes." Held, that under the statutes relating to powers the son Reuben took a fee absolute, as respects the rights of creditors and purchasers.⁹³

557. Gift with payment of legacies a charge on the property—A will provided as follows: "I give, devise, and bequeath to my wife, Mary Kennedy, the balance of said northwest quarter of said section, being eighty acres, more or less, to be disposed of by her in such manner as to pay the legacies hereinafter named in the manner hereinafter prescribed. I also give and bequeath to my said wife all my personal property of every name and nature, excepting that out of the property which I have bequeathed to her, my said wife, she shall pay, as soon as convenient for her after my death, and within the term of three years after my said decease, the sum of \$1,000 to each of my sons, John, James, Joseph, and Thomas, and my daughters, Mary, Alice, Sarah, and Margaret, which sum of \$1,000 apiece I give and bequeath to each of my last-named eight children." Held, that the legacies were a charge on the property, but not on the person of the widow.⁹⁴

⁹² Lane v. Eaton, 69 Minn. 141, 71 N. W. 1031.

⁹³ Hershey v. Meeker County Bank, 71 Minn. 255, 73 N. W. 967.

⁹⁴ Eddy v. Kelly, 72 Minn. 32, 74 N. W. 1020.

✓ **558. Life estate to husband with vested remainder to children**—A will provided as follows: "That is to say, the residue of my estate, real and personal, I give, bequeath and dispose of as follows, to wit: To my beloved husband, Ignatius Will, all my real estate during the term of his natural life, and after his death to be divided equally among my children, Frederick J. Will and Minka E. Will, share and share alike. Also, all my personal estate, of whatever nature it may be, I give and bequeath to my above-named husband, to enable him to collect all moneys due to me, and appropriate the same to the best of his abilities. None of my children, or their heirs, shall have any right on my residue property until the death of my beloved husband, Ignatius Will." Held, that each of the children took a vested remainder in fee in the real estate as of the date of their mother's death.⁹⁵

✓ **559. Gift to wife with directions to divide it among their children when they become of age**—A will provided as follows: "After all my lawful debts are paid and discharged, the residue of my real estate and personal I give and bequeath and dispose of as follows to wit: To my beloved wife, Bridget, I intrust the whole care and charge of the management of all my temporal affairs, real and personal, to have her raise up and educate my children, and, when they are of age, to divide my real estate, viz., the west half of the northwest quarter, and the southeast quarter of the northwest quarter, and the northwest quarter of the southwest quarter, in section No. 12, township 114, range 26, between them to the best advantage, as she sees fit and proper." In its decree of distribution the probate court assigned the real estate to the widow, "subject to the conditions and provisions of the will." Held, that by the terms of the decree the widow did not take the real estate for her own use and benefit, but was required to divide it between the children, and, in doing so, could not exclude any of them.⁹⁶

560. Annuity for widow—Interest of residuary legatees in trust fund—M. provided in his will that his executors should set apart, out of his estate, interest bearing securities sufficient to produce an annual income of \$8,000 per annum, which they should collect and pay over to his wife during her natural life, and upon her death such securities to be held by the executors as a part of the residue of his estate, and go to his residuary legatees. The executors were given power to sell any of the securities for the purpose of reinvesting the proceeds. The executors set apart, for the purposes of this trust, certain corporate stocks. The balance of the estate has been fully administered and distributed under the final order of the probate court, by which the securities referred to were assigned to the executors, as trustees. The conditions of the trust are still unperformed, the widow of M. still living. R. is

⁹⁵ *State v. Willrich*, 72 Minn. 185, 75 N. W. 123.

⁹⁶ *Faloon v. Flannery*, 74 Minn. 38, 76 N. W. 954.

one of the residuary legatees under the will. Held, that, while R. has a vested interest in this fund, yet so long as the title to and dominion over these securities, with power to sell the same, are vested in the trustees, and the conditions of the trust in favor of the widow are not fully performed, R. has no attachable interest in the specific securities.⁹⁷

561. Life estate to wife with power to sell and convey fee—A. devised all of his real estate, except a part not herein involved, to his wife, during the term of her natural life, and also provided: "I do hereby fully authorize and empower her to sell and dispose of my said estate, or any part thereof, and give good and absolute title thereto by deed or otherwise, whenever in her judgment it is expedient to dispose of the same; and purchasers of said property are not required to look after the application of the proceeds thereof." And, further: "That at the death of my said wife all of my said estate that may remain unsold and undisposed of by her I give, devise, and bequeath to my three children aforesaid, Thomas Ashton, Isaiah Heylin Ashton, and Eliza Burton Ashton, to be divided equally between them, share and share alike." The will was duly probated, and thereafter the grantee of the power, the widow of the devisee, conveyed by deed containing full covenants of warranty and in the usual form a part of the premises to a railway company. In an action of ejectment, brought after the decease of the widow, by the heirs at law of a remainderman against the tenant of the company, it is held, that under the provisions of G. S. 1894, §§ 4309, 4312, 4313, 4350, the grantee in the deed acquired a perfect and complete title to the property, and that the plaintiffs have no interest therein.⁹⁸

562. Gift of money to executors in trust to invest, principal and interest to be paid grandchild when of certain age—A will provided as follows: "I give, devise, and bequeath unto my executors the sum of five thousand dollars, to be held in trust for my beloved granddaughter, Ethel Vanderwarker, to be paid to my said granddaughter, Ethel, in the manner, at the times, and upon the conditions hereinafter stated, and not otherwise. Said sum of five thousand dollars shall be by my executors invested, by loaning the same, and taking as security for such loans first mortgages upon unincumbered real estate, the land of which shall be double the value of the loan made thereon. The interest on said loan to be added to the principal until my said granddaughter, Ethel, shall have arrived at the age of twenty-one years, at which time I direct my executors to pay to my said granddaughter, Ethel, all of the interest which shall have accrued to that time, leaving the said sum of five thousand dollars invested as aforesaid for her benefit. And I

⁹⁷ *Merriam v. Wagener*, 74 Minn. 215, 77 N. W. 44. See *Merriam v. Merriam*, 80 Minn. 254, 83 N. W. 162; *Eggleston v. Merriam*, 83 Minn. 98, 85 N. W. 937,

86 N. W. 444; *Eggleston v. Merriam*, 86 Minn. 88, 90 N. W. 118.

⁹⁸ *Ashton v. Great Northern Ry. Co.*, 78 Minn. 201, 80 N. W. 963. See § 432.

direct my said executors to pay to my said granddaughter, Ethel, the interest on said sum of five thousand dollars annually thereafter, until she arrives at the age of thirty years, when I direct my said executors to pay to my said granddaughter, Ethel, the said sum of five thousand dollars (\$5,000), and any interest thereon which may have accrued and not have been paid to her." Held, that the legacy to the grandchild was vested; that the fund designated in the will for the payment thereof should be segregated from the rest of the estate; and, upon the death of the legatee before its receipt, it descended to her heirs.⁹⁹

563. Residuary clause—Gift according to the statutes of descent and distribution—Provision for children of deceased parents—Meaning of "child" and "children"—A will provided as follows: "All the rest, residue, and remainder of my estate, real, personal, and mixed, of which I shall die seised, wheresoever situated, I give, devise, and bequeath to the same persons and in the same proportions as my said estate would descend under or according to the laws of the state of Minnesota as existing at the time of my death,—the child or children of any deceased parent taking the share of such parent by right of representation." The words "child" or "children" construed where, under the laws of the state (G. S. 1894, § 4471, subd. 6), the next of kin were first cousins, and surviving the deceased were children of first cousins who had previously died, and also grandchildren and great-grandchildren of living, as well as deceased, first cousins. Held, that the words "child" or "children" included and comprehended all of the immediate descendants, in the first degree, of first cousins deceased at the time of the death of the testator.¹

564. Devise of homestead to wife with remainder to a child—A will held to devise a homestead to a wife of the testator, with the remainder in fee to one of his children.²

565. Gift for masses and education of priests—Bequests for masses, to a bishop or his successors, for the education of priests for his diocese, residue to another bishop or his successors, for the education of priests for his diocese. Held, that the gifts were not absolute, but gifts in trust and void as such, not being authorized by the statute.³

566. Gift to a city in trust for maintenance of a kindergarten—A testator bequeathed to certain persons a fund of \$5,000, the income of which was to be used in aiding and maintaining a kindergarten in the city of Owatonna, provided that, whenever the city should be authorized to

⁹⁹ Fox v. Hicks, 81 Minn. 197, 83 N. W. 538.

¹ Yates v. Shern, 84 Minn. 161, 86 N. W. 1004.

² Schacht v. Schacht, 86 Minn. 91, 90 N. W. 127.

³ Shanahan v. Kelly, 88 Minn. 202, 92 N. W. 948. See Church of St. Vincent De Paul v. Brannan, 97 Minn. 349, 107 N. W. 141.

receive and administer such trust, the same should be transferred to it. The estate was administered, and the fund came into the possession of the individual trustees, who failed to devote it to the trust purposes. Subdivision 6, § 4284, G. S. 1894, was then amended by adding the maintaining of kindergartens to the list of objects for which municipalities might administer trusts. Thereupon the city council of Owatonna accepted the trust, and made demand for the money in the hands of the individual trustees, which being refused, this action was brought to compel an accounting and payment of the fund on hand. Held, the city is not the beneficiary, but the trustee, and by the amendment of G. S. 1894, § 4284, subd. 6, it was authorized to accept and administer such trusts. The transfer of the trust to the city was mandatory. The beneficiary is not so indefinite and uncertain that the trust could not be administered, and the statute against perpetuities has no application. Trusts for such purposes are expressly authorized by the statute.⁴

567. Revocation of bequest by codicil—Void disposition of property affected—Direction to destroy money and other property—A testator by the seventh clause of his will gave the residue of his estate to the county of Rice, this state. He added a codicil thereto, the second clause of which was this: "I hereby revoke the seventh item in the above will, having made a different disposition of my money; and Rice county shall not be a legatee, nor have any interest in or to my estate, or any part thereof." And in the third and last clause thereof he directed his executor to destroy the residue of money and evidence of credit belonging to his estate. Held, that the bequest to the county was expressly and unconditionally revoked by the codicil, though the new disposition of the subject thereof may be void.⁵

568. Devise of "real estate" held to include interest under sheriff's certificate on execution sale—A will provided as follows: "I give, devise and bequeath unto my son, Charles A. Joslyn, all real estate in the state of Minnesota which I may own at the time of my death." When the testatrix died she was the owner and in possession of certain premises upon which she held a sheriff's certificate on execution sale, the time for redemption not having expired. Held, the interest she had as the holder of the sheriff's certificate was such as under the terms of the will passed to the devisee, although the legal title remained in the judgment debtor.⁶

569. Gift to wife of what she would take under statute—A will executed in 1888 provided: "Second. It is my will that my wife Anna Kajsa Johnson, shall have such share and part of my estate, both real estate

⁴ *Owatonna v. Rosebrock*, 88 Minn. 318, 92 N. W. 1122.

⁶ *Morgan v. Joslyn*, 91 Minn. 60, 97 N. W. 449.

⁵ *Rice County v. Scott*, 88 Minn. 386, 93 N. W. 109.

and personal property, as she may be entitled to under the statutes of the state of Minnesota, as the same may provide at the date of my decease. Third, I do hereby give, devise and bequeath all the rest and residue of my estate, both real estate and personal property, of which I may die seized or possessed unto the children of (naming a certain sister and brother), who may be living at the date of my decease." The will having been executed prior to, and the testator having died after, the time the present Probate Code went into effect, held, the surviving wife took the same interest in the husband's estate as she would have taken had he died intestate.⁷

✓ **570. Gift to insane daughter to be paid on her recovering sanity—Gift to her children conditional on her not recovering sanity or dying—** A testator, after providing for his wife and other children, made a bequest to his insane daughter in these words: "I further give and bequeath the sum of one thousand dollars to my only other daughter (naming her), who is now in the Hospital for the Insane at St. Peter, this state, said amount to be paid to her on the recovery of her sanity, provided that if she does not recover her reason or dies, then the amount is to be divided equally between her three children now living." Held, that the children are only entitled to the bequest in case their mother dies before recovering her reason, and that, until the possibility of her recovery is extinguished by her death, they cannot maintain an action to enforce the payment of the bequest to themselves.⁸

571. Conditional gift to person whose whereabouts was unknown—Directions in case of death of other beneficiaries—When legacies vested— A will provided as follows: "Twentieth, pay to Daniel Brookhouse, son of my sister Mary, the sum of five thousand dollars. I do not know the place of residence of said Daniel Brookhouse, or even that he is now living. Now this bequest is made on condition that he, said Daniel Brookhouse shall appear and claim this bequest before the final distribution of my estate according to the terms hereof, and in no event later than ten years from the date hereof. * * * Should any of the devisees hereinbefore named to whom said trustees and executors are directed to pay any part of my estate, die before payment is made to them, without leaving children or grandchildren, then and in every case, such bequest and devise shall wholly fail and the share of my estate so directed to be paid shall be paid to my wife, Frances J. Pray." It appears that D. B. did not survive the testator. Held: (a) That the clauses quoted, read in the light of section 4449, G. S. 1894, vested in his children a contingent interest in such legacy, and that they took under the statute as purchasers. (b) The testator intended to provide for his wife and blood relatives to the exclusion of others. (c) The

⁷ Johnson v. Linstrom, 92 Minn. 8, 90 N. W. 212.

⁸ Mingo v. Huntington, 92 Minn. 13, 90 N. W. 45.

children of D. B. having died without issue before payment was made, said legacy vested in testator's wife.⁹

572. Devise of life estate with power of alienation—A will bequeathing certain property to A., contained the following clause: "For him and to his use during the full term and period of his life, with full power and authority to sell the whole or any part thereof, for such sum or sums and on such terms as he may see fit. It being my wish and desire that he shall not be in any manner restricted in the use and disposal of my property as long as he may live." Held, that a life estate is thereby vested in A., with power of alienation, for a valuable consideration, during his life.¹⁰

573. Charity—Gift to charitable corporation to be thereafter formed to administer charity—Poor of a city the beneficiaries—Residuary gift for the worthy poor of the city of St. Paul. Provision for the organization of a corporation to administer the charity. Gift held valid and not an evasion of the statutes relating to uses and trusts.¹¹

574. Contingent legacy—When vested—A bequest of money was made payable only upon the happening of any one of three contingencies. The first was the death of the testator, his wife and daughter, in a common disaster. The second was the death of his daughter without issue before she was twenty-eight years of age. The third was the death of his daughter without issue after she received her distributive share. If the first one had occurred the other two would have been impossible. If the second had occurred the third could not. The last one did occur and the bequest became vested upon the death of the testator.¹²

575. Gift to employees of testator—Provision as to their continuing business—A will provided as follows: "After the payment of all of my just debts, including the debts of the business of which I am sole proprietor, conducted under the name of the Northwestern Star Oil Company of Minneapolis, Minn., I hereby give and bequeath as follows: To Charles H. Durrin, Stanislaus Mitchell and Luke B. Hancock, the sum of two thousand dollars each in cash or good security, to be paid at such time as does not inconvenience the business I have left, nor my estate to pay the same. Provided these three named parties, as above, shall continue to manage and have charge of the business I am now engaged in. They to decide whether it is best to continue said business, and if not so continued, how to close it out or sell it to the best advantage of my estate." Held, that the bequest vested upon the death

⁹ *Brookhouse v. Pray*, 92 Minn. 448, 100 N. W. 235.

¹⁰ *Semper v. Coates*, 93 Minn. 76, 100 N. W. 662.

¹¹ *Watkins v. Bigelow*, 93 Minn. 210, 100 N. W. 1104.

¹² *Watkins v. Bigelow*, 93 Minn. 361, 101 N. W. 497. See *Appleby v. Wilder*, 100 Minn. 408, 111 N. W. 305.

of the testator and that the provision as to continuing the business was not a condition precedent.¹³

576. Life estate to husband in rents, profits and income of real estate—Directions against placing incumbrances on property—A will contained the following provisions: "It is my wish and desire that my husband, John Poseng, shall have all the rents, profits and income derived from all my real estate and houses of which I shall die seized and possessed of, during his natural life, provided, * * * that my husband, John Poseng, shall pay and continue to pay year after year all current expenses such as taxes, insurance, improvements and repairs on said real estate." Also: "It is my wish and desire, and this bequest herein is made upon the express condition that all my real estate, of which I shall die seized or possessed of, shall be kept free from any incumbrances by mortgages or otherwise, and that no such incumbrance shall be made upon the same by my husband, John Poseng, during his natural life." Held, upon the death of the testatrix her husband did not become vested with the legal estate, but the interest and profits thereof were devised to him during his natural life only.¹⁴

577. Life estate in farm to wife—Indefinite description of farm held sufficient—A will provided as follows: "After the payment of lawful debts and funeral expenses I give and bequeath to my wife, Christine Olson, the use of my farm, consisting of about ninety-five acres situated in the county of Fillmore and state of Minnesota, during her life; also all cattle, horses, and swine of every kind, and all the grain of every kind, whether growing in the field or harvested or in the granary or cribs or barns; and also all household goods and furniture." Held, that the description of the farm was sufficient.¹⁵

578. Trust for benefit of grandson—Income of estate payable to him semi-annually—Corpus of estate payable to him on his arriving at certain ages—A will gave the residue of an estate to trustees to be invested, and directed them to pay semi-annually the net income therefrom to B, a grandson of testator, during the time the estate should remain in their hands, and to pay and deliver the corpus of the estate to him in four equal instalments, the first one to be turned over to him when he should have attained the age of twenty-five years, and the others in their order, when he should have reached the age of thirty, thirty-five, and forty years, respectively. The will, in the event of B's death before he should have received the whole or any part of the estate, gave the balance in the hands of the trustees to other legatees. Held, that the legacy to B was contingent.¹⁶

¹³ Davis v. Hancock, 95 Minn. 340, 104 N. W. 299.

¹⁴ Rosbach v. Weidenbach, 95 Minn. 343, 104 N. W. 137.

¹⁵ Sorenson v. Carey, 96 Minn. 202, 104 N. W. 838.

¹⁶ State v. Probate Court, 100 Minn. 192, 110 N. W. 805.

✓ **579. Trust for benefit of children**—A will gave the entire estate to a trustee to hold for ten years with direction to pay children certain sums annually and certain additional sums at the expiration of five years from the death of the testator. The whole share of each child in the remainder was payable at the expiration of the ten years. There was also provision for grandchildren by right of representation payable on their reaching the age of twenty-one.¹⁷

580. Provision for wife in lieu of statutory rights—Directions in case wife elects to take under statute—A will provided as follows: "It is my will that the portion allotted to my wife, Elizabeth Parker, shall be in lieu of her dower and statutory right in all property belonging to me at my decease, and in the event she elects to accept the property or benefits in my estate provided for her by statute, then the portion herein devised and bequeathed to her shall be equally divided and distributed among the other legatees hereinbefore named." Held, to put the wife to an election.¹⁸

581. Provision in case of death of beneficiaries without issue—A will provided as follows: "It is my wish and I do hereby direct that in the event of the decease of any of the above-named legatees or devisees without issue living before my decease, that his or her share herein shall be distributed and divided equally among the remaining of said devisees or legatees share and share alike, but in the event such deceased person shall leave issue living, then his or her share shall go to and be divided among such issue."¹⁹

582. Trust—Annuity for sister—Power of sale—Income—Interest—A will provided as follows: "10. All the estate thereafter remaining, I direct to be turned over to my trustees hereinafter named, to be by them invested in such a way as to bear interest, and if any real estate shall be found belonging to my estate, I authorize and empower the said trustees to sell and convey the same and invest the proceeds of such sales in such a way as to produce an annual income, and to pay all the interest arising out of my personal property left, and out of the proceeds of my real estate annually to my sister, Carrie H. Goodwin, as long as she shall live." Held, that the word "interest" was used as the equivalent of income, and that the owner of the life estate was entitled to the net income only after the payment of taxes and other necessary and proper expenses incidental to the care, preservation and handling of the property.²⁰

583. Trust—Gift to church for music—A will provided as follows: "11. Out of the amount of the principal of the funds in hands of my

¹⁷ State v. Probate Court, 101 Minn. 485, 112 N. W. 878; Id., 132 Minn. 104, 155 N. W. 1077.

¹⁹ Howe Lumber Co. v. Parker, 105 Minn. 310, 117 N. W. 518.

²⁰ Goodwin v. McGaughey, 108 Minn.

¹⁸ Howe Lumber Co. v. Parker, 105 Minn. 310, 117 N. W. 518. 248, 122 N. W. 6.

trustees at the death of my sister Carrie, they are directed to pay to the St. Paul's Episcopal Church of Winona, Minn., the sum of five thousand dollars (\$5,000), to be forever safely invested by the said religious corporation so as to produce interest to be forever used and applied to and for church music (in memory of my dear daughter) and they, the trustees, shall further pay to the Congregational Church of South Berwick, Maine, the sum of five thousand dollars (\$5,000), to be safely invested by said religious corporation forever so as to bear interest, such interest to be used for the improvement of its church music." ²¹

584. Trust for maintenance of a charity—Power of alienation unlawfully suspended—A trust for the maintenance of an orphans' home held invalid because it suspended the power of alienation without reference to lives in being. ²²

585. Bequest of money to executors to use as they see proper—A bequest of money to executors "to use as they see proper" held void for uncertainty. ²³

586. Devise of farm to son for life with a provision against sale—Remainder to his children to take effect immediately in case of sale—A will executed in a foreign state contained a devise of real estate in Minnesota to a tenant for life, with the following provision: "And as I intend this bequest as a provision for the support of my son and his family, I direct that his said life interest in the said farm shall not be subject to be sold by him, and that upon any sale of it by him, or by any other person on account of his liabilities or engagements, or otherwise, the said bequest of the remainder to his children shall immediately take effect as in case of his death, saving the rights and claims of my child or children who may be afterwards born." The testator died in 1865. The life tenant conveyed the entire estate by warranty deed in 1872, and the subsequent grantees, from that time, have been in the actual, open and exclusive possession. Held, that the life tenancy ceased upon the conveyance of the premises by the life tenant, the remainderman became entitled to the immediate possession, and the grantee and his successors became owners in fee by adverse possession. ²⁴

587. Estate for life in homestead to wife with remainder to children—Provision granting children right to occupy homestead "until they shall have homes of their own"—Trust to maintain homestead and provide for support of wife and children—A testator devised his homestead to his wife for her life, remainder to certain children, and provided certain named children, including defendants, should have the right to occupy the homestead with the widow "until they shall have homes of their

²¹ Goodwin v. McGaughey, 108 Minn. 248, 122 N. W. 6.

²² Rong v. Haller, 109 Minn. 191, 123 N. W. 471.

²³ Casey v. Brabec, 111 Minn. 43, 126 N. W. 401.

²⁴ Barnes v. Gunter, 111 Minn. 383, 127 N. W. 398.

own." Other provisions of the will created a trust estate to maintain the homestead and provide for the support of the widow and children. The trust estate having terminated by limitation plaintiff claims defendants' right of occupancy in the homestead has also expired. Held, the only direct limitation upon defendants' right to live upon the homestead was when they should have homes of their own. The subsequent provisions not being necessarily in conflict with this language, the intention of the testator must be determined from the words used in actually granting the right.²⁵

✓ **588. Trust for benefit of wife and children**—A will gave the entire estate to trustees with directions to pay the wife the net income of the estate while she remained unmarried. If she remarried she was to receive in lieu of the entire net income one-fourth of the estate. The residue was given to two sons or their heirs, such residue to be held in trust until the youngest son should arrive at thirty-five years of age. The trustees were empowered during the continuance of the trust to make advances to the sons.²⁶

589. Devise of a leasehold interest for life to wife with remainder to brother—Specific legacies—Sale—A testator by his will gave to his wife a legacy of \$5,000, a devise of a leasehold interest for life, and the remainder thereof to his brother, and made a number of other legacies. The district court, on appeal from the probate court, made its order directing a sale of the real estate, and the order in which it should be sold, and the application of the rents from the leasehold estate. Held, that it was not error to omit from the sale the homestead, nor to include in the sale land contiguous thereto, but not a part of it, nor to direct a sale of the remainder of the leasehold estate before the sale of the life estate, nor to direct that advances made to the widow and taxes paid by the executors on the leasehold estate be repaid out of the rents of the leasehold estate.²⁷

590. Trust for charity—Annuity to sons of testator—Annuity valid though charitable trust invalid—The testator herein gave three funds to the appellant herein, in trust to pay the annual income therefrom to each of his three sons during his life, and at his death to pay two-thirds of the fund held for his benefit to the trustees of a home for aged men and women, which the testator attempted by his will to found and endow; but the provisions as to the proposed home are invalid. Held, that the provisions for the benefit of the sons were not so connected with and dependent upon those for the home that they must also fail.²⁸

²⁵ *Lohlker v. Lohlker*, 112 Minn. 273, 127 N. W. 1122.

²⁶ *State v. Probate Court*, 112 Minn. 279, 128 N. W. 18.

²⁷ *Baldwin v. Zien*, 117 Minn. 178, 134 N. W. 498.

²⁸ *Bemis v. Northwestern Trust Co.*, 117 Minn. 409, 135 N. W. 1124.

591. Devise with reference to deed on record—A will provided as follows: "I devise all of that certain piece of land known as part of lot 3, Village of Excelsior, Minnesota, and recorded in the office of the register of deeds of the county of Hennepin, Minn., in Book 632 of Deeds, on page 155, etc. to Mary Fairley."²⁰

592. Residuary clause held to include homestead—A residuary clause in a will provided as follows: "All the rest, residue and remainder of my estate, real, personal, or mixed." Held, to include homestead.²⁰

593. Trust for benefit of children—Power of appointment to children—Testatrix, a resident of Kentucky, gave the residue of her estate to her executor in trust for her two sons. The trustee was given the management and control of the property, with power to sell and reinvest the proceeds. The income of the trust estate was given to the two sons, to be paid to them equally as it was collected by the trustee. Each son was given the right to dispose of one moiety of the trust estate by will as he might choose. If both died intestate, the entire trust estate was to descend and be distributed according to the laws of Kentucky. If one son should die testate and the other intestate the moiety of the one dying testate was to descend as he should direct by his will, and the other moiety according to the laws of Kentucky.²¹

594. Gift of real and personal property to wife for life with specific legacies to children after her death—Implied power of sale—Equitable conversion—Gift of real and personal property to wife of testator for life. Specific legacies to children "after her death and within two years thereafter." Legacies exceeded personal estate. Power to sell real estate to pay legacies implied. Equitable conversion as of the time of the death of the testator. Between that time and the actual sale the legatees had no interest in the land that could be levied upon or sold on execution.²²

595. Life estate in all real and personal property to wife—After her death all property to be sold and specified amounts given to children—When interest of children vested—The testator devised a life estate in all his property, real and personal, to his wife. The will provided that after her death the property should be converted into money and specific sums should go to three daughters named, and the balance to a fourth daughter named. The fourth daughter outlived her father, was married after his death, and predeceased her mother, leaving no issue. Her husband survived her. Held, that the provision in the will for a sale and division of the property amounted to an equitable conversion as

²⁰ *Empenger v. Fairley*, 119 Minn. 186, 137 N. W. 1110.

²⁰ *Larson v. Curran*, 121 Minn. 104, 140 N. W. 337.

²¹ *State v. Probate Court*, 124 Minn. 508, 145 N. W. 390.

²² *Greenman v. McVey*, 126 Minn. 21, 147 N. W. 812.

of the date of the testator's death; that the daughter now deceased took a vested estate in remainder upon the death of the testator; that upon her death her estate passed to her husband.³³

596. Absolute gift of one-half of all property to wife—A will provided that "my wife shall have and be lawful owner of one-half of my property," and certain children "shall have their equal share after my wife takes her half." Held, that the wife took one-half of the property absolutely and the children the other half.³⁴

597. Absolute gift of all property to wife—Directions to divide property among children held not to raise a precatory trust—A gift to a wife of all testator's property in fee "simply requesting her to do with the property when she is done with it or can spare it or any portion thereof, as I know she intends to do, and as I desire shall be done with it, that is, divide all property equally among our children." Held, that the quoted words did not reduce the fee to a life estate nor raise a precatory trust in favor of the children.³⁵

598. Absolute gift of one-third to each of two sons—Gift of other one-third to trustees for benefit of daughter for life with remainder to two grandchildren—A will provided as follows: "Second: I give, devise and bequeath to my children, to be divided into three equal parts, said children being Joseph M. Wenger, Jr., William J. Wenger, and Julia C. Wenger (now Mrs. L. A. Hutchins), the business known as J. M. Wenger and Sons, located at Campbell, Minnesota. Third: All the real estate situated whether within the state of Minnesota or elsewhere to go to the above named children and to be divided into three equal parts. Fourth: It is my will and desire that the interests I possess in any property both real and personal, also any above referred to which is to come to my daughter (Mrs. L. A. Hutchins), shall be held in trust for her and that she be entitled only to the income from same, during her lifetime, at her death, said daughter's interest is to go to the children of my son Joseph M. Wenger, Jr. Fifth: It is my will and desire that the remainder of my estate—that portion which remains undivided—and being the portion to come to my son, William J. Wenger, shall remain in trust for a period of ten years after my decease." Held, to give one-third of the property to each of two sons absolutely, and the other one-third to trustees for the benefit of the daughter during her life with remainder to two grandchildren.³⁶

599. Trust for benefit of wife—Income to wife subject to expenses of administering trust—Title of wife to income—A will created a trust in

³³ *Johrden v. Pond*, 126 Minn. 247, 148 N. W. 112.

³⁴ *Elberg v. Elberg*, 132 Minn. 15, 155 N. W. 751.

³⁵ *Long v. Willsey*, 132 Minn. 316, 156 N. W. 349.

³⁶ *Hutchins v. Wenger*, 133 Minn. 188, 158 N. W. 52.

certain funds with directions that the income therefrom, less the expense of administration, be paid to the wife of the testator, semi-annually during her life. Held, conceding for the purposes of the case that the rights of the wife became vested as of the date of the death of the testator, and before the trust property had been turned over to the trustees, that the payment of the income to the beneficiary was subject to deductions of the necessary expense of administering the property while in the hands of the executors of the will. The will is construed to have intended to vest in the beneficiary the absolute title and right to the income, received by the trustees, less expenses; and it is held that income in the form of interest upon money investments which had accrued but was not due and collectable at the time of the death of the beneficiary, as well as interest which was then due but not collected, was the property of the beneficiary, and passed to the executor of her last will and testament.³⁷

600. Devise of real estate equally between two children—Specific bequests to various persons—Residuary bequest to son—Construction of residuary clause—A testatrix at the time of making a will owned a valuable apartment building, the bulk of her estate. She had then no personal property of consequence, save household and personal belongings. By her will she first divided her real estate equally between her son and daughter, her sole heirs at law. She then made four bequests numbered three to six, giving to different persons enumerated personal belongings, such as jewelry, plate, china, pictures, furniture and books, and then by a seventh bequest gave "the residue * * * of my personal effects * * * not herein enumerated" to her son. After making the will she sold the apartment building and received money and securities therefor. Held, the money and securities did not pass under the residuary clause of the seventh bequest.³⁸

601. Devise to each of three children of a farm—Bequests to two daughters made payable by son—All three children residuary legatees—Farms devised conveyed by testator to devisees during his life—Specific legacies not revoked by conveyances—Testator devised his real estate, consisting of three farms, to his three children, one farm to each. He bequeathed to each daughter a certain sum and provided that "said sums of money have to be paid by my son." The three children were also residuary legatees. During his lifetime testator conveyed to each child the farm devised to the same. Held: (1) The specific legacies were not revoked by the conveyances, since they were not made specific charges upon the land devised. (2) That the intention of the testator is clear that the specific legacies were not to be paid by the estate direct, but were to be paid by the son and the court rightly deducted from his

³⁷ Held *v. Keller*, 135 Minn. 192, 160 N. W. 487.

³⁸ *Barney v. May*, 135 Minn. 299, 160 N. W. 790.

share as residuary legatee the sums bequeathed to the sisters and added the same to their respective shares.³⁹

602. Trust for accumulation of fund from income of mines for benefit of unborn children held invalid—A will creating a trust for the accumulation of a fund from the income of mines for the benefit of unborn children, the corpus of the fund not to be distributed until twenty years after the death of the survivor of six named persons living at the date of the will, held invalid as creating an unauthorized trust.⁴⁰

603. Devise of a remainder in fee to a son with restriction on sale held invalid—Legacies held charge on land—A devise of a remainder in fee to the son of the testatrix, "provided that he shall not sell the said described premises for five years after his father's death," does not violate the statute against perpetuities as the restriction is imposed upon the son only and would terminate at his death, but the restriction is void as repugnant to the grant of a remainder in fee. The testatrix, who possessed no other property, gave her husband a life estate in land, and gave her son the remainder in fee coupled with a provision that certain legacies should be paid to her daughter. Held, that the legacies were a charge on the land.⁴¹

604. Trust for benefit of son—Trust in favor of son until he should marry, attain the age of forty-five, or die. Direction that income from trust fund be paid to son quarterly during continuance of trust; that if the trust should be terminated by the marriage of the son or by his attaining the age of forty-five, the entire trust fund be given to him absolutely; that if the trust should be terminated by the death of the son, unmarried and before attaining the age of forty-five, the trust fund should be given to other persons designated by the will; and that the share which would go to designated relatives if living when the fund was distributed should go to their heirs at law if such relatives were not then living.⁴²

605. Life estate to wife subject to forfeiture on remarriage—Remainder to children by former wife—A will gave a life estate in certain property to the wife of the testator with a condition for a forfeiture in case of her remarriage, with remainder to children of testator by a former wife. Provision for sale of homestead and other property on death of wife and division of proceeds among children.⁴³

606. Life estate to wife—Legacy to daughter—Remainder to son—Contingent remainders to grandchildren in case son died before wife—John Savela died testate November 14, 1913, leaving a widow and sever-

³⁹ *Miller v. Klossner*, 135 Minn. 377, 160 N. W. 1025.

⁴⁰ *Minnesota Loan & Trust Co. v. Douglas*, 135 Minn. 413, 161 N. W. 158.

⁴¹ *Hause v. O'Leary*, 136 Minn. 126, 161 N. W. 392.

⁴² *State v. Probate Court*, 136 Minn. 392, 162 N. W. 459.

⁴³ *Robinson v. Thomson*, 137 Minn. 440, 163 N. W. 786.

al children and grandchildren. By his will he gave the possession and use of all of his property to his wife Elsa for life. After her death he gave a legacy to his daughter Anna, and "all the rest and residue" to his son August, and provided that: "Should my son August die before the death of my beloved wife Elsa, then and in that case I give, devise and bequeath all of the said estate * * * in the following manner: Ten (\$10.00) dollars * * * to my grandchild William Alfred Martin, and all the rest and residue of the said estate to my other grandchildren, to my daughter Anna, and to my foster son August M. Savela, to be divided among them share and share alike." Held, that the grandchildren took contingent remainders and that membership of the class entitled to take was to be determined as of the time when the gift to the class vested in enjoyment and not as of the time of the death of the testator.⁴⁴

607. Gift of proceeds of insurance policy—A will provided as follows: "I hereby give, devise and bequeath to my beloved children by my former wife * * * all the proceeds of a certain policy of life insurance * * * the proceeds of which policy I desire to be divided equally among the four children above named, share and share alike, free of any and all debts and encumbrances." Held, that the legacy was specific.⁴⁵

608. Gift to religious corporation—Absolute and not in trust—Restraint on alienation of burial lot—Gift of all the property of testator to a religious corporation. Directions for the perpetual care of a burial lot and a provision against its alienation. Direction that all the property except the burial lot, consisting chiefly of a farm, be sold and converted into a fund, only the income of which should be used for religious and benevolent purposes. Held, that the gift was absolute and not in trust, though terms of trust were used, and that the restraint on the alienation of the burial lot was not void.⁴⁶

609. Trust for beneficiaries for life—Limitation over in case devisee died without children—A will gave certain legacies and created several trusts directing the deposit of funds in trust, the income to be paid to beneficiaries for life. On the death of each legatee, the funds deposited for his benefit were to become part of the residuary estate. The will directed that the balance of the estate be transferred to a corporation to be formed. The residuary estate, made up mostly of the returned deposits, the will gave to the wife and children of the testator and provided, "that if either of my children shall die without leaving a child or

⁴⁴ *Savela v. Erickson*, 138 Minn. 93, 183 N. W. 1029.

⁴⁵ *Little v. Universalist Convention*, 143 Minn. 298, 173 N. W. 659.

⁴⁶ *Kelleher v. Kelleher*, 140 Minn. 409, 168 N. W. 586.

children, then the share of such child shall become the property of the survivors, it being my intention that the surviving child, in case the others die without leaving a living child or children, shall have the whole balance of my estate." Held, that if a child died without issue the other children would take his share whether he died before or after the testator.⁴⁷

610. Trust for religious purposes—A will bequeathed to a person named therein a certain sum of money to be used by him for the extension of the kingdom of God in a certain church. Held, that the bequest was not an absolute gift to the person named, but was an attempted bequest in trust for the purpose stated in the will, and was invalid because the beneficiaries were not certain or capable of being made certain.⁴⁸

611. Gift to wife of fee in farm and life estate in house and lot—A will gave to the wife "one-half of my farm situate in sec. 14 containing 152 acres and also for the full term of her natural life the house and lot situated in Cologne, Minn., but upon the death of my wife it shall be equally divided amongst all my children." Held, that the wife took a fee in one-half of the farm.⁴⁹

612. Trust for children as a class—Husband of deceased daughter held not to take—A will bequeathed testator's residuary estate, consisting wholly of personalty, to a trustee to be held, invested and disposed of as follows: The income was to be divided among all his children living at the time of his death, or, if any should die, then to their children. When the youngest child reached the age of thirty years, the trustee was directed to divide one-half of the corpus of the estate among all of testator's children or the descendants of a deceased child, and when the youngest child reached the age of forty years the remainder was to be divided among testator's children or their descendants living at that time. The will was made in contemplation of testator's early death. Held, that the husband of one of testator's daughters, entitled by law to the estate of his wife, who died after the death of testator, took no share of the trust estate which his wife would have taken had she lived.⁵⁰

612a. Trust for wife—Conditional gift to son—Residuary gift to testator's legal heirs—Widow held not an heir—The will of the testator, who was childless, created a trust in his executors, and directed the payment of a stipulated sum monthly to his widow. The residue was to go to a so-called adopted son when he became thirty, if he should be worthy to have it in the judgment of the executors; and, if in their

⁴⁷ In re Peavey's Estate, 144 Minn. 208, 175 N. W. 105.

⁴⁸ In re Ford's Estate, 144 Minn. 454, 175 N. W. 913.

⁴⁹ In re Meuwissen's Estate, 146 Minn. 9, 177 N. W. 668.

⁵⁰ In re Bell's Will, 147 Minn. 62, 179 N. W. 650.

judgment he was not, the residuary estate was to go to the testator's "legal heirs." Held, that the widow did not come within the term "legal heirs," as meant by the testator, but that by such words he meant his blood relatives.⁵¹

612b. Trust for payment of annuities to wife, brother and sisters—Residuary gift conditioned on the existence of a certain residue—A will made certain specific gifts and then gave the balance of the estate to trustees for the payment of annuities to the testator's wife, brother and sisters. It then provided that if there was a certain residue after the payment of such annuities a certain legacy should be paid to a friend. There was no such residue. Held, that the legacy was adeemed.⁵²

612c. Devise to wife of estate for life with power of sale—Remainder to daughter—A will gave a life estate to a wife with a power to mortgage or sell, remainder to daughter. Held, that the power of disposition did not convert the life estate into a fee and that the daughter took a vested remainder.⁵³

612d. Life estate in realty to wife—Direction for conversion of realty into money by executor within one year after death of wife—Proceeds to be divided among children and grandchildren—Heirs of deceased legatee to take—The testator gave to his wife all of his personal property and a life estate in his real property. He directed that within one year after her death his executor should convert his real estate into money. He bequeathed the proceeds to his children and stepchildren and certain grandchildren. He provided that if any legatee, who was a child or stepchild, should die prior to the time he received his bequest, then the same should be paid and was willed to the heirs at law of such legatee. The bequest involved upon this appeal was to a stepchild who died after the testator's death, but before the death of the testator's wife, leaving her husband her sole heir. He died prior to the death of the testator's wife. At the death of the testator's wife a sister and half-sister were the sole heirs of the legatee. Held, that the intent of the testator was that the estate, otherwise passing to such legatee, should pass to her heirs at the time of the death of his wife, rather than to the heirs of the deceased husband of such legatee; and that the sister and stepsister took the bequest under the will by purchase and not by descent.⁵⁴

⁵¹ *In re Anderson's Estate*, 148 Minn. 44, 180 N. W. 1019.

⁵² *In re Douglas' Estate*, 149 Minn. 276, 183 N. W. 355.

⁵³ *In re Meldrum's Estate*, 149 Minn. 342, 183 N. W. 835.

⁵⁴ *In re Freeman's Estate* (Minn.) 187 N. W. 411.

EXECUTORS AND ADMINISTRATORS—ADMINISTRATION

ADMINISTRATION—IN GENERAL

613. Nature and object—To take charge of, collect and manage the estate of a decedent, to settle and pay claims against the estate, and to distribute the remainder of the estate according to law, are the primary purposes of administration.⁵⁵ When the owners of property die, that property, under the conditions and restrictions of the law applicable, is transmitted to their successors named by their wills or by the laws regulating inheritance in cases of intestacy. For a suitable time it is essential that the property should remain under the control of the state, until all just charges against it can be discovered and paid, and those entitled to it as new owners can be ascertained. It is in the public interest that the property should come under the control of the new owners, after such delays only as will afford opportunity for investigation and hearing to guard against mistake, injustice or fraud. It is the duty of the sovereign to provide a tribunal under whose direction the just demands against the estate may be determined and paid, the succession decreed, and the estate devolved to those who are found entitled to it. Sometimes this duty is performed by conferring jurisdiction upon a single court and sometimes by dividing the jurisdiction among two or three courts. The courts may be called ecclesiastical, probate, orphans', surrogate or equity courts. The jurisdiction may be exercised exclusively in one, or divided among two or more, as the sovereign shall determine. But somewhere the power must exist to decide finally as against the world all questions which arise in the settlement of the succession. Mistakes may occur and sometimes do occur, but it is better that they should be endured than that, in a vain search for infallibility, questions shall remain open indefinitely. The world must move on, and those who claim an interest in persons and things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings in rem. It is therefore within the power of the sovereign to give to its courts the authority, while settling the succession of estates in their possession through their officers, the executors or administrators, to determine finally as against the world all questions that arise therein.⁵⁶ If a person dies testate, the will has to be probated, and the estate administered, distributed, and assigned according to the provisions of the

⁵⁵ *Balch v. Hooper*, 32 Minn. 158, 160, 162, 20 N. W. 124; *State v. Probate Court*, 33 Minn. 94, 95, 22 N. W. 10; *Mousseau v. Mousseau*, 40 Minn. 236, 238, 41 N. W. 977; *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140, 146, 90 N. W. 378; *Granger v. Harriman*, 89

Minn. 303, 305, 94 N. W. 869; *First Nat. Bank v. Towle*, 118 Minn. 514, 523, 137 N. W. 291; *Maddock v. Russell*, 109 Cal. 417, 423, 42 Pac. 139; 18 Cyc. 57; 23 C. J. 997; *Woerner*, *Am. Law of Adm.* (2 ed.) § 10. See §§ 26, 625.

⁵⁶ *Tilt v. Kelsey*, 207 U. S. 43, 55.

will; if he dies intestate, his estate has to be administered, distributed, and assigned according to the law of succession and inheritance. In the one case the probate court has to determine whether the will has been executed according to law, and, if so, to construe its provisions; in the other case, it has to determine who are the distributees or heirs, according to the statute.⁵⁷ Power over the estates of decedents within its jurisdiction is inherent in every state on common-law principles, of which the provisions of the probate code in that regard are but declaratory.⁵⁸

614. In rem—Administration proceedings are in rem, the res being the estate of the decedent.⁵⁹

615. Assets essential—As a general rule the existence of assets within the jurisdiction is essential to administration, for it is the estate and not the expired breath of the decedent upon which administration operates.⁶⁰ The want of assets is not a ground for a collateral attack on the appointment of a representative.⁶¹

616. Death of owner of estate—Presumption—Absentees—Statutes—Death of the owner of an estate is a jurisdictional prerequisite to administration. If the supposed decedent was in fact alive at the time of the initiation of administration proceedings on his estate the proceedings are absolutely void, in the absence of statute. They are subject to collateral attack and are not a protection to any one, though acting in good faith.⁶² Where the state provides for suitable notice and adequately safeguards the property of an absentee it may confer on its courts power to administer his estate, even though he is in fact alive,

⁵⁷ *Johnson v. Harrison*, 47 Minn. 575, 50 N. W. 923.

⁵⁸ *Putnam v. Pitney*, 45 Minn. 242, 245, 47 N. W. 790.

⁵⁹ *Morin v. St. Paul etc. Ry. Co.*, 33 Minn. 176, 178, 22 N. W. 251; *Hutchins v. St. Paul etc. Ry. Co.*, 44 Minn. 5, 7, 46 N. W. 79; *McNamara v. Casserly*, 61 Minn. 335, 343, 63 N. W. 880; *Ladd v. Weiskopf*, 62 Minn. 29, 36, 64 N. W. 99; *Fridley v. Farmers & Mechanics Savings Bank*, 136 Minn. 333, 162 N. W. 454; *In re Barlow's Estate* (Minn.) 188 N. W. 282; *Carter v. Frahm*, 31 S. D. 379, 141 N. W. 370; *Bolton v. Schriever*, 135 N. Y. 65, 31 N. E. 1001; *Tilt v. Kelsey*, 207 U. S. 43; *Goodrich v. Ferris*, 214 U. S. 71; 18 Cyc. 64; 23 C. J. 1006; *Woerner*, *Am. Law of Adm.* (2 ed.) § 148. See §§ 40, 240, 259, 613, 661, 662, 949, 1073.

⁶⁰ *Hutchins v. St. Paul etc. Ry. Co.*, 44 Minn. 5, 7, 46 N. W. 79; *Fitzpatrick*

v. Simonson Bros. Mfg. Co., 86 Minn. 140, 146, 90 N. W. 373; *Hanson v. Nygaard*, 105 Minn. 30, 33, 117 N. W. 235; *Doran v. Kennedy*, 122 Minn. 1, 4, 141 N. W. 851; *Fridley v. Farmers & Mechanics Sav. Bank*, 136 Minn. 333, 162 N. W. 454; 23 C. J. 1008. See §§ 245, 662, 1197.

⁶¹ *Taylor v. Badger*, 226 Mass. 258, 115 N. E. 405; *Chicago, etc. Ry. Co. v. Forrester* (Okla.) 177 Pac. 593.

⁶² *Scott v. McNeal*, 154 U. S. 34; *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140, 146, 90 N. W. 378; *Fridley v. Farmers & Mechanics Sav. Bank*, 136 Minn. 333, 162 N. W. 454; *Becthold v. King*, 134 Minn. 105, 158 N. W. 910; *In re Paulsen's Estate* (Cal. App.) 170 Pac. 855; 19 Ency. Pl. & Pr. 840; 11 A. & E. Ency. of Law (2 ed.) 759; 18 Cyc. 65; 23 C. J. 1007; *Woerner*, *Am. Law of Adm.* (2 ed.) §§ 208-213; 4 Ann. Cas. 1119. See § 679.

after a reasonably long absence has raised a presumption of his death.⁶³ There is a presumption of law that one who has been absent from his home for seven years without being heard from by those who would naturally hear from him, is dead. This presumption affords sufficient *prima facie* evidence of the death of such absentee to authorize administration on his estate.⁶⁴

617. One whole proceeding—When a probate court legally probates a will or appoints a first administrator it thereby acquires jurisdiction to direct and control the administration, and such jurisdiction continues over the administration, as one proceeding, till its close.⁶⁵ Administration proceedings are one whole single proceeding, or at least may be made so by statute, as in this state.⁶⁶

618. Control of probate court—The whole estate of every decedent is subject to administration whatever disposition may be made of it by will. Whenever the jurisdiction of the probate court attaches in the particular instance to the estate, the whole of it, and more especially the personalty, comes within the authority and control of the court, for the purpose of administration and for distribution according to law or the directions of the will if there be one. This control of the property the court exercises through the executor or administrator, whose duty it is to bring the personal property into his possession. Until it has passed to him through administration, no legatee, whether the bequest to him is in his own right or as trustee, and no next of kin, has a right to the possession. That right is in the executor or administrator, as such, and if he takes possession he takes it in that capacity.⁶⁷ The

⁶³ *Cunnius v. Reading School District*, 198 U. S. 458; *Nelson v. Blinn*, 197 Mass. 279, 83 N. E. 889; 222 U. S. 1; *Stevenson v. Montgomery*, 263 Ill. 93, 104 N. E. 1075; 19 Harv. L. Rev. 535.

⁶⁴ *Scott v. Neal*, 154 U. S. 34, 49; *Wisconsin Trust Co. v. Wisconsin M. & F. Ins. Co.*, 105 Wis. 464, 81 N. W. 642; *Miller v. Sovereign Camp*, 140 Wis. 505, 122 N. W. 1126 (search for absentee not necessary); *Stevenson v. Montgomery*, 263 Ill. 93, 104 N. E. 1075; *Appeal of Daggett*, 114 Me. 167, 95 Atl. 809; *McLaughlin v. Sovereign Camp*, 97 Neb. 71, 149 N. W. 112 (search for absentee not necessary); 11 A. & E. Ency. of Law (2 ed.) 760; 22 Id. 1245; 13 Cyc. 297; 18 Id. 66; 40 Id. 1245; 23 C. J. 1007; 8 R. C. L. 708; 26 L. R. A. (N. S.) 294; L. R. A. 1915B, 729; L. R. A. 1915B, 756; 7 Ann. Cas. 570; 14 Ann. Cas. 240; Ann. Cas. 1917A, 82. See *State v. Plym*, 43 Minn. 385, 45 N. W. 848; *Walte v.*

Coarcy, 45 Minn. 159, 47 N. W. 537; *Spahr v. Mutual Life Ins. Co.*, 98 Minn. 471, 108 N. W. 4; *Behlmer v. Grand Lodge*, 109 Minn. 305, 123 N. W. 1071; *Pierson v. Modern Woodmen*, 125 Minn. 150, 145 N. W. 806; *Swanson v. Modern Brotherhood*, 135 Minn. 304, 160 N. W. 779.

⁶⁵ *Culver v. Hardenbergh*, 37 Minn. 225, 33 N. W. 792; *Rice v. Dickerman*, 47 Minn. 527, 529, 50 N. W. 698; *Boltz v. Schutz*, 61 Minn. 444, 447, 64 N. W. 48; *Hanson v. Nygaard*, 105 Minn. 30, 117 N. W. 235; *In re Barlow's Estate* (Minn.) 188 N. W. 282; *Michigan Trust Co. v. Ferry*, 228 U. S. 346. See *Bombolis v. Minneapolis & St. Louis R. Co.*, 128 Minn. 112, 150 N. W. 385; and § 32.

⁶⁶ *Michigan Trust Co. v. Ferry*, 228 U. S. 346.

⁶⁷ *In re Scheffer's Estate*, 58 Minn. 29, 34, 59 N. W. 956.

theory of our statutes governing the administration of estates is that the rights and claims of all persons interested in the estate of a decedent are to be determined and passed on, in the first instance, by the probate court, and that all moneys, whether to creditors, legatees, or next of kin, are to be paid out of the estate upon order or decree of that court first duly made.⁶⁸

619. Nature of estates of decedents—The estate of a decedent has no legal personality that can have a status in court. It cannot sue or be sued, or be a grantor or grantee of property.⁶⁹ It is not an entity, corporate or otherwise.⁷⁰ An estate of a decedent is the property of every kind left by him at his death.⁷¹

620. Probate law defined—The term "probate law" is used in this country to denote all matters of which probate courts usually have jurisdiction, including the administration of the estates of decedents. The word "probate" originally meant merely "relating to proof" and afterwards "relating to the proof of wills."⁷²

621. Presumption of close—Where it is shown that administration proceedings were had many years ago it will be presumed that they proceeded in due course and were closed.⁷³

622. In what county—Administration proceedings must be had in the county wherein the decedent resided at the time of his death, if he was a resident of the state, and if he was a nonresident, in any county wherein he left property, or into which any property belonging to his estate shall come.⁷⁴

623. Unorganized counties attached to organized counties—Where a county "established," but not organized, nor authorized to have a probate court, is attached for judicial purposes to an "organized" county, the probate court of the latter has jurisdiction over the former.⁷⁵

624. Amicable distribution without administration—Where no administration of the estate of a deceased person who died intestate is applied for, either by the next of kin or creditors, within the statutory time for the presentation of claims against the estate, and no claims are filed or presented within that time, or administration had, the heirs en-

⁶⁸ *Huntsman v. Hooper*, 32 Minn. 163, 165, 20 N. W. 127; *Wiley v. Lockwood* (Minn.) 186 N. W. 699.

⁶⁹ *Estate of Columbus v. Monti*, 6 Minn. 568 (403); *Kenaston v. Lorig*, 81 Minn. 454, 457, 84 N. W. 323. See *Ma goun v. Fireman's Fund Ins. Co.*, 86 Minn. 486, 91 N. W. 5 (a fire insurance policy may be made payable to an estate of a deceased person).

⁷⁰ *De Paris v. Wilmington Trust Co.* (Del.) 104 Atl. 1352.

⁷¹ *Kenaston v. Lorig*, 81 Minn. 454, 84 N. W. 323. See *Hutchins v. St. Paul etc. Ry. Co.*, 44 Minn. 5, 7, 46 N. W. 79.

⁷² *Johnson v. Harrison*, 47 Minn. 575, 50 N. W. 923.

⁷³ *State v. Probate Court*, 25 Minn. 22, 28.

⁷⁴ G. S. 1913, § 7205. See §§ 251, 296, 303, 647, 1146, 1153.

⁷⁵ *State v. Wilcox*, 24 Minn. 143.

titled to the personal estate may dispense with the appointment of an administrator and formal administration by amicable distribution of such property according to their respective rights and thus acquire a valid title thereto.⁷⁶

625. Time limited for settlement of estates—Statute—At the time of granting letters testamentary or of administration, the court shall make an order allowing the executor or administrator reasonable time, not exceeding eighteen months, for the settlement of the estate. But for good cause shown by the executor or administrator, such time may be extended, not exceeding one year at a time.⁷⁷ The purpose of statutory proceedings for the administration of estates is to marshal the assets of the estate in order that the debts of the estate may be promptly paid and the remaining assets promptly distributed to those entitled to them, and probate courts should require an expeditious compliance with the statutes.⁷⁸

626. Same—When another administrator is appointed—Statute—When an executor or administrator dies, resigns, or becomes incapable of discharging his trust, and another administrator is appointed, the probate court may extend the time for the settlement of the estate beyond the time originally allowed, not exceeding one year at a time, and not exceeding one year beyond the time which the court might by law allow to the original executor or administrator, as provided in § 7333 (625, *supra*).⁷⁹

627. Same—Representative not disqualified after time limited—Statute—After the expiration of the time finally limited, an executor or administrator shall not be disqualified from doing anything necessary to settle the estate which he might have done before, unless removed by the probate court, but he shall not be relieved from any liability or penalty incurred by his failure to settle the estate within the time limited.⁸⁰

628. Jurisdiction of federal courts—Where proper diversity of citizenship exists and the requisite amount is in controversy a federal court has original jurisdiction to determine the rights of creditors, legatees, and heirs in an estate and to enforce them by appropriate process in per-

⁷⁶ *Granger v. Harriman*, 89 Minn. 303, 94 N. W. 869. See *Foote v. Foote*, 61 Mich. 181, 28 N. W. 90; *Letts v. Letts*, 73 Mich. 138, 41 N. W. 99; *Ewers v. White's Estate*, 114 Mich. 266, 72 N. W. 184; *Powell v. Pennock*, 181 Mich. 588, 148 N. W. 430; *Brobst v. Brobst*, 190 Mich. 63, 155 N. W. 734; 11 A. & E. Ency. of Law (2 ed.) 742; 18 Cyc. 62; 23 C. J. 1002; *Woerner*, Am. Law of Adm. (2 ed.) § 201; 112 Am. St. Rep.

727; 22 L. R. A. (N. S.) 454; 6 A. L. R. 555.

⁷⁷ G. S. 1913, § 7333.

⁷⁸ *Bolles v. Boyer*, 141 Minn. 404, 170 N. W. 229; *In re S. Marks & Co.'s Estate*, 66 Or. 340, 133 Pac. 777; *Maddock v. Russell*, 109 Cal. 417, 423, 42 Pac. 139; *Tilt v. Kelsey*, 207 U. S. 43, 55; *In re Delaney's Estate* (Nev.) 171 Pac. 383. See §§ 613, 691, 749, 882, 1057, 1142.

⁷⁹ G. S. 1913, § 7334.

⁸⁰ G. S. 1913, § 7335.

sonam. But a federal court cannot disturb the possession of an estate by a state court. It cannot enforce its orders and decrees by seizing and controlling the property of an estate which is in course of administration in a state court. A citizen of another state may establish in a federal court a claim against an estate in course of administration in a state court, but the claim so established must take its place and share of the estate as administered in the state court and cannot be enforced by process directly against the property of the decedent. In like manner a distributee who is a resident of another state may establish in a federal court his right to a share in an estate, and enforce the right so established against an executor or administrator personally, or his sureties, or against any other parties subject to liability, or in any other way which does not disturb the possession of the property by the state court. Federal courts have no general probate jurisdiction. They cannot seize, administer or distribute the estates of deceased persons within the several states.⁸¹ The fact that administration proceedings are pending in a state court does not deprive a federal court of the state to determine whether a lien exists in favor of citizens of another state on some of the distributive shares, the lien only to be enforced after the state court has finished its functions.⁸² The federal courts have no general equity jurisdiction to set aside a will or the probate thereof.⁸³ A federal court has jurisdiction to determine the right of one to a share in an estate and rights growing out of an assignment thereof, but not to settle the estate or direct distribution.⁸⁴ A claim against an estate cannot be established in a federal court after the time for the presentation of such claims has expired in the state court having charge of the administration of the estate.⁸⁵

629. Injunction or receiver pending—Equity will sometimes grant an injunction or receiver to preserve property in statu quo pending administration proceedings in another court.⁸⁶

EXECUTORS AND ADMINISTRATORS—IN GENERAL

630. Representatives — Personal representatives — Definitions — The terms "representative," "personal representative" and "legal representative" mean, in their ordinary use, executors or administrators. They are sometimes used to denote next of kin, heirs, or any one succeeding

⁸¹ *Johnson v. Powers*, 139 U. S. 156; *Byers v. McAuley*, 149 U. S. 608; *Ingersoll v. Coram*, 211 U. S. 335; *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33; *McClellan v. Carland*, 217 U. S. 268; *Sutton v. English*, 246 U. S. 199; *Schwartz v. Harris*, 206 Fed. 936; *Smith v. Jennings*, 238 Fed. 48;

Johnson v. Johnson, 225 Fed. 413. See *Ann. Cas.* 1913D, 464.

⁸² *Ingersoll v. Coram*, 211 U. S. 335.

⁸³ *Sutton v. English*, 246 U. S. 199; *Stead v. Curtis*, 205 Fed. 439.

⁸⁴ *Stotesbury v. Huber*, 237 Fed. 413.

⁸⁵ *Security Trust Co. v. Black River Nat. Bank*, 187 U. S. 147.

⁸⁶ See § 24; 38 L. R. A. (N. S.) 231.

to the rights and liabilities of the decedent, or any one who, by operation of law, stands in the place of and represents the interests of another.⁸⁷ In the statutes relating to the probate court the word "representative" includes executors, administrators, special administrators, administrators with the will annexed, administrators de bonis non and guardians.⁸⁸

631. An officer of the law and of the probate court—Subject to orders of court—A representative is an officer of the law.⁸⁹ He is an officer of the probate court appointing him, and subject to its control and directions.⁹⁰ He is a mere judicial instrumentality in the settling of an estate.⁹¹ The probate court controls and administers the property of an estate through the representative.⁹² A failure of a representative to obey an order or decree of the court is a breach of his bond.⁹³

632. Not agent of estate or of decedent—A representative is not regarded as an agent of the estate or of the decedent. He has no principal and the law of principal and agent has no application in determining the powers and duties of representatives as such.⁹⁴

633. Trust relation—Fiduciary capacity—While a representative is not a trustee in the strict sense of the term so far as his title to the property of the estate is concerned, yet he is a trustee in the sense that he occupies a fiduciary relation toward those interested in the estate and in a general way his duties and liabilities are those of a trustee.⁹⁵ The

⁸⁷ *Boutiller v. Steamer Milwaukee*, 8 Minn. 97 (72, 79); *Landis v. Olds*, 9 Minn. 90 (79); *Jones v. Tainter*, 15 Minn. 512 (423); *Atkinson v. Duffy*, 16 Minn. 45 (30); *Simpson v. Cook*, 24 Minn. 180, 187; *Nash v. Tousley*, 28 Minn. 5, 5 N. W. 875; *Walter v. Hensel*, 42 Minn. 204, 209, 44 N. W. 57; *Ewing v. Warner*, 47 Minn. 446, 50 N. W. 603; *Schultz v. Citizens' Mutual Life Ins. Co.*, 59 Minn. 308, 313, 61 N. W. 331; *Willoughby v. St. Paul German Ins. Co.*, 80 Minn. 432, 436, 83 N. W. 377; *Argall v. Sullivan*, 83 Minn. 71, 85 N. W. 931; *Alford v. Consolidated Fire & Marine Ins. Co.*, 88 Minn. 478, 93 N. W. 517; *Lowry v. Duluth*, 94 Minn. 95, 99, 101 N. W. 1059; *Jones v. Minnesota Transfer Ry. Co.*, 108 Minn. 129, 121 N. W. 606.

⁸⁸ *G. S. 1913*, § 7214; *Jones v. Minnesota Transfer Ry. Co.*, 108 Minn. 129, 121 N. W. 606 (special administrators).

⁸⁹ *Wiswell v. Wiswell*, 35 Minn. 371, 29 N. W. 166; *Woerner, Am. Law of Adm. (2 ed.)* § 10.

⁹⁰ *Betcher v. Betcher*, 83 Minn. 215,

218, 86 N. W. 1; *Brown v. Strom*, 113 Minn. 1, 5, 129 N. W. 136; *Beaulieu v. Ain-E-Waush*, 126 Minn. 321, 148 N. W. 282; *State v. Probate Court*, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234; *Fischer v. Hintz*, 145 Minn. 161, 176 N. W. 177; *Raugh v. Weis*, 138 Ind. 42, 45, 37 N. E. 331; *Byers v. McAuley*, 149 U. S. 608; *Tilt v. Kelsey*, 207 U. S. 43, 56; *Woerner, Am. Law of Adm. (2 ed.)* § 10; 18 Cyc. 208; 23 C. J. 1174. See §§ 26, 29, 691, 724, 936, 1029, 1043.

⁹¹ *Cowle v. Strohmeier*, 150 Wis. 401, 136 N. W. 956, 137 N. W. 778.

⁹² *Fischer v. Hintz*, 145 Minn. 161, 176 N. W. 177.

⁹³ See § 691.

⁹⁴ *Ferrin v. Myrick*, 41 N. Y. 315. See § 733.

⁹⁵ *Fleming v. McCutcheon*, 85 Minn. 152, 155, 88 N. W. 433; *Burmester v. Gust*, 117 Minn. 247, 250, 135 N. W. 980; *First Nat. Bank v. Towle*, 118 Minn. 514, 523, 137 N. W. 291; *Arnold v. Smith*, 121 Minn. 116, 140 N. W. 748; *Id.*, 137 Minn. 364, 163 N. W. 672; *Michigan*

general rule which disables a trustee from deriving a personal benefit from the manner in which he manages property intrusted to him applies to a representative.⁹⁶ A representative is a trustee for creditors of assets in his hands.⁹⁷ It is the duty of a representative to look after the interests of creditors, heirs, legatees and devisees. In a limited sense he represents all persons interested in the estate and must act impartially between them.⁹⁸ A representative has no authority to represent the heirs or creditors in the administration of an estate, except in so far as he is required to conserve the estate for all interested therein.⁹⁹

634. Source of authority and status—At common law the source of an executor's authority is in the will and his letters testamentary are mere evidence of his authority.¹ Under our system of administration an executor has no authority to act as such before he is appointed by the probate court and until he qualifies. He is an officer of the law and of the court appointing him and not a mere representative of the testator. The source of his authority is in the law as well as in the will. The mere fact that he is named as executor in the will does not make him an executor but merely gives him a preferential right to be appointed as such by the probate court. Under our system there is little substantial difference between an executor and an administrator. Both are primarily mere officers of the court appointing them. In a limited sense they represent not only the decedent but also creditors and beneficiaries of the estate—all persons interested in the estate.² At common law an executor was regarded as a kind of attorney or representative of the decedent to carry out his wishes or the donee of a power for that purpose. Some of the limitations on the authority of an executor which still exist are traceable to this theory of his status. Much of the modern law of executors and administrators cannot be justified rationally but may be explained historically.³

Trust Co. v. Ferry, 228 U. S. 346, 354; 23 C. J. 1170; *Woerner*, Am. Law of Adm. (2 ed.) §§ 10, 174, 334, 383, 500.

⁹⁶ *Fleming v. McCutcheon*, 85 Minn. 152, 155, 88 N. W. 433.

⁹⁷ *Wyman v. Wyman*, 26 N. Y. 253. See *Devaney v. Ancient Order etc. Ins. Fund*, 122 Minn. 221, 225, 142 N. W. 316.

⁹⁸ *Corey v. Corey*, 120 Minn. 304, 311, 139 N. W. 509; *O'Brien v. Murphy*, 136 Minn. 327, 162 N. W. 356; *McQuaide v. Perot*, 223 N. Y. 75, 119 N. E. 230. See 23 C. J. 1170.

⁹⁹ *State v. Probate Court*, 145 Minn. 344, 177 N. W. 354.

¹ *In re Bergdorf's Will*, 206 N. Y. 309, 99 N. E. 714; 11 A. & E. Ency. of Law (2 ed.) 744; 18 Cyc. 56; 23 C. J. 997, 1019; *Woerner*, Am. Law of Adm. (2 ed.) § 171.

² *Corey v. Corey*, 120 Minn. 304, 311, 139 N. W. 509; *In re Smith's Estate*, 165 Iowa 614, 146 N. W. 836; *Stagg v. Green*, 47 Mo. 500; *Shoenberger v. Lancaster*, 28 Pa. St. 459, 466; *Cheshire Nat. Bank v. Jaynes*, 225 Mass. 432, 114 N. E. 727; 11 A. & E. Ency. of Law (2 ed.) 744; 18 Cyc. 56, 213; 23 C. J. 997, 1020.

³ See 18 Harv. L. Rev. 224; *Holmes*, Common Law, 344; *Maine*, Ancient Law, cc. 6, 7.

635. De facto administrators—Whether there may be a de facto administrator is an open question, but it has been strongly intimated that there may be.⁴

636. Notice to decedent as notice to representative—After the execution of a first mortgage on land a portion of the land was conveyed with a warranty against incumbrance and the grantee made a second mortgage on such portion. The holder of the first mortgage died having knowledge of such conveyance and thereafter his executors extended the time of payment, without any actual knowledge of such conveyance or the second mortgage. Held, that the knowledge of the testator was not imputable to his executors and such portion was not released from the lien of the first mortgage by such extension, and that possession of such portion by the subsequent grantee was not notice to the executors of the second mortgage.⁵

637. Notice of powers—Persons dealing with a representative acting under a will are charged with notice of his powers thereunder.⁶

638. Co-executors and co-administrators—Co-executors and co-administrators are considered for most purposes as one person and the act of one is deemed the act of all and the title of each extends to all the property of the estate. Each has as complete control and right of possession over the estate as if he were the sole representative. One may collect assets, compound, compromise or release debts due the estate, sell, assign, pledge or otherwise dispose of the personal property of the estate, submit claims to arbitration, give acquittances, discharge mortgages, transfer stock, or do any other of the ordinary acts of administration. There is no distinction between executors and administrators in this regard.⁷ All the acting executors of a will must join in the execution of a power of sale in the will unless the will provides otherwise. But if one or more of the persons named as executors dies, refuses to act, or fails to qualify, the others who do qualify and act may execute the power. If only one qualifies and acts he may execute the power.⁸ One representative is not ordinarily liable for the independent acts or omissions of a co-representative. They may act separately or jointly. They are jointly responsible for joint acts and separately liable for their separate acts or omissions.⁹ All the representatives should join in an

⁴ *Culver v. Hardenbergh*, 37 Minn. 225, 33 N. W. 792; *Fridley v. Farmers & Mechanics Sav. Bank*, 136 Minn. 333, 162 N. W. 454.

⁵ *Norton v. Metropolitan Life Ins. Co.*, 74 Minn. 484, 77 N. W. 298.

⁶ *Beakey v. Knutson (Or.)* 174 Pac. 1149.

⁷ *Willis v. Farley*, 24 Cal. 490; *Ames v. Armstrong*, 106 Mass. 15; *Barry v.*

Lambert, 98 N. Y. 300; 17 A. & E. Ency. of Law (2 ed.) 617; 18 Cyc. 1330-1336; 24 C. J. 1184-1189; *Woerner, Am. Law of Adm.* (2 ed.) § 346; 9 L. R. A. 223; 127 Am. St. Rep. 381.

⁸ G. S. 1913, § 6765; 22 A. & E. Ency. of Law (2 ed.) 1100; 18 Cyc. 1334; 24 C. J. 1188; 127 Am. St. Rep. 389; 50 L. R. A. (N. S.) 622. See § 477.

⁹ *Nanz v. Oakley*, 120 N. Y. 84, 24 N.

application for a license to sell real estate but their failure to do so will not render the sale void.¹⁰ All should join in a petition for a final decree.¹¹ All should join in a petition for discharge.¹² They may contest each other's accounts.¹³ It is within the province of the probate court to determine the amount due each of several representatives for his services, but where that court, instead of doing so, allows a lump sum for the services of all of them, the district court may apportion such sum between them in proportion to the services which they have respectively rendered the estate.¹⁴ A court of equity will entertain an action brought by an executor on the part of the estate against a co-executor to determine the amount of a disputed claim, or to force an account, or to foreclose a mortgage, or in any other case, where justice requires it, there being no remedy at law.¹⁵

GRANTING LETTERS TESTAMENTARY

639. When and to whom granted—Statute—When a will has been duly proved and allowed, the court shall issue letters testamentary thereon to the executor named therein, if he is legally competent, and accepts the trust and gives bond as required by law; otherwise, such court shall grant letters of administration with the will annexed.¹⁶ An executor is nominated and in a sense appointed by the will. The letters testamentary are in fact, as well as in form an order of appointment.¹⁷ The person named in the will as executor must be appointed by the court, if he is competent and willing to qualify, unless there are substantial reasons to the contrary.¹⁸ He should be appointed unless conditions have materially changed since the will was executed and it is not likely that the testator would have made the appointment if he had foreseen the conditions existing at the time of the application.¹⁹ He cannot be denied appointment because of objections to his disposi-

E. 306; *In re Sanderson's Estate*, 74 Cal. 199, 15 Pac. 753; *Ames v. Armstrong*, 106 Mass. 15; *In re Hagerty's Estate* (Wash.) 178 Pac. 644; 17 A. & E. Ency. of Law (2 ed.) 625; 18 Cyc. 1336-1345; 24 C. J. 1189-1196; Woerner, Am. Law of Adm. (2 ed.) § 348; 13 Prob. Rep. Ann. 270; 11 L. R. A. (N. S.) 297; 34 Harv. L. Rev. 503.

¹⁰ See § 967.

¹¹ See § 1068.

¹² See § 1144.

¹³ See § 1034.

¹⁴ *Slingerland v. Norton*, 136 Minn. 204, 161 N. W. 497.

¹⁵ *Peterson v. Vanderburgh*, 77 Minn.

218, 79 N. W. 828. See *Patten v. Patten* (N. H.) 109 Atl. 415.

¹⁶ G. S. 1913, § 7283.

¹⁷ *Mumford v. Hall*, 25 Minn. 347, 354.

¹⁸ *Breen v. Kehoe*, 142 Mich. 58, 105 N. W. 28; *Saxe v. Saxe*, 119 Wis. 557, 97 N. W. 187; *Holladay v. Holladay*, 16 Or. 147, 19 Pac. 81; *Smith's Appeal*, 61 Conn. 420, 24 Atl. 273; *In re Bauquier*, 88 Cal. 302, 26 Pac. 178; *In re Smale's Estate*, 150 Iowa 391, 130 N. W. 119; *In re LeLand's Will*, 219 N. Y. 387, 114 N. E. 854; 11 A. & E. Ency. of Law (2 ed.) 745; 18 Cyc. 77; 23 C. J. 1023; Woerner, Am. Law of Adm. (2 ed.) § 229.

¹⁹ *In re Smale's Estate*, 150 Iowa 391, 130 N. W. 119.

tion and moral character by heirs, to whom he is obnoxious, at least if his immorality does not affect his capacity to administer the estate.²⁰ Non-residence is not a disqualification.²¹ That a person is a creditor of the estate does not disqualify him.²² That a person is indebted to the estate does not disqualify him.²³ If a person is not impartial he is not a suitable person to be appointed.²⁴ A domestic trust company is authorized to act as executor.²⁵ The testator may delegate to another the power to choose his executor. He may delegate it to the judge of probate.²⁶ National banks are authorized to act as executors when licensed by the Federal Reserve Board.²⁷ The statute is inapplicable to foreign wills.²⁸

640. Death or failure to qualify—Statute—If a person named as executor in a will has died or refused to accept the trust, or, after being duly cited for that purpose, neglects to accept the same, or for twenty days after the probate of the will neglects to give bond according to law, the court shall grant letters to the other executors, if there are any competent and willing to accept the trust; and in all cases where the executors named in a will are not all appointed, those receiving letters shall have the same authority to act, in every respect, as all would when duly appointed, and acting together. If there be no other executor competent and willing to accept the trust, the court shall appoint as administrator with the will annexed the person who would have been entitled to administration had there been no will.²⁹ An executor declining to serve may withdraw his declination but not after letters of administration have been granted.³⁰

641. When person named in will a minor—Statute—When a person named as executor in a will is, at the time of the probate thereof, under

²⁰ *Saxe v. Saxe*, 119 Wis. 557, 97 N. W. 187; *Woerner*, Am. Law of Adm. (2 ed.) § 233.

²¹ *Cutler v. Howard*, 9 Wis. 309; *Breen v. Kehoe*, 142 Mich. 58, 105 N. W. 28; *In re Brown's Estate*, 80 Cal. 381, 22 Pac. 233; *In re Connor's Estate*, 16 Mont. 465, 41 Pac. 271. See *Hardin v. Jamison*, 60 Minn. 112, 61 N. W. 1018; 11 A. & E. Ency. of Law (2 ed.) 753; 18 Cyc. 78; 23 C. J. 1025; *Woerner*, Am. Law of Adm. (2 ed.) § 230; 1 L. R. A. (N. S.) 341; 113 Am. St. Rep. 562.

²² *Bowen v. Stewart*, 128 Ind. 507, 26 N. E. 168. See *Hardin v. Jamison*, 60 Minn. 112, 61 N. W. 1018; *Corey v. Corey*, 120 Minn. 304, 139 N. W. 509.

²³ *Breen v. Kehoe*, 142 Mich. 58, 105 N. W. 28; *Kidd v. Bates*, 120 Ala. 79, 23 So. 735.

²⁴ *Corey v. Corey*, 120 Minn. 304, 139 N. W. 509.

²⁵ G. S. 1913, § 6410; *Minnesota Loan & Trust Co. v. Beebe*, 40 Minn. 7, 41 N. W. 232; *In re Kilborn's Estate*, 5 Cal. App. 161, 89 Pac. 985 (appointment not compulsory on court).

²⁶ *Brown v. Just*, 118 Mich. 678, 77 N. W. 263.

²⁷ *First Nat. Bank v. Union Trust Co.*, 244 U. S. 416.

²⁸ *Babcock v. Collins*, 60 Minn. 73, 78, 61 N. W. 1020; *Hardin v. Jamison*, 60 Minn. 112, 61 N. W. 1081.

²⁹ G. S. 1913, § 7284. See *Ann. Cas.* 1918D, 459 (what constitutes renunciation of executorship).

³⁰ G. S. 1913, § 7291; *Shannon v. Shannon*, 111 Mass. 331; *Jewett v. Turner*, 172 Mass. 496, 52 N. E. 1082.

full age, the other executor, if any, who accepts the trust, shall administer the estate until the minor arrives at full age, when, upon giving bond according to law, he may be admitted as a joint executor of such will.³¹ Our statute requiring all executors to give bond inferentially disqualifies a minor.³²

642. Executor of an executor—Statute—The statute provides that the executor of an executor shall not, as such, administer on the estate of the first testator.³³ At common law the executor of an executor was ipso facto the executor of the first testator and this right of representation might be transmitted indefinitely. The statute was simply designed to abolish this rule.³⁴ It is the duty of an executor of a deceased executor to account to the probate court for the administration of the decedent.³⁵

643. Existence of claims against estate not necessary—It is no defence to an application for letters testamentary that there are no claims against the estate of the decedent.³⁶

644. Order of appointment—Letters—The letters are in fact, as well as in form, an order of appointment.³⁷

645. Effect of letters as evidence—Res judicata—Collateral attack—If the court has jurisdiction letters testamentary are conclusive evidence of the due appointment of the person therein named as executor and are not subject to collateral attack for error, irregularity or fraud. On collateral attack the jurisdiction of the court will be conclusively presumed unless the record affirmatively shows the contrary.³⁸ Letters testamentary are in the nature of a decree in rem and actually invest the executor with the character which they declare belongs to him and are conclusive upon all the world as to that fact. But they are not conclusive on all the world as to the facts upon which they are based, including the death and domicil of the testator, where the representative character of the executor is not directly involved.³⁹

³¹ G. S. 1913, § 7285.

³² See *Bailey v. Miller*, 27 N. C. 444; *McGooch v. McGooch*, 4 Mass. 348; 11 A. & E. Ency. of Law (2 ed.) 752; 23 C. J. 1025; *Woerner*, Am. Law of Adm. (2 ed.) § 231.

³³ G. S. 1913, § 7286.

³⁴ *Tallon v. Tallon*, 156 Mass. 313, 21 N. E. 287; *Foster v. Bailey*, 157 Mass. 160, 31 N. E. 771; *Petition of Davis* (Mass.) 129 N. E. 366; 11 A. & E. Ency. of Law (2 ed.) 748; 18 Cyc. 1348; *Woerner*, Am. Law of Adm. (2 ed.) § 350.

³⁵ See §§ 1029, 1159.

³⁶ *In re Collins' Estate* (Wash.) 173 Pac. 1016.

³⁷ *Mumford v. Hall*, 25 Minn. 347, 354.

³⁸ *Mumford v. Hall*, 25 Minn. 347 (order of appointment covers sufficiency of bond); 11 A. & E. Ency. of Law (2 ed.) 785; 18 Cyc. 140; 23 C. J. 1084; *Woerner*, Am. Law of Adm. (2 ed.) § 266. See analogous cases under § 662.

³⁹ *Morin v. St. Paul etc. Ry. Co.*, 33 Minn. 176, 180, 22 N. W. 251; *Tilt v. Kelsey*, 207 U. S. 43; *Smith v. Smith's Executor* (Va.) 94 S. E. 777. See § 662.

GRANTING LETTERS OF ADMINISTRATION

646. **Jurisdiction**—In the case of a resident of the state the essential jurisdictional facts are his death and his residence in the state. In the case of a non-resident the essential jurisdictional facts are his death and the existence of property left by him in this state. The fact that the decedent died intestate, or that he was a resident of the particular county in which administration is sought, or that he left property in such county, or, if he is a resident, that he left property in the state, is not jurisdictional in the sense that an appointment in the absence of such fact is absolutely void and subject to collateral attack. In some cases, however, these latter facts are inaccurately spoken of as jurisdictional facts, but they are jurisdictional only in the sense that without proof of them an administrator cannot be properly appointed, and his appointment is subject to direct attack.⁴⁰ In case of a resident of the state the existence of property in the state is not jurisdictional.⁴¹ In some of our cases it is said in the course of argument that the existence of property within the state is essential to jurisdiction even in the case of a resident, but the question has never been squarely presented for decision in this state.⁴² The fact of intestacy is not jurisdictional in the sense that an appointment of an administrator in the mistaken belief of such fact is absolutely void and subject to collateral attack.⁴³ The fact that the decedent was a resident or left property in the particular county wherein administration is sought is not jurisdictional in the sense that an appointment in the wrong county is absolutely void and subject to collateral attack.⁴⁴ Proof that decedent executed a will, which he afterwards destroyed while insane, will not defeat an application for the appointment of an administrator, unless its contents can be proved with such degree of certainty that it may be established as a will.⁴⁵ Jurisdiction will be conclusively presumed unless the record affirmatively shows the contrary.⁴⁶

⁴⁰ See G. S. 1913, §§ 7205, 7287; *Moreland v. Lawrence*, 23 Minn. 84; *Pick v. Strong*, 26 Minn. 303, 3 N. W. 697; *Fridley v. Farmers & Mechanics Sav. Bank*, 136 Minn. 333, 162 N. W. 454; *Larson v. Union Pacific R. Co.*, 70 Neb. 261, 97 N. W. 313; *Wilkinson v. Conalty*, 65 Mich. 614, 32 N. W. 841; *Perkins v. Owen*, 123 Wis. 238, 101 N. W. 415; *Barlass v. Barlass*, 143 Wis. 497, 128 N. W. 58; 11 A. & E. Ency. of Law (2 ed.) 759-763; 18 Cyc. 67-73; 23 C. J. 1007; 32 Harv. L. Rev. 328.

⁴¹ *Watson v. Collins*, 37 Ala. 587; *Bar-*

lass v. Barlass, 143 Wis. 497, 128 N. W. 58; *Connors v. Cunard S. S. Co.*, 204 Mass. 310, 90 N. E. 601; 11 A. & E. Ency. of Law (2 ed.) 763; 18 Cyc. 67; 23 C. J. 1008.

⁴² See cases under § 615.

⁴³ *Perkins v. Owen*, 123 Wis. 238, 101 N. W. 415; *Fridley v. Farmers & Mechanics Sav. Bank*, 136 Minn. 333, 162 N. W. 454. See § 659.

⁴⁴ See § 647.

⁴⁵ *In re Ellis' Estate*, 55 Minn. 401, 56 N. W. 1056.

⁴⁶ See § 34.

647. County in which administration must be had—Domicil of decedent—Statute—Wills shall be proved and administration upon the estates of decedents shall be granted:

1. If the decedent, at the time of his death, was a resident of this state, in the county of such residence.

2. If a non-resident, dying within or without this state, in any county wherein he left property, or into which any property belonging to his estate shall come; and such administration first legally granted shall extend to all the assets of the decedent in this state.⁴⁷ This statute was designed to prevent conflict between the probate courts of the several counties, and to remove doubt as to the proper court to entertain jurisdiction in particular cases.⁴⁸ If a decedent leaves property in a county of this state the probate court of that county has jurisdiction, if a court of another county has not already assumed jurisdiction, regardless of whether the decedent died testate or intestate and regardless of his domicil.⁴⁹ It is not a matter of fundamental importance in what county administration proceedings should be had. It is merely a matter of convenience. Jurisdiction over the estates of deceased persons is an attribute of the sovereignty of the state which it has delegated to the probate courts of the several counties and the jurisdiction of these courts is general. In the organization of the tribunals which are to exercise this jurisdiction, though the language of the statute may create a separate and distinct tribunal for each county in the state, and upon certain facts grant jurisdiction to one of them to the exclusion of others, yet the facts upon which the jurisdiction is given to the court of one county instead of to another are merely incidental, partaking somewhat of the character of matters of procedure, the main fact being the actual death of a person who, at the time of his death, was a resident of the state or left property therein. That is the jurisdictional fact, upon the existence of which is founded the duty of the state to protect and distribute the property according to law.⁵⁰ The word "residence" is used in the statute in the sense of legal domicil. Residence and domicil are not synonymous. Residence is an act. Domicil is an act coupled with an intent. Residence means living in a particular place, while domicil means living in a particular place with an intention to make it a home permanently or for an indefinite time. One may have several residences but only one domicil. Whether there has been a change of domicil is a question of fact rather than of law and the burden of proof is on those who assert it. The declarations of the decedent are admissible to show his intention. The place where one lives is pre-

⁴⁷ G. S. 1913, § 7205.

⁴⁸ *Culver v. Hardenbergh*, 37 Minn. 225, 233, 33 N. W. 792; *State v. Probate Court*, 130 Minn. 269, 153 N. W. 520.

⁴⁹ *Lipman v. Bechhoefer*, 141 Minn. 131, 169 N. W. 536.

⁵⁰ *Bolton v. Schriever*, 135 N. Y. 65, 51 N. E. 1001. See 32 Harv. L. Rev. 329; 23 C. J. 1010.

sumptively his domicil. A domicil once shown to exist is presumed to continue until the contrary is shown.⁵¹ The domicil of the testator may be established by a recital of his residence in the will, in the absence of convincing evidence to the contrary. Such recitals are not conclusive.⁵² A change of domicil may be complete though the decedent left his family temporarily at his former home until he could conveniently move them to his new home.⁵³ Jurisdiction to determine where the residence of the decedent was is necessarily involved in the granting of letters. Domicil is a jurisdictional fact which it is the duty of the court to find. The admission of a will to probate is in effect a decision on the question of domicil.⁵⁴ The will of a married woman must be probated in the county of her husband's domicil though they were living apart, in the absence of proof that she had acquired a separate domicil.⁵⁵ Where the decedent was a non-resident leaving property in several counties of this state the probate court of a county where such property is situated in which application for letters is first made has exclusive jurisdiction to administer all the estate situated in this state regardless of county lines.⁵⁶ Where the probate court of the county wherein a resident decedent was domiciled at the time of his death has first acquired jurisdiction over his estate, the probate court of the county wherein he was temporarily abiding at the time of his death is not thereafter entitled to take jurisdiction of the same estate.⁵⁷ In the case of a non-resident decedent administration must be had in a county where he left property subject to administration, and this is so though the proceedings are based on a will probated in another state.⁵⁸ A cause of action for

⁵¹ *Dunnell*, Minn. Digest and Supplements, §§ 2812-2817; *Seccomb v. Bovey*, 135 Minn. 353, 160 N. W. 1018; *Matter of Newcomb*, 192 N. Y. 238, 84 N. E. 950; *In re McElwaine's Will*, 137 N. Y. S. 681; *Barron v. Boston*, 187 Mass. 168, 170, 72 N. E. 951; *Emery v. Emery*, 218 Mass. 227, 105 N. E. 879; *White v. Stowell*, 229 Mass. 594, 119 N. E. 121; *Williamson v. Osenton*, 232 U. S. 619; *Gilbert v. David*, 235 U. S. 561.

⁵² *Seccomb v. Bovey*, 135 Minn. 353, 160 N. W. 1018; *Wilberding v. Miller*, 88 Ohio St. 609, 106 N. E. 665; *Magruder v. Drury*, 37 D. C. App. 519.

⁵³ *Emery v. Emery*, 218 Mass. 227, 105 N. E. 879. See *White v. Stowell*, 229 Mass. 594, 119 N. E. 121.

⁵⁴ *Lipman v. Bechhoefer*, 141 Minn. 131, 169 N. W. 538; *In re Durkee's Will*, 164 Wis. 41, 159 N. W. 555; *Stanley v. Safe Deposit etc. Co.*, 87 Md. 450, 40 Atl. 53; *Whitehead v. Roberts*, 86 Conn.

351, 85 Atl. 538; *Wilberding v. Miller*, 88 Ohio St. 609, 106 N. E. 665. See *Bigelow v. Booth* (S. D.) 160 N. W. 525 (allowance of will held not an adjudication that jurisdiction attached under a particular subdivision of statute).

⁵⁵ *In re Wickes' Estate*, 128 Cal. 270, 60 Pac. 867. See *Williams v. Moody*, 35 Minn. 280, 28 N. W. 510; *Kramer v. Lamb*, 84 Minn. 468, 471, 87 N. W. 1024; *Willmar v. Spicer*, 129 Minn. 395, 152 N. W. 767; *Williamson v. Osenton*, 232 U. S. 619; 26 Harv. L. Rev. 447; 28 Id. 196; 84 Am. St. Rep. 27.

⁵⁶ *Dungan v. Superior Court*, 149 Cal. 98, 84 Pac. 767.

⁵⁷ *State v. Probate Court*, 130 Minn. 269, 153 N. W. 520.

⁵⁸ *Putnam v. Pitney*, 45 Minn. 242, 244, 47 N. W. 790; *In re Southard's Will*, 48 Minn. 37, 50 N. W. 932. See §§ 296, 647.

the death of a non-resident is "property" giving the court of the county where the injury was inflicted jurisdiction.⁶⁰ The filing of a petition for letters gives the court precedence.⁶⁰ If letters of administration are granted in the wrong county the proceedings are not absolutely void and subject to collateral attack, but may be set aside on direct attack. Until set aside they protect all persons who act in good faith in reliance thereon.⁶¹ If proceedings are initiated in the wrong county a change of venue cannot be had under the general statutes. The proper practice is for the court to dismiss the petition or to transfer the proceeding to the proper county.⁶² Findings as to the domicil of the decedent in probate proceedings in one state are not conclusive in like proceedings in another state.⁶³ Where a person dies while in the act of moving from one residence to another the probate court of the county from which he was moving probably has jurisdiction.⁶⁴ Under the Fourteenth Amendment, the courts of one state are without power to determine by an action in personam the domicil of a decedent or the devolution of his personal assets situate in another state, as against persons, residents of the latter, who do not appear in the proceedings and are notified by publication only.⁶⁵

648. Who entitled to appointment—Statutes—Administration of the estate of a person dying intestate shall be granted to one or more of the persons hereinafter mentioned, and in the following order:

1. The surviving spouse or next of kin or both, as the court may determine, or some person selected by them or either of them, provided that in any case the person appointed shall be suitable and competent to discharge the trust.

2. If all such persons are incompetent or unsuitable, or refuse to accept, or if the surviving spouse or next of kin, for thirty days after the death of the intestate, neglect to apply for administration, the same

⁶⁰ *Hutchins v. St. Paul etc. Ry. Co.*, 44 Minn. 5, 46 N. W. 79.

⁶⁰ *Dungan v. Superior Court*, 149 Cal. 98, 84 Pac. 767.

⁶¹ *Bolton v. Schriever*, 135 N. Y. 65, 31 N. E. 1001; *Fridley v. Farmers & Mechanics Sav. Bank*, 136 Minn. 333, 162 N. W. 454; *Holmes v. Oregon etc. R. Co.*, 5 Fed. 523; *Kling v. Connell*, 105 Ala. 590, 17 So. 121; *Irwin v. Scriber*, 18 Cal. 449; *In re Griffith's Estate*, 84 Cal. 107, 23 Pac. 528; *In re Latour's Estate*, 140 Cal. 414, 425, 73 Pac. 1070; *Tant v. Wigfall*, 65 Ga. 412; *Donahue v. Daniel*, 58 Md. 595; *Johnson v. Benzley*, 65 Mo. 250; *Eller v. Richardson*, 89 Tenn. 575, 15 S. W. 650; *Connors v. Cunard S. S. Co.*, 204 Mass. 310, 90 N. E. 601.

See 19 Ency. Pl. & Pr. 839; 32 Harv. L. Rev. 329.

⁶² *In re Scott's Estate*, 15 Cal. 200.

⁶³ *Lipman v. Bechhoefer*, 141 Minn. 131, 169 N. W. 536; *Overby v. Gordon*, 177 U. S. 214; *Burbank v. Ernst*, 232 U. S. 162; *Magruder v. Drury*, 235 U. S. 106; *Baker v. Baker, Eccles & Co.*, 242 U. S. 394; *Iowa v. Slimmer*, 248 U. S. 115; *In re Horton's Will*, 217 N. Y. 363, 111 N. E. 1066.

⁶⁴ See *Reynolds v. Lloyd Cotton Mills*, 177 N. C. 412, 99 S. E. 240; *Rudolph v. Wetherington's Administrator*, 180 Ky. 271, 202 S. W. 652; *Woerner*, Am. Law of Adm. (2 ed.) § 206.

⁶⁵ *Baker v. Baker, Eccles & Co.*, 242 U. S. 394.

may be granted to one or more of the principal creditors, if any such are competent and willing to take it, or to some other person who may be interested in the administration of the estate. If the decedent was a native of any foreign country and the surviving spouse and next of kin neglect for thirty days after his death to apply for administration, the same may be granted to the consul or other representative of the country of which the decedent was a native, residing in this state, who has filed a copy of his appointment with the secretary of state, or to such person as he may select, if suitable and competent to discharge the trust. But the court in any case arising under this subdivision shall have the discretion to appoint one or more creditors, or other person interested, or to appoint any suitable or competent person interested in the estate by purchase or otherwise.

3. If the person so appointed neglects for thirty days, after written notice of such appointment, under the seal of the probate court, served personally or by mail, to file the oath and bond required by law and the court, such neglect shall be deemed a refusal to serve, and the court may appoint such other person or persons as are next entitled to administer such estate. Such person may be appointed without notice.⁶⁶ The county treasurers of the several counties, and the attorney general, have the same rights to apply for letters of administration as are conferred upon creditors by law.⁶⁷

649. Eligibility—In general—Interest in the estate is not essential to eligibility where the persons given a preference by the statute fail to apply within the statutory period.⁶⁸ It is the general policy of most of the states to give administration of intestate estates first to persons interested in the estates, upon the presumption that such persons will be most likely to conserve the assets for their own benefit and for that of all other persons who may be entitled to share therein, and that in the absence of express power of nomination the right so given is personal and non-delegable. In some states a power to appoint by virtue of a general equitable jurisdiction is recognized, in addition to the power conferred by statute. But this power, if it exists in this state, cannot be exercised until the limits prescribed by the several subdivisions of G. S. 1913, § 7287, have expired.⁶⁹ A married woman may be appointed.⁷⁰ As a general rule a non-resident should not be appointed if there is a competent distributee within the state and willing to act.⁷¹

⁶⁶ G. S. 1913, § 7287, as amended by Laws 1917, c. 513.

⁶⁷ G. S. 1913, § 2283.

⁶⁸ *Austro-Hungarian Consul v. Westphal*, 120 Minn. 122, 131, 139 N. W. 300.

⁶⁹ *Austro-Hungarian Consul v. Westphal*, 120 Minn. 122, 139 N. W. 300;

Woerner, *Am. Law of Adm.* (2 ed.) § 235.

⁷⁰ *McLanahan v. Chamberlain*, 85 Neb. 850, 124 N. W. 684; 11 A. & E. Ency. of Law (2 ed.) 780; 18 Cyc. 96.

⁷¹ *Chicago etc. Ry. Co. v. Gould*, 64 Iowa 343, 20 N. W. 464; *In re Sargent's*

Domestic trust companies may be appointed.⁷² When authorized by the Federal Reserve Board national banks may be appointed.⁷³ Foreign corporations cannot be appointed.⁷⁴ A minor cannot act as an administrator though he is next of kin.⁷⁵ The fact that one is indebted to the estate does not disqualify him.⁷⁶ A person whose personal interests would conflict with his duties as administrator should not be appointed. He is "unsuitable" within the meaning of the statute.⁷⁷ Considerable discretion is given to the probate court in the appointment, for in all cases, the person selected must be one who is in the opinion of the court, "suitable and competent to discharge the trust."⁷⁸ No hard and fast rules can be laid down, but where there is a choice between several of the same class the court should appoint the one who, by reason of age, intelligence, business experience, financial standing, prudence, diligence, integrity and impartiality will best serve the interests of all concerned. The surviving spouse should be preferred, then next of kin and the creditors. Larger interests should be preferred to smaller, males to females, relatives of the whole blood to those of the half blood, and residents to non-residents.⁷⁹ To entitle a consul of a foreign country to appointment as administrator of the estate of a deceased resident of this state he must prove that the decedent was a citizen of that country.⁸⁰ Who shall be appointed is to be determined with reference to the situation at the time of the appointment and not at the time of the death of the decedent.⁸¹

650. Order of preference—The order of preference prescribed by the statute is mandatory and the probate court cannot depart from it.⁸² A foreign consul cannot, as such, assert the priority of right of administration in the surviving spouse or next of kin of one of his deceased

Estate, 62 Wis. 130, 22 N. W. 131; 11 A. & E. Ency. of Law (2 ed.) 780; 18 Cyc. 96; 23 C. J. 1048; Woerner, Am. Law of Adm. (2 ed.) § 241; Note, 1 L. R. A. (N. S.) 341; 1 A. L. R. 1249.

⁷² G. S. 1913, § 6410; Minnesota Loan & Trust Co. v. Beebe, 40 Minn. 7, 41 N. W. 232; Old Colony Trust Co. v. Wallace, 212 Mass. 335, 98 N. E. 1035. Contra, as to foreign trust companies, Grunow v. Simonitsch, 21 N. D. 277, 130 N. W. 835.

⁷³ First Nat. Bank v. Union Trust Co., 244 U. S. 416.

⁷⁴ Grunow v. Simonitsch, 21 N. D. 277, 130 N. W. 835. See 24 L. R. A. 291.

⁷⁵ McGooch v. McGooch, 4 Mass. 348; 11 A. & E. Ency. of Law (2 ed.) 780.

⁷⁶ Latham v. Mullen, 37 R. I. 297, 92

Atl. 804; 11 A. & E. Ency. of Law (2 ed.) 781; 18 Cyc. 94; 23 C. J. 1047.

⁷⁷ First Nat. Bank v. Towle, 118 Minn. 514, 137 N. W. 291. See Corey v. Corey, 120 Minn. 304, 139 N. W. 509.

⁷⁸ Hanson v. Nygaard, 105 Minn. 30, 35, 117 N. W. 235.

⁷⁹ 11 A. & E. Ency. of Law (2 ed.) 871; 18 Cyc. 87; 23 C. J. 1038; Woerner, Am. Law of Adm. (2 ed.) § 242; 1 A. L. R. 1245.

⁸⁰ In re Person's Estate, 146 Minn. 230, 178 N. W. 738.

⁸¹ In re Sprague's Estate, 125 Mich. 357, 84 N. W. 293. See, however, In re Infelise's Estate, 51 Mont. 18, 149 Pac. 365 (next of kin means such with reference to the time of the death of the decedent).

⁸² Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 131, 139 N. W. 300.

nationals.⁸² In the statutory limitation of time within which a right of priority to appointment must be asserted the word "neglect" is used synonymously with "fail."⁸³

651. Surviving spouse—Under our statute a surviving spouse has not an absolute right to appointment. The probate court may refuse to appoint a surviving spouse if he or she is not "suitable and competent to discharge the trust." Ordinarily, however, a surviving spouse is appointed as a matter of course.⁸⁴ A controversy as to whether an applicant was in fact married to the decedent is to be determined by the law of the place where the alleged marriage took place.⁸⁵ In this state, following Massachusetts, and contrary to the rule in most states, the surviving spouse is in the same class as next of kin.⁸⁶ A wife's right to administer on her husband's estate is not absolute, and where she is a non-resident an administrator already appointed will not be removed as of course to make way for her.⁸⁷ The marriage of a widow does not affect her right to appointment.⁸⁸ The fact that a wife had deserted her husband is sufficient ground for refusing to appoint her, but the mere fact that she was living apart from him at the time of his death is not a sufficient ground for refusing to appoint her.⁸⁹ The right of a surviving spouse to appointment is defeated by an absolute divorce.⁹⁰ A surviving spouse may waive the preference given by the statute.⁹¹ A retraction of such a waiver is not a matter of right but is addressed to the discretion of the court.⁹² A widow who has waived her preferential right to letters of administration by not seasonably applying therefor cannot complain of mere prematurity of issuance thereof to another.⁹³

652. Right of nomination—The statute gives the surviving spouse and next of kin a right to nominate an administrator.⁹⁴ A surviving spouse cannot nominate an administrator to the exclusion of the next of kin.⁹⁵

⁸² *Austro-Hungarian Consul v. Westphal*, 120 Minn. 122, 139 N. W. 300.

⁸³ See *Lando v. Lando*, 112 Minn. 257, 127 N. W. 1125; *Osmun v. Galbraith*, 131 Mich. 577, 92 N. W. 101; *Stearns v. Fiske*, 18 Pick. (Mass.) 24; 11 A. & E. Ency. of Law (2 ed.) 768; 18 Cyc. 84; 23 C. J. 1035, 1036; *Woerner*, Am. Law of Adm. (2 ed.) §§ 236, 237; 1 A. L. R. 1247.

⁸⁴ *Lando v. Lando*, 112 Minn. 257, 127 N. W. 1125. See 31 Harv. L. Rev. 567.

⁸⁵ *Cobb v. Newcomb*, 19 Pick. (Mass.) 336; *McGooch v. McGooch*, 4 Mass. 348. See 1 A. L. R. 1247.

⁸⁶ *In re O'Brien's Estate*, 63 Iowa 622, 19 N. W. 797.

⁸⁷ *In re Dow's Estate*, 132 Cal. 309, 64 Pac. 402.

⁸⁸ 11 A. & E. Ency. of Law (2 ed.) 770; 18 Cyc. 86; 23 C. J. 1036; 11 R. C. L. 36.

⁸⁹ *O'Gara v. Eisenlohr*, 38 N. Y. 296.

⁹⁰ *In re Infelise's Estate*, 51 Mont. 18, 149 Pac. 365.

⁹¹ *In re Lowe's Estate* (Cal.) 172 Pac. 583.

⁹² *Garrett v. Harrison* (Ala.) 77 So. 712.

⁹³ See § 648.

⁹⁴ *Cobb v. Newcomb*, 19 Pick. (Mass.) 336.

A minor wife may nominate an administrator though she could not herself act.⁹⁵ The nomination of a non-resident may be disregarded.⁹⁶ One cannot nominate a stranger to a preferred class unless all of that class waive their privilege.⁹⁷ A guardian of a minor next of kin cannot nominate an administrator.⁹⁸ There is no right of nomination except as authorized by statute. A creditor has no right of nomination under subdivision 2 of G. S. 1913, § 7287.⁹⁹ The appointment of a nominee is within the discretion of the court, for the nominee must be, in the opinion of the court, "suitable and competent to discharge the trust."¹

653. Next of kin—Next of kin, within the meaning of the statute, are those who take under the statutes of descent and distribution, excepting husband and wife.² Next of kin means next of kin at the time of the death of the decedent and does not include an heir of an heir of decedent.³ A brother is not next of kin if the decedent left a child.⁴

654. Creditors—The statute authorizes the appointment of creditors under certain conditions.⁵ One holding a claim for funeral expenses is a creditor within the statute and he may be appointed though the only asset of the estate is a cause of action for the wrongful death of the decedent.⁶ The right of a spouse or next of kin to appointment in preference to creditors must be asserted within thirty days from the death of the intestate.⁷ A creditor seeking appointment must allege and prove that he is a creditor of the intestate, but his claim need not be filed in the probate court before administration is granted.⁸ A mere legatee is not a creditor within the statute.⁹ The fact that the intestate's widow disputed the claim of a creditor and that bad feeling existed between them

⁹⁵ *In re Stuart's Estate*, 18 Mont. 595, 46 Pac. 806.

⁹⁶ *In re Sargent*, 62 Wis. 130, 22 N. W. 131.

⁹⁷ *Justice v. Wilkins*, 251 Ill. 13, 95 N. E. 1025.

⁹⁸ *In re Wood's Estate*, 97 Cal. 428, 32 Pac. 516.

⁹⁹ *Austro-Hungarian Consul v. Westphal*, 120 Minn. 122, 139 N. W. 300.

¹ *In re Daggett's Estate*, 15 Idaho 504, 98 Pac. 849.

² *Swasey v. Jaques*, 144 Mass. 135, 10 N. E. 758; *Weaver v. Lamb*, 140 Iowa 615, 119 N. W. 69; *In re Infelise's Estate*, 51 Mont. 18, 149 Pac. 365. See *Watson v. St. Paul City Ry. Co.*, 70 Minn. 514, 73 N. W. 400; 11 A. & E. Ency. of Law (2 ed.) 771; 18 Cyc. 86; 23 C. J. 1037; 11 R. C. L. 37; *Woerner*, Am. Law of Adm. (2 ed.) § 238.

³ *In re Infelise's Estate*, 51 Mont. 18, 149 Pac. 365.

⁴ *Weaver v. Lamb*, 140 Iowa 615, 119 N. W. 69.

⁵ See § 648; *Putnam v. Pitney*, 45 Minn. 242, 245, 47 N. W. 790; *Granger v. Harriman*, 89 Minn. 303, 306, 94 N. W. 869; *Austro-Hungarian Consul v. Westphal*, 120 Minn. 122, 139 N. W. 300; 11 A. & E. Ency. of Law (2 ed.) 772; 18 Cyc. 89; 23 C. J. 1041; 11 R. C. L. 39; *Woerner*, Am. Law of Adm. (2 ed.) § 239; 1 A. L. R. 1251.

⁶ *Austro-Hungarian Consul v. Westphal*, 120 Minn. 122, 139 N. W. 300.

⁷ *Spencer v. Wolf*, 49 Neb. 8, 67 N. W. 858.

⁸ *Appeal of Miller*, 32 Neb. 480, 49 N. W. 427.

⁹ *Chapin v. Hastings*, 2 Pick. (Mass.) 361.

has been held sufficient to justify the court in refusing to appoint him.¹⁰ A creditor has no right to nominate a stranger.¹¹

655. Foreign consuls—The statute authorizes the appointment of a foreign consul under certain conditions.¹² It is questionable whether the "most favored nation clause" in a treaty between the United States and a foreign nation carries the benefit of a provision of a consular convention between the United States and another country, conferring upon the representatives of the parties thereto the right to administer upon the estates of their deceased nationals. Article 14 of the treaty between the United States and Sweden, proclaimed March 20, 1911, purports to give to the consuls of the parties thereto the right to administer upon the estates of their deceased nationals only "so far as the laws of each country will permit;" and hence any right thereby conferred upon a foreign consul, under the "favored nation clause," with respect to the administration of the estate of one of his deceased nationals dying in Minnesota, is expressly subject to the conditions imposed by the laws of this state. A foreign consul cannot, as such, assert the priority of right of administration conferred, by R. L. 1905, § 3696, § 1, upon the surviving spouse or next of kin of one of his deceased nationals.¹³

656. Petition for letters—Contents—Statute—A petition for letters of administration shall show:

1. The jurisdictional facts.
2. The names, ages, and places of residence of the heirs so far as known to the petitioner.
3. The probable value of the real and personal property and the general character of the real estate.
4. The name and address of the person for whom administration is prayed.

No defect of form or in the statement of facts contained in the petition shall invalidate the proceedings.¹⁴ The petition is jurisdictional. If it affirmatively appears from the record, or is conceded, that there was no petition the letters and all subsequent proceedings are void and subject to collateral attack.¹⁵ The essential jurisdictional facts to be alleged in a petition are (1) That the person died intestate; (2) that

¹⁰ *Carpenter v. Wood*, 131 Mich. 314, 91 N. W. 162.

¹¹ *Austro-Hungarian Consul v. Westphal*, 120 Minn. 122, 139 N. W. 300.

¹² See § 648; *Austro-Hungarian Consul v. Westphal*, 120 Minn. 122, 139 N. W. 300; *In re D'Adamos' Estate*, 212 N. Y. 214, 106 N. E. 81; *Hamilton v. Erie R. Co.*, 219 N. Y. 343, 114 N. E. 399; *In re Bagnola's Estate*, 178 Iowa, 757, 154 N. W. 461; 160 N. W. 228; 25 Harv.

L. Rev. 735; 37 L. R. A. (N. S.) 549; Ann. Cas. 1916D, 213; 23 C. J. 1044.

¹³ *Austro-Hungarian Consul v. Westphal*, 120 Minn. 122, 139 N. W. 300.

¹⁴ G. S. 1913, § 7288. See 19 Ency. Pl. & Pr. 828; 18 Cyc. 122; 23 C. J. 1058; Woerner, Am. Law of Adm. (2 ed.) 261.

¹⁵ *Bombolis v. Minneapolis & St. Louis R. Co.*, 128 Minn. 112, 150 N. W. 385. See § 31.

at the time of his death he was a resident of the county; or (3) that he left property in the county to be administered, if he was a non-resident.¹⁶ In a petition by a creditor it is sufficient for him to allege generally that he is a creditor. He need not allege that he is a principal creditor or set out the nature or amount of his claim, or allege that the surviving spouse and next of kin have failed to apply for appointment, or that they are incompetent or unsuitable.¹⁷ The petition must be made by some one interested in the estate.¹⁸ A failure to sign the petition is not fatal. If the petitioner signs his verification of the petition it is a sufficient signing of the petition.¹⁹ Informality in a petition does not render the appointment void and subject to collateral attack.²⁰

657. Notice of hearing—On filing the petition the probate court is required to fix by order a time and place for hearing the petition.²¹ Three weeks' published notice of the hearing must be given.²² The jurisdiction of the probate court over the estate of a deceased person attaches when its general jurisdiction is invoked by the presentation to the court of a proper petition by some person entitled to take such action. The failure to give proper notice to interested parties of the hearing on a petition for the appointment of an administrator, by the publication of the citation for the full time required by the statute, is an irregularity which renders the subsequent proceedings voidable and subject to be set aside on motion or appeal. But the giving of such notice, by the proper publication of the citation, is not necessary in order to confer jurisdiction over the estate upon the court, and therefore the validity of the subsequent proceedings cannot be questioned in a collateral proceeding. Upon the presentation of a petition for the appointment of an administrator, the probate court issued a proper citation, and it was published three times in a legal newspaper. The time of the hearing was improperly set for two days previous to the expiration of a legal publication, and on the date named the administrator was appointed. Subsequent proceedings, which were in all respects regular, resulted in the sale of the real estate and the final closing up of the estate. Ten years thereafter, one of the heirs at law, who had not appeared in the proceedings, filed a petition for administration on the estate, ignoring the previous administration on the theory that the appointment of the

¹⁶ *Larson v. Union Pacific R. Co.*, 70 Neb. 261, 97 N. W. 313; *Wilkinson v. Conalty*, 65 Mich. 614, 32 N. W. 841. See § 646.

¹⁷ *Appeal of Miller*, 32 Neb. 480, 49 N. W. 427; *Wilkinson v. Conalty*, 65 Mich. 614, 32 N. W. 841; *In re Johnson's Estate*, 66 Mich. 525, 33 N. W. 413.

¹⁸ *Pick v. Strong*, 26 Minn. 303, 3 N. W. 697; *Wilkinson v. Conalty*, 65 Mich. 614, 32 N. W. 841.

¹⁹ *Ward v. Graff*, 86 Neb. 535, 125 N. W. 1091.

²⁰ *Fridley v. Farmers & Mechanics Sav. Bank*, 136 Minn. 333, 162 N. W. 454; *Christianson v. King County*, 239 U. S. 356, citing *Pick v. Strong*, 26 Minn. 303, 3 N. W. 697.

²¹ See § 658.

²² See §§ 41, 42.

administrator was void because of the failure to give the proper notice of the hearing on the petition for the appointment of the administrator. Held, that as the publication of the notice was not jurisdictional and the appointment of the administrator therefore only irregular, the question of the validity of the proceedings cannot be raised in this collateral proceeding.²³

658. Hearing on petition—Proof—Contest—Granting letters—Statute—On filing such petition, the court shall by order fix a time and place for hearing the same. Any person interested may contest the petition or oppose the appointment of the person for whom letters are prayed, on the ground of incompetency, or his own right to administration, by filing written objections, stating the ground thereof, at or before the time fixed for the hearing. On the hearing, proof of service of the notice being filed, the court shall hear the proofs offered by all parties, and order the issue of letters of administration to such person as it deems entitled thereto.²⁴ On the hearing it is not necessary to make proof of prior proceedings for the court will take judicial notice of them. Thus, in an application by a creditor, it is not necessary to prove that no application has been made by a surviving spouse or next of kin, for of that fact the court will take judicial notice.²⁵ A creditor seeking appointment must prove his claim, but it need not be filed in the probate court before administration is granted.²⁶ A claim of a creditor seeking appointment may be proved by his account books verified by his oath.²⁷ It has been held that the state could not contest an appointment by virtue of its possible right to an escheat.²⁸ An officious intermeddler has no right to contest the appointment.²⁹ A foreign consul as such, has a proper status to intervene in and become a party to proceedings upon an application to appoint an administrator of the estate of one of his deceased nationals dying in this state, and may appeal from the order of the court making the appointment.³⁰ If it is claimed that there is a will of the decedent entitled to probate it may be shown that it has been revoked.³¹ A mere debtor of the estate cannot contest the appointment of an administrator.³² In an order for letters it is not necessary to specify the relation which the appointee holds to the estate.³³

²³ *Hanson v. Nygaard*, 105 Minn. 30, 117 N. W. 235. See *Carter v. Frahm*, 31 S. D. 379, 141 N. W. 370.

²⁴ G. S. 1913, § 7289.

²⁵ *Wilkinson v. Conalty*, 65 Mich. 614, 32 N. W. 841.

²⁶ *Appeal of Miller*, 32 Neb. 480, 49 N. W. 427.

²⁷ *Arnold v. Sabin*, 1 Cush. (Mass.) 525.

²⁸ *McClellan v. State*, 27 S. D. 109, 129 N. W. 1037. See § 262.

²⁹ *In re Smale's Estate*, 150 Iowa 391, 130 N. W. 119.

³⁰ *Austro-Hungarian Consul v. Westphal*, 120 Minn. 122, 139 N. W. 300.

³¹ *Patterson v. Fuller (Wis.)* 170 N. W. 254.

³² *In re Hardy's Estate*, 35 Minn. 193, 28 N. W. 219; *State v. Probate Court*, 149 Minn. 464, 184 N. W. 43.

³³ *Wilkinson v. Conalty*, 65 Mich. 614, 32 N. W. 841.

659. Effect of subsequent proof of will—Statute—If after granting administration on an estate, as of an intestate decedent, a will is proved and allowed, the court shall by order revoke the administration, and the powers of such administrator shall cease, and he shall surrender his letters to the court and render an account of his administration within such time as the court shall direct. In such case the executor of the will shall be entitled to sue for and collect all goods, chattels, rights, and credits of the decedent remaining unadministered, and be admitted to prosecute any suit commenced by the administrator before the revocation of his letters.³⁴ The probate of the will must precede the order revoking the first administration. Possibly the proceedings to probate the will and to revoke the first administration may go hand in hand, the order of revocation being made to depend entirely on the success of the application to prove the will.³⁵ If letters of administration are revoked upon the subsequent proof of a will all persons who have acted in good faith in reliance on the letters are protected thereby.³⁶

660. Existence of claims against estate not necessary—It is no defence to an application for the appointment of an administrator that there are no claims against the estate. Whether there are any such claims can only be determined by administration and notice to creditors to present their claims as provided by statute.³⁷

661. Proceedings in rem—Proceedings for the appointment of an administrator are in rem.³⁸

662. Effect of letters as evidence—Res judicata—Collateral attack—Letters of administration issued by a court with jurisdiction are conclusive evidence of the due appointment of the person therein named as administrator and are not subject to collateral attack for error, irregularity or fraud. On collateral attack the jurisdiction of the court will be conclusively presumed unless the record affirmatively shows the contrary.³⁹ In all cases to which an administrator, as such, is a party, for

³⁴ G. S. 1913, § 7290; *Stackhouse v. Berryhill*, 47 Minn. 20, 49 N. W. 392.

³⁵ *Stackhouse v. Berryhill*, 47 Minn. 20, 49 N. W. 392.

³⁶ *Fridley v. Farmers & Mechanics Sav. Bank*, 136 Minn. 333, 162 N. W. 454. See 1917B, 1128; 28 Harv. L. Rev. 208.

³⁷ *In re Collins' Estate* (Wash.) 173 Pac. 1016.

³⁸ *Fridley v. Farmers & Mechanics Sav. Bank*, 136 Minn. 333, 162 N. W. 454; *Overby v. Gordon*, 177 U. S. 214; *Anderson v. Qualey*, 216 Mass. 106, 103 N. W. 90; *Carter v. Frahm*, 31 S. D. 379, 141 N. W. 370; 18 Cyc. 65; 23 C. J. 1006. See §§ 614, 662.

³⁹ *Moreland v. Lawrence*, 23 Minn. 84; *Pick v. Strong*, 26 Minn. 303, 3 N. W. 697; *Morin v. St. Paul etc. Ry. Co.*, 33 Minn. 176, 180, 22 N. W. 251; *Olson v. Fish*, 75 Minn. 228, 77 N. W. 818; *Hanson v. Nygaard*, 105 Minn. 30, 37, 117 N. W. 235; *Doran v. Kennedy*, 122 Minn. 1, 141 N. W. 851, 237 U. S. 362; *Fridley v. Farmers & Mechanics Sav. Bank*, 136 Minn. 333, 162 N. W. 454; *Christianson v. King County*, 239 U. S. 356. See *Mumford v. Hall*, 25 Minn. 347; *Davis v. Hudson*, 29 Minn. 27, 38, 11 N. W. 136; *Culver v. Hardenbergh*, 37 Minn. 225, 33 N. W. 792; *Minnesota Loan & Trust Co. v. Beebe*, 40 Minn. 7, 11, 41 N. W. 232; *Hutchins v. St. Paul etc.*

the purpose of showing his representative capacity and his authority to act for and enforce and protect the rights of the estate he assumes to represent, letters of administration to him are at least *prima facie* evidence of every fact upon which such capacity and authority depend, including the death of the person on whose estate the letters issued.⁴⁰ A grant of administration is in the nature of a decree in rem and actually invests the administrator with the character which it declares belongs to him and is conclusive against all the world as to that fact.⁴¹ Letters of administration are not evidence against all the world of the facts upon which they are based, including the death and domicil of the decedent, where the representative character of the administrator is not directly involved.⁴² In an action by an administrator to recover possession of realty of the decedent his appointment is *prima facie* evidence that administration of the estate was necessary, that there were outstanding debts, and that possession of the premises is necessary for purposes of administration.⁴³ One against whom an administrator asserts a right of action has no standing in the probate court to object to the administrator whom the court has appointed, unless the appointment is void on the face of the record.⁴⁴ Letters of administration under seal of the court issuing them prove themselves. It is not necessary to prove the proceedings leading up to their issue.⁴⁵ If it appears from the record, or is conceded, that there was no petition for the appointment of the administrator, the letters are void and may be collaterally attacked.⁴⁶ The appointment of an administrator for the estate of a person who is in fact alive is void and subject to collateral attack.⁴⁷ While the burden of proving the death of the person for whose estate an administrator is asked is upon the petitioner for letters the finding by the court in making the appointment that the person is dead establishes that fact *prima facie*, and the burden is upon one collaterally attacking the order to show that the person is alive.⁴⁸ The appointment of an administrator is

Ry. Co., 44 Minn. 5, 6, 46 N. W. 79; 11 A. & E. Ency. of Law (2 ed.) 785; 18 Cyc. 141; 23 C. J. 1086; Woerner, Am. Law of Adm. (2 ed.) § 266; 81 Am. St. Rep. 535.

⁴⁰ Pick v. Strong, 26 Minn. 303, 3 N. W. 697. See Morin v. St. Paul etc. Ry. Co., 33 Minn. 176, 180, 22 N. W. 251.

⁴¹ Morin v. St. Paul etc. Ry. Co., 33 Minn. 176, 180, 22 N. W. 251; Fridley v. Farmers & Mechanics Sav. Bank, 136 Minn. 333, 162 N. W. 454.

⁴² Morin v. St. Paul etc. Ry. Co., 33 Minn. 176, 180, 22 N. W. 251; Tilt v. Kelsey, 207 U. S. 43; Mutual Benefit Life Ins. Co. v. Tisdale, 91 U. S. 238; Brigham v. Fayerweather, 140 Mass. 411,

5 N. E. 265; Carroll v. Carroll, 60 N. Y. 121; Werner v. Fraternal Bankers' Reserve Soc., 172 Iowa 504, 154 N. W. 773; Smith v. Smith's Executor (Va.) 94 S. E. 777.

⁴³ Kern v. Cooper, 91 Minn. 121, 124, 97 N. W. 648.

⁴⁴ State v. Probate Court, 149 Minn. 464, 184 N. W. 43. See 14 A. L. R. 619.

⁴⁵ Moreland v. Lawrence, 23 Minn. 84.

⁴⁶ Bombolls v. Minneapolis & St. Louis R. Co., 128 Minn. 112, 150 N. W. 385.

⁴⁷ In re Barrett's Estate, 167 Iowa 218, 149 N. W. 247. See § 616.

⁴⁸ In re Barrett's Estate, 167 Iowa 218, 149 N. W. 247.

not subject to collateral attack on the ground that there was no property belonging to the estate to be administered.⁴⁹ Letters of administration which are void on their face may be collaterally attacked by a debtor of the estate whenever the administrator seeks to enforce payment against him.⁵⁰

663. Relate back to death of decedent—Whenever necessary for the protection of the estate or innocent parties letters of administration will be taken to relate back to the time of the death of the intestate.⁵¹ The granting of letters of administration relates back to the death of the intestate and by operation of law makes valid all acts of the administrator in settlement of the estate from the time of the death and protects those who dealt with him in good faith in relation to the estate. It validates his collection of claims and property of the estate before his appointment and he is bound to account therefor.⁵² The granting of letters by relation vests in the administrator causes of action arising after the death of the decedent and before the granting of letters.⁵³

664. Protect parties acting in reliance thereon—While in force letters of administration are a protection to all persons who act in reliance thereon in good faith provided the court issuing them had jurisdiction of the subject-matter. If they are revoked because issued to a person not entitled thereto, or for any other reason not going to the jurisdiction of the court over the subject-matter, the revocation does not affect those who have acted in reliance thereon in good faith.⁵⁴

665. Effect of appointing person not entitled to appointment—The appointment of a person not entitled to letters is not void and subject to collateral attack, but may be set aside on direct attack. While in force it is a protection to all persons who act in good faith in reliance thereon, provided the court had jurisdiction of the subject-matter.⁵⁵

⁴⁹ *Taylor v. Badger*, 226 Mass. 258, 115 N. E. 405.

⁵⁰ *State v. Probate Court*, 149 Minn. 464, 184 N. W. 43.

⁵¹ *Noon v. Finnegan*, 29 Minn. 418, 13 N. W. 197; *Id.*, 32 Minn. 81, 19 N. W. 391; *Wiswell v. Wiswell*, 35 Minn. 371, 29 N. W. 166.

⁵² *Alvord v. Marsh*, 12 Allen (Mass.) 603; 11 A. & E. Ency. of Law (2 ed.) 908; 18 Cyc. 213; 23 C. J. 1180; *Woerner*, Am. Law of Adm. (2 ed.) § 187.

⁵³ *Noon v. Finnegan*, 29 Minn. 418, 13 N. W. 197; *Id.*, 32 Minn. 81, 19 N. W.

391; 11 A. & E. Ency. of Law (2 ed.) 909; 18 Cyc. 176; 23 C. J. 1181.

⁵⁴ *Fridley v. Farmers & Mechanics Sav. Bank*, 136 Minn. 333, 162 N. W. 454; *State v. Probate Court*, 149 Minn. 464, 184 N. W. 43; 18 Cyc. 141; 23 C. J. 1085; 14 A. L. R. 619. See §§ 659, 665.

⁵⁵ *Pick v. Strong*, 26 Minn. 303, 3 N. W. 697; *Fridley v. Farmers & Mechanics Sav. Bank*, 136 Minn. 333, 162 N. W. 454. See *McNamara v. Casserly*, 61 Minn. 335, 63 N. W. 880; 18 Cyc. 141, 143; 23 C. J. 1088.

BONDS OF REPRESENTATIVES

666. General bond—Statute—Every representative, before entering upon the duties of his trust, shall give a bond in such sum as the court directs, with sufficient sureties, conditioned for the faithful discharge of all the duties of his trust according to law.⁵⁶ The duty of a representative to give a bond is absolute and the probate court cannot excuse him. An executor must give a bond though the testator in his will requests that none be required of him.⁵⁷ When a representative is the sole or residuary legatee and gives the special bond authorized by G. S. 1913, § 7417, he need not give the general bond required by G. S. 1913, § 7416.⁵⁸ The failure to give a bond does not render the appointment of the representative void and subject to collateral attack.⁵⁹ The probate court may require a bond of an administrator appointed to prosecute an action under the statute for death by wrongful act.⁶⁰

667. Form and contents of bond—Conditions—The statute provides that bonds shall run to the probate judge and his successors in office.⁶¹ The general bond of a representative is conditioned for the faithful discharge of all the duties of his trust according to law.⁶² The bond of an administrator is substantially the same as that required of an executor.⁶³ It is no objection that a bond does not name the person who is probate judge.⁶⁴ Letters testamentary or of administration cannot be collaterally attacked for insufficiency of the bond. A grant of letters is an adjudication of the sufficiency of the bond.⁶⁵

668. Several representatives—Joint or separate bond—Statute—When two or more persons are appointed joint executors, administrators, or guardians, the court may take a separate bond from each, or a joint bond from all.⁶⁶ If a joint bond is executed by several representatives

⁵⁶ G. S. 1913, § 7416.

⁵⁷ *Chamberlain v. Husel*, 178 Mich. 1, 144 N. W. 549; 11 A. & E. Ency. of Law (2 ed.) 864; 18 Cyc. 128, 131; 23 C. J. 1069.

⁵⁸ G. S. 1913, § 7417; *Olson v. Fish*, 75 Minn. 228, 77 N. W. 818.

⁵⁹ *Olson v. Fish*, 75 Minn. 228, 77 N. W. 818; *Harris v. Chipman*, 9 Utah 101, 33 Pac. 242; *Ions v. Harbison*, 112 Cal. 260, 44 Pac. 572; 11 A. & E. Ency. of Law (2 ed.) 868; 18 Cyc. 131; 23 C. J. 1077; *Woerner*, Am. Law of Adm. (2 ed.) § 253.

⁶⁰ *Vukmirovich v. Nickolich*, 123 Minn. 165, 143 N. W. 255.

⁶¹ See § 670; *Berkey v. Judd*, 34 Minn. 393, 26 N. W. 5; *O'Gorman v. Lindeke*, 26 Minn. 93, 1 N. W. 841; *Lanier v. Irvine*, 24 Minn. 116.

⁶² § 666; *Balch v. Hooper*, 32 Minn. 158, 162, 20 N. W. 124; *Vukmirovich v. Nickolich*, 123 Minn. 165, 143 N. W. 255. See, as to the sufficiency of conditions under former statutes, *Lanier v. Irvine*, 21 Minn. 447; *Mumford v. Hall*, 25 Minn. 347.

⁶³ *Olson v. Fish*, 75 Minn. 228, 77 N. W. 818.

⁶⁴ *Buel v. Dickey*, 9 Neb. 285, 2 N. W. 884.

⁶⁵ *Mumford v. Hall*, 25 Minn. 347.

⁶⁶ G. S. 1913, § 7418.

each becomes liable for the others unless the bond provides otherwise. They are principals as to the joint sureties and are therefore bound to protect the sureties from each other's acts.⁶⁷

669. Guardians and sureties when discharged—Statute—Whenever a guardian's annual account is adjusted and settled, and it appears that the proceeds of any sale or mortgage of real estate have been included in such account, if the original general bond given on his appointment is found to be then sufficient, or, if insufficient, upon the filing and approval of a new and sufficient general bond, the court, by its order, may cancel any sale bond previously given, provided that when a new bond is given the sureties thereon shall be liable for the full amount of personalty shown by such account as settled to be in the guardian's hands.⁶⁸

670. Run to probate judge—Approval—Leave to sue on—Statute—All bonds authorized or required by law in proceedings in the probate court, or in respect of any estate under administration therein, save as otherwise expressly provided, shall be approved by the probate judge, and shall run to such judge and his successors in office; and, in case of breach of any condition thereof, such bond may be prosecuted by leave of said court in the name and for the benefit of any person interested.⁶⁹

671. Amount of bond—There is no statute in this state fixing the amount of the bond except that it shall be "in such sum as the court directs."⁷⁰ As a general rule it is proper to make the amount of the bond double the value of the personal property and the annual income from the real property. Under special circumstances, however, the amount may properly be much less or even nominal, as, for example, where the representative is the sole or chief beneficiary and there are no debts, or debts for only a trifling amount. A request of a testator in his will that only a nominal bond should be required is not controlling.⁷¹

672. Additional bonds—Statute—Whenever any probate court becomes satisfied that the bond of any representative is insufficient, it may require an additional bond on its own motion or upon the petition of any one interested in the estate of the decedent or ward; and a refusal or failure to furnish such bond within a reasonable time shall be sufficient cause for removal.⁷² The sureties on the additional bond are liable for the acts and omissions of the representative and for assets received by him before as well as after its execution. The remedy on the

⁶⁷ 11 A. & E. Ency. of Law (2 ed.) 881; 18 Cyc. 1250; 24 C. J. 1060; Woerner, Am. Law of Adm. (2 ed.) § 258; 13 Prob. Rep. Ann. 277.

⁶⁸ G. S. 1913, § 7420.

⁶⁹ G. S. 1913, § 7421.

⁷⁰ See § 666.

⁷¹ 11 A. & E. Ency. of Law (2 ed.) 872; 18 Cyc. 131; 23 C. J. 1072; Woerner, Am. Law of Adm. (2 ed.) § 257.

⁷² G. S. 1913, § 7422. Cited arguendo, *Eaton v. Gale*, 96 Minn. 161; 104 N. W. 833.

additional bond is cumulative. The liability of the sureties on the original bond is unaffected.⁷³ A recital in an additional bond that it was given pursuant to an order of court at a specified time is conclusive on the surety.⁷⁴

673. Deposit of securities with trust company to reduce additional bond—Statute—Provision is made by statute for depositing part of the securities of an estate with a trust company and fixing the amount of an additional bond with reference only to the remainder.⁷⁵

674. Discharge of sureties on application to court—Statute—Upon application of any surety on a probate bond to be discharged from further liability as such, the court shall order the principal therein to furnish a new bond within ten days after service upon him of such order. On failure to furnish such new bond, such principal shall be removed, and required to render and settle his account at the earliest practicable time. When the new bond has been given and approved, the surety shall be discharged from liability for any subsequent act or omission of such principal, and the court shall so order. Upon application of such surety, the court shall require the principal, as soon as practicable, to render and settle an account of all his prior doings.⁷⁶ The right of a surety to discharge under the statute is absolute. The probate court has no discretion if proper application is made.⁷⁷ A surety cannot be discharged on the application of the principal.⁷⁸ A discharge under the statute does not relieve the surety from acts or defaults of the representative prior to his discharge.⁷⁹ Where proceedings are had under the statute and the representative appears therein and files a new bond which is approved, the sureties on the old bond are thereby discharged without any formal order of court, though such order should regularly be made.⁸⁰ A discharge by the court of one surety on a bond and the giving of a new bond will discharge the other surety, at least if done without his knowledge or consent.⁸¹

675. Annual examination of bonds by probate judge—Statute—At least once in each year every probate judge shall carefully examine all

⁷³ *Elizalde v. Murphy*, 163 Cal. 681, 126 Pac. 978; *Ellyson v. Lord*, 124 Iowa 125, 99 N. W. 582; *Bellinger v. Thompson*, 26 Or. 320, 37 Pac. 714, 40 Pac. 229; *Choate v. Arrington*, 116 Mass. 552; *Scofield v. Churchill*, 72 N. Y. 565; 11 A. & E. Ency. of Law (2 ed.) 880; 18 Cyc. 1251; 23 C. J. 1079; *Woerner*, Am. Law of Adm. (2 ed.) § 255.

⁷⁴ *Elizalde v. Murphy*, 163 Cal. 681, 126 Pac. 978.

⁷⁵ G. S. 1913, § 6411.

⁷⁶ G. S. 1913, § 7423. See 11 A. & E. Ency. of Law (2 ed.) 897; 18 Cyc. 1265;

23 C. J. 1081; *Woerner*, Am. Law of Adm. (2 ed.) § 255.

⁷⁷ *Allen v. Sanders*, 34 N. J. Eq. 203; *Lane v. State*, 27 Ind. 108.

⁷⁸ *Clark v. American Surety Co.*, 171 Ill. 235, 49 N. E. 481. See *Bellinger v. Thompson*, 26 Or. 320, 37 Pac. 714, 40 Pac. 229.

⁷⁹ *McKim v. Blake*, 132 Mass. 343.

⁸⁰ *Lane v. State*, 29 Ind. 108.

⁸¹ *McKim v. Demmon*, 130 Mass. 404. See *Elizalde v. Murphy*, 146 Cal. 108, 79 Pac. 866.

bonds on file in his office and in force pending the settlement of estates, for the purpose of ascertaining the solvency of the sureties thereon, and, if satisfied that any such bond is insufficient, he shall order an additional bond to be given.⁸²

676. Time within which to give bond—The statutory limitation of twenty days within which an executor must give bond after the probate of a will is probably directory and the court may extend the time.⁸³ The fact that an administrator does not present his bond for approval until several days after the issue of letters to him and the taking of the oath of office does not require the issuance of new letters after such bond is given.⁸⁴

677. Duration of liability—Normally the sureties remain liable so long as the probate court retains jurisdiction of the estate and until the representative is formally discharged by the court as provided by law.⁸⁵

678. Discharge of representative—A final discharge of a representative as provided by statute ordinarily terminates the liability of himself and the sureties on his bond.⁸⁶ The approval of the final report of an administrator and discharging him is a complete adjudication of the account, and no action lies against him or his sureties, on his bond, to compel a restitution of money represented by an alleged fraudulent credit, until the judgment has been set aside in a direct attack, the validity of the judgment not being open to collateral attack.⁸⁷ An order discharging the representative obtained by fraud does not release his sureties.⁸⁸

679. Supposed decedent living—A bond of a representative is void if the supposed decedent is in fact living.⁸⁹

680. Bonding company as surety—Bonding companies may act as sureties on the bonds of representatives and the expense thereof may be allowed on the final accounting of the representative.⁹⁰

681. Justification of sureties—The statute (G. S. 1913, §§ 8231, 8232) relating to the justification of sureties on "official" bonds probably does not apply to bonds of representatives.⁹¹ A probate judge cannot arbitrarily reject a bond, but may require the sureties to justify if there is any reasonable doubt of their responsibility, and the supreme court

⁸² G. S. 1913, § 7424.

⁸³ See *In re Schnorenberg*, 150 Wis. 537, 137 N. W. 752.

⁸⁴ *Ions v. Harbison*, 112 Cal. 260, 267, 44 Pac. 572.

⁸⁵ *Deabold v. Oppermann*, 111 N. Y. 531, 19 N. E. 94; *Williams v. State*, 68 Miss. 680, 10 So. 52; *Walber v. Wilmanns*, 116 Wis. 246, 93 N. W. 47.

⁸⁶ See §§ 1144, 1336.

⁸⁷ *Tucker v. Stewart*, 147 Iowa 294, 126 N. W. 183.

⁸⁸ *Tucker v. Stewart*, 147 Iowa 294, 126 N. W. 183.

⁸⁹ *Springer v. Schavender*, 116 N. C. 12, 21 S. E. 397.

⁹⁰ G. S. 1913, §§ 8235, 8238; *Cozad v. Hibner*, 97 Neb. 780, 151 N. W. 316.

⁹¹ See *Bissell v. Wayne Probate Judge*, 58 Mich. 237, 24 N. W. 886; *Blied v. Barnard*, 120 Minn. 399, 139 N. W. 714.

will not interfere with his action unless there is a clear abuse of discretion.⁹²

682. Liability of sureties contingent—The liability of sureties on the bond is contingent on a breach of trust on the part of the representative.⁹³

683. Sureties discharged by change in liability of principal—The liability of sureties is co-extensive with that of the principal, and can be extended no further than his. Any dealings by those interested in the bond with the principal which would change or increase such liability discharges the sureties.⁹⁴ A surety is not entitled to any favor or immunity that would not be accorded to the representative himself.⁹⁵

684. Sureties not discharged by order extending time to account—An order of the probate court, made after a decree directing payment of debts, extending the time for the representative to render his final account beyond the limits fixed by statute, does not affect the liability of the sureties of the representative with respect to the amounts directed by the decree to be paid to the creditors.⁹⁶

685. Sureties charged with notice of orders and decrees—Sureties are charged with notice of all orders and decrees regularly and properly made by the probate court in the course of the administration.⁹⁷

686. Judgment against representative conclusive on sureties—A judgment, order or decree against a representative is conclusive against his sureties, in the absence of fraud or collusion, though they were not parties to the action or proceeding in which it was rendered. Such a judgment, order or decree cannot be collaterally attacked for error or irregularity in an action on the bond of the representative.⁹⁸

687. Final settlement binding on sureties—The final accounting and settlement of the estate is conclusive upon the sureties, whether they appeared or not, in the absence of fraud or collusion.⁹⁹

⁹² *Carpenter v. Ottawa Probate Judge*, 48 Mich. 318, 12 N. W. 197.

⁹³ *Palmer v. Pollock*, 26 Minn. 433, 4 N. W. 1113.

⁹⁴ *Ward v. Thinkham*, 65 Mich. 695, 32 N. W. 901; 11 A. & E. Ency. of Law (2 ed.) 895; 18 Cyc. 1261; 24 C. J. 1068; Woerner, Am. Law of Adm. (2 ed.) § 255.

⁹⁵ *Ordinary v. Connolly*, 75 N. J. Eq. 521, 72 Atl. 363.

⁹⁶ *Lanier v. Irvine*, 24 Minn. 116.

⁹⁷ *Tucker v. Stewart*, 147 Iowa 294, 126 N. W. 183.

⁹⁸ *Berkey v. Judd*, 31 Minn. 211, 17 N. W. 618; *Jacobson v. Anderson*, 72 Minn. 426, 75 N. W. 607; *Connecticut Mutual Life Ins. Co. v. Schurmeier*, 125 Minn.

368, 147 N. W. 246; *Pierce v. Maetzold*, 126 Minn. 445, 148 N. W. 302; *Sjoli v. Hogenson*, 19 N. D. 82, 122 N. W. 1008 (final decree); *Roberts v. Weadock*, 98 Wis. 400, 74 N. W. 93 (order for payment of debts); 11 A. & E. Ency. of Law (2 ed.) 901; 18 Cyc. 1272; 24 C. J. 1079; Woerner, Am. Law of Adm. (2 ed.) § 255; 52 L. R. A. 187; 40 L. R. A. (N. S.) 708; L. R. A. 1918E, 816; Ann. Cas. 1915D, 400.

⁹⁹ *Meyer v. Barth*, 97 Wis. 352, 72 N. W. 748; *Barney v. Babcock's Estate*, 115 Wis. 409, 91 N. W. 983; *Wallber v. Wilmanns*, 116 Wis. 246, 93 N. W. 47; *Clark v. Fredenburg*, 43 Mich. 263, 5 N. W. 306; *Joy v. Elton*, 9 N. D. 428, 83 N.

688. Fraud—Estoppel of sureties—Where the signatures of the sureties to a bond were obtained by fraud it was held that they were estopped from asserting the defence as against creditors and other beneficiaries of the estate.¹ In an action on a bond for the non-payment of a judgment, held, that a surety was estopped from asserting as a defence an agreement between him and the principals on the bond that the bond should not take effect until signed by other sureties, the obligee not having notice of the agreement.²

689. Effect of death—The liability of a surety on a bond is not discharged by his death but continues throughout the administration and his estate is liable accordingly.³ The death of the representative does not discharge his sureties for his acts and defaults prior to his death.⁴

690. Estoppel of beneficiaries of estate—Where executors had no authority to sell realty, but did so, and devisees, without any objection, received the proceeds, they were estopped from claiming that there was a breach of the bond of the executors.⁵

691. What is a breach of the bond—What property and acts covered—The bond must be construed in the light of the statutes creating the obligations intended to be secured, and either extended or restricted in scope, as the case may be, to cases contemplated by the statute, without doing violence to the language of the bond. The language of a bond conditioned "for the faithful discharge of all the duties of his trust according to law" is broad enough to cover all violations of legal duty.⁶ The general bond applies to a sale of realty under a license from the probate court though a special bond is given on such sale.⁷ Failure to pay over funds of the estate to a successor on demand is a breach of the bond.⁸

W. 875; *Sjoll v. Hogenson*, 19 N. D. 82, 122 N. W. 1008; *Coates v. Lunt*, 213 Mass. 401, 100 N. E. 829; *Reither v. Murdock*, 135 Cal. 197, 87 Pac. 784; *Bellinger v. Thompson*, 26 Or. 320, 37 Pac. 714; *Kenck v. Parchen*, 22 Mont. 519, 57 Pac. 94; *Greer v. McNeal*, 11 Okl. 526, 69 Pac. 93; 11 A. & E. Ency. of Law (2 ed.) 901; 18 Cyc. 1272; 24 C. J. 1080; 52 L. R. A. 165. See §§ 1044, 1073.

¹ *Engstad v. Syverson*, 72 Minn. 188, 75 N. W. 125. See *Olson v. Fish*, 75 Minn. 228, 77 N. W. 818.

² *Berkey v. Judd*, 34 Minn. 393, 26 N. W. 5.

³ *McKeen v. Waldron*, 25 Minn. 466; *Hantzsch v. Massolt*, 61 Minn. 361, 63 N. W. 1069; *Green v. Young*, 8 Greenl. (Me.) 14; *Snyder v. State*, 5 Wyo. 318, 40 Pac. 441; 11 A. & E. Ency. of Law (2 ed.) 897; 18 Cyc. 1262; 24 C. J. 1070.

⁴ *Hetcht v. Skaggs*, 53 Ark. 291, 13 S. W. 930; *Sjoll v. Hogenson*, 19 N. D. 82, 122 N. W. 1008. See 18 Cyc. 1262; 24 C. J. 1069.

⁵ *Forbes v. Keyes*, 193 Mass. 38, 78 N. E. 733.

⁶ *Vukmirovich v. Nickolich*, 123 Minn. 165, 143 N. W. 255. See *Balch v. Hooper*, 32 Minn. 158, 162, 20 N. W. 124; 51 Am. Dec. 519.

⁷ See § 972.

⁸ *Balch v. Hooper*, 32 Minn. 158, 20 N. W. 124; *McAlpine v. Kratka*, 98 Minn. 151, 107 N. W. 961; *Vukmirovich v. Nickolich*, 123 Minn. 165, 143 N. W. 255; *Pierce v. Maetzold*, 126 Minn. 445, 148 N. W. 302. See *Martz v. McMahon*, 114 Minn. 34, 129 N. W. 1049; 11 A. & E. Ency. of Law (2 ed.) 893; 18 Cyc. 1272; 24 C. J. 1079.

Failure to render an account is a breach of the bond.⁹ Failure or refusal to obey an order or decree of the probate court is a breach of the bond.¹⁰ Failure of the representative to pay over money found due on his final accounting is a breach of the bond.¹¹ Failure to pay legacies or distributive shares under a decree of distribution is a breach of the bond.¹² Failure to pay claims against the estate duly allowed by the probate court or other court with jurisdiction is a breach of the bond.¹³ Failure to pay a claim ordered paid by the district court on appeal from the district court is a breach of the bond.¹⁴ Any waste or misappropriation of the assets of the estate is a breach of the bond.¹⁵ A surety on an administrator's bond is liable thereon where the principal converts the proceeds of a settlement of a statutory cause of action for the wrongful death of the intestate.¹⁶ The bond covers breaches of trust committed prior to its execution as well as subsequent thereto.¹⁷ The bond covers all assets actually collected by the representative and also those not collected for want of due diligence on his part.¹⁸ Sureties are not liable for uncollected debts due the estate, if the representative was unable to collect them and the inability was not due to his fault.¹⁹ The bond covers proceeds of realty sold under a power in a will.²⁰ It covers rents and profits of realty.²¹ It covers assets from

⁹ *Forepaugh v. Hoffman*, 23 Minn. 295; *First Nat. Bank v. How*, 28 Minn. 150, 9 N. W. 626; *Golder v. Littlejohn*, 30 Wis. 344; 11 A. & E. Ency. of Law (2 ed.) 894; 18 Cyc. 1271; 24 C. J. 1078.

¹⁰ *Forepaugh v. Hoffman*, 23 Minn. 295; *O'Gorman v. Lindeke*, 26 Minn. 93, 1 N. W. 841; *First Nat. Bank v. How*, 28 Minn. 150, 9 N. W. 626; *Balch v. Hooper*, 32 Minn. 158, 20 N. W. 124; *Pierce v. Maetzold*, 126 Minn. 445, 148 N. W. 302. See *Robbins v. Burrledge*, 128 Mich. 25, 87 N. W. 93 (not liable for failure to obey order not entered in the estate being administered); 11 A. & E. Ency. of Law (2 ed.) 892.

¹¹ *Pierce v. Maetzold*, 126 Minn. 445, 148 N. W. 302; *Mortenson v. Bergthold*, 64 Neb. 208, 89 N. W. 742; *Tucker v. Stewart*, 147 Iowa 294, 128 N. W. 183. See 18 Cyc. 1270.

¹² See §§ 1073, 1087, 1105, 1124.

¹³ See §§ 936-938.

¹⁴ *Berkey v. Judd*, 31 Minn. 271, 17 N. W. 618.

¹⁵ *Vukmirovich v. Nickolich*, 123 Minn. 165, 143 N. W. 255; *Cranson v. Wilsey*, 71 Mich. 356, 39 N. W. 9. See *Whitney v. Pinney*, 51 Minn. 146, 53 N. W. 198;

11 A. & E. Ency. of Law (2 ed.) 893; 18 Cyc. 1271; 24 C. J. 1078.

¹⁶ *Vukmirovich v. Nickolich*, 123 Minn. 165, 143 N. W. 255.

¹⁷ *Elizalde v. Murphy*, 163 Cal. 681, 126 Pac. 978; *Scofield v. Churchill*, 72 N. Y. 565; *Choate v. Arrington*, 116 Mass. 552; *Bellinger v. Thompson*, 26 Or. 320, 37 Pac. 714; *Snyder v. State*, 5 Wyo. 318, 40 Pac. 441; *Ellyson v. Lord*, 124 Iowa 125, 99 N. W. 582; 11 A. & E. Ency. of Law (2 ed.) 880; 18 Cyc. 1253; 24 C. J. 1062.

¹⁸ *Choate v. Arrington*, 116 Mass. 552; 11 A. & E. Ency. of Law (2 ed.) 882; 18 Cyc. 1253; 24 C. J. 1075.

¹⁹ *Lyon v. Osgood*, 58 Vt. 707, 7 Atl. 5.

²⁰ *Hood v. Hood*, 85 N. Y. 561; *Dix v. Morris*, 66 Mo. 514; *Ammidown v. Kinsey*, 144 Mass. 587, 12 N. E. 365; 11 A. & E. Ency. of Law (2 ed.) 885; 18 Cyc. 1256; 24 C. J. 1064. See *Emmons v. Gordon*, 140 Mo. 490, 41 S. W. 998 (bond held not to cover proceeds of sale under power in will of land in foreign state, the will not being probated there). Contra *Hooper v. Hooper*, 29 W. Va. 276.

²¹ G. S. 1913, § 7296; *Lyons v. Lyons*, 101 Mo. App. 494; *Brooks v. Jackson*,

another state actually received by the representative.²² Failure of a representative to pay a widow's allowance pending administration as ordered by the probate court is a breach of the bond.²³ The sureties are not liable for moneys illegally borrowed or tortiously obtained by the representative, though they are used for the benefit of the estate.²⁴ The bond does not cover contracts of the representative in relation to the estate under which he is only personally liable and which do not bind the estate, though the estate is benefited thereby.²⁵ Sureties on the bond of a deceased executor are liable for the charges and expenses of an administration de bonis non if such administration is made necessary by the default of the executor.²⁶ It is generally held that the bond does not cover money or other property not legal assets of the estate, or subject to administration, or to which the representative is not entitled in his representative capacity.²⁷ If a representative obtains a fraudulent order for the sale of property of the estate there is a breach of his bond at once.²⁸ Failure to return an inventory within three months is a breach of the bond.²⁹ The bond covers counsel fees incurred in proceedings to remove a derelict representative.³⁰ The bond is continuous throughout the administration. Each violation of it is a cause of action, and so long as there remains any duty which the representative is legally liable to perform the obligation of the bond continues, and there may be successive and distinct breaches of the bond growing out of the same transaction.³¹ An executor misappropriated large sums of the estate and then absconded. Held, that his sureties were liable for the reasonable expenses incurred in his removal and the appointment of an administrator de bonis non, and in procuring leave to

125 Mass. 307; 11 A. & E. Ency. of Law (2 ed.) 885; 18 Cyc. 1257; 24 C. J. 1065.

²² Fletcher v. Sanders, 7 Dana (Ky.) 345; 11 A. & E. Ency. of Law (2 ed.) 887; 18 Cyc. 1255; 24 C. J. 1064. See § 1058.

²³ Choate v. Jacobs, 136 Mass. 297. See 24 C. J. 1065.

²⁴ Bank of Newton County v. American Bonding Co., 141 Ga. 326, 80 S. E. 1003.

²⁵ Childress v. Morris, 23 Gratt. (Va.) 802; Merrill v. Harris, 20 N. H. 142; McLean v. McLean, 88 N. C. 394; Bank of Newton County v. American Bonding Co., 141 Ga. 326, 80 S. E. 1003; Thompson v. Mann, 65 W. Va. 648, 64 S. E. 920; 11 A. & E. Ency. of Law (2 ed.) 889; 18 Cyc. 1260; 24 C. J. 1068; 22 L. R. A. (N. S.) 1094.

²⁶ Forbes v. Allen, 166 Mass. 569, 44 N. E. 1065.

²⁷ Nickals v. Stanley, 146 Cal. 724, 81 Pac. 117 (insurance money received by

representative payable to widow); Robinson v. Morris & Co., 30 R. I. 132, 73 Atl. 382; Campbell v. American Bonding Co., 172 Ala. 458, 55 So. 306; Costigan v. Kraus, 158 Ky. 818, 166 S. W. 755. See Vukmirovich v. Nickolich, 123 Minn. 165, 143 N. W. 255 (liable for proceeds of settlement of a cause of action for death by wrongful act); 11 A. & E. Ency. of Law (2 ed.) 883; 24 C. J. 1063; 18 Cyc. 1254; 19 Ann. Cas. 560; Ann. Cas. 1915D, 121; 22 Harv. L. Rev. 451.

²⁸ Fincke v. Bundrick, 72 Kan. 182, 83 Pac. 403.

²⁹ Johannes v. Youngs, 45 Wis. 445; Ellis v. Johnson, 83 Wis. 394, 53 N. W. 691; 11 A. & E. Ency. of Law (2 ed.) 890; 18 Cyc. 1267; 24 C. J. 1075.

³⁰ Ordinary v. Connolly, 75 N. J. Eq. 521, 72 Atl. 363.

³¹ Tucker v. Stewart, 147 Iowa 294, 126 N. W. 183.

bring an action on the bond, but were not liable for the services of the new administrator, or for expenses incurred by him in bringing and prosecuting the action on the bond, or for the services and expenses of the new administrator in completing the settlement of the estate.³² A representative charged with the investment of a fund for a particular purpose does not relieve himself and his sureties from liability for the fund until the investment is actually made.³³ Where a representative is also a testamentary trustee under the will of the decedent the sureties on his bond as representative are liable for his acts and omissions in relation to the trust property until he ceases to be a representative, or until he qualifies and gives a bond as trustee.³⁴ The sureties on the bond are not liable for the debts of the representative to the estate if he is insolvent and unable to pay them during the whole period of the administration; otherwise if at any time during the administration he was able to pay them.³⁵ Failure to pay an annuity as directed by a will is a breach of the bond.³⁶ Failure to settle an estate within a reasonable time is a breach of the bond.³⁷ Where under the terms of a will it was the duty of an executor to account for the rents as well as the proceeds of the sales of the realty and turn them over to a foreign executor, his failure to do so was held a breach of his bond.³⁸ Knowledge of the fraud or other default of a representative is not essential to the liability of his sureties.³⁹ Where an executor or administrator dies before a final accounting, it is the duty of his executor or administrator to settle his account. Upon such an accounting an order directing the executor or administrator of the deceased executor or administrator to pay into court the amount found due is proper. The failure of the representative to obey such order is a breach of his bond.⁴⁰

³² McIntire v. Mower, 204 Mass. 233, 90 N. E. 567. Contra, as to additional expense of administration. American Surety Co. v. Piatt, 67 Kan. 294, 72 Pac. 775.

³³ Ellyson v. Lord, 124 Iowa 125, 99 N. W. 582.

³⁴ Martz v. McMahon, 114 Minn. 34, 129 N. W. 1049; Joy v. Elton, 9 N. D. 428, 83 N. W. 875; Wallber v. Wilmanns, 116 Wis. 246, 93 N. W. 47; Karel v. Pereles, 161 Wis. 598, 155 N. W. 152; Cluff v. Day, 124 N. Y. 195, 26 N. E. 306; Coates v. Lunt, 213 Mass. 401, 100 N. E. 829; 11 A. & E. Ency. of Law (2 ed.) 890; 18 Cyc. 1259; 24 C. J. 1066.

³⁵ Sanders v. Dodge, 140 Mich. 236, 103 N. W. 597; Howell v. Anderson, 66 Neb. 575, 92 N. W. 760; McEwen v. Fletcher, 164 Iowa 517, 146 N. W. 1; Costigan v. Kraus, 158 Ky. 818, 166 S.

W. 755; Sanchez v. Forster, 133 Cal. 614, 65 Pac. 1077; Chapin v. Waters, 110 Mass. 195; Probate Judge v. Sullo-way, 68 N. H. 511, 44 Atl. 720; State v. Morrison, 244 Mo. 193, 148 S. W. 907 (action by administrator de bonis non); 11 A. & E. Ency. of Law (2 ed.) 886; 18 Cyc. 1254; 24 C. J. 1062; 18 Harv. L. Rev. 394; 112 Am. St. Rep. 409; 2 Ann. Cas. 353; Ann. Cas. 1916D, 636; 8 A. L. R. 94.

³⁶ Sanford v. Gilman, 44 Conn. 461.

³⁷ In re Delaney's Estate (Nev.) 171 Pac. 383.

³⁸ McIntire v. Mower, 204 Mass. 233, 90 N. E. 567.

³⁹ Fincke v. Bundrick, 72 Kan. 182, 83 Pac. 403.

⁴⁰ O'Gorman v. Lindeke, 26 Minn. 93, 1 N. W. 841. See Robbins v. Burrridge, 128 Mich. 25, 87 N. W. 93.

ACTIONS ON BONDS

692. Jurisdiction—The district court has exclusive jurisdiction of actions on bonds and an action may be maintained therein even before there has been a final accounting and settlement in the probate court. In a proper case the district court will stay proceedings until there has been a final accounting and settlement in the probate court.⁴¹ While the district court has exclusive jurisdiction of actions on bonds a claim for breach of a bond may be presented to the probate court the same as any other claim arising on contract.⁴² The probate court has no authority to determine the validity of the bond as between the sureties and creditors or distributees, or the liability of the sureties to creditors or distributees.⁴³ It is only in exceptional cases that an action on the bond of a representative will lie out of the jurisdiction of his appointment.⁴⁴

693. Who may sue on bond—The bond runs to the probate judge and he may sue thereon in his own name for failure or refusal of the representative to comply with an order of the court.⁴⁵ Formerly the statute required all actions on bonds to be brought in the name of the probate judge.⁴⁶ An administrator de bonis non is an "interested" person within the statute and may sue on his predecessor's bond.⁴⁷ Legatees or distributees cannot sue on the bond for their shares until the probate court has made a decree of distribution.⁴⁸ A creditor of the estate is an "interested" person within the statute and may sue on the bond for failure of the representative to obey the orders of the court or to render an account, to the prejudice of the creditor.⁴⁹ A former statute provided for an action on the bond by a "creditor." Held, that a creditor within the meaning of the statute was one whose claim had been allowed against the estate, by commissioners or by the judge of probate, in the manner prescribed by statute.⁵⁰ A creditor whose claim has been allowed by the probate court, or other court with jurisdiction, may sue on the bond for a failure of the representative to pay it, though there has been no order of court to pay it.⁵¹ One entitled to money realized from

⁴¹ *McAlpine v. Kratka*, 98 Minn. 151, 107 N. W. 961. See 18 Cyc. 1289.

⁴² *Palmer v. Pollock*, 26 Minn. 433, 4 N. W. 1113.

⁴³ *Fidelity & Deposit Co. v. Moshier*, 151 Fed. 806.

⁴⁴ 35 L. R. A. (N. S.) 334. See §§ 1190, 1206.

⁴⁵ *O'Gorman v. Lindeke*, 26 Minn. 93, 1 N. W. 841.

⁴⁶ *Lanier v. Irvine*, 24 Minn. 116.

⁴⁷ See § 1161.

⁴⁸ See §§ 699, 1060, 1073, 1105.

⁴⁹ *Forepaugh v. Hoffman*, 23 Minn.

295. See *First Nat. Bank v. How*, 28 Minn. 150, 9 N. W. 626.

⁵⁰ *First Nat. Bank v. How*, 28 Minn. 150, 9 N. W. 626. See *Lanier v. Irvine*, 24 Minn. 116.

⁵¹ *Johanson v. Hoff*, 70 Minn. 140, 72 N. W. 965; *Connecticut Mutual Life Ins. Co. v. Schurmeler*, 125 Minn. 368, 147 N. W. 246. Under a former statute an order of court for payment was a prerequisite. *Wood v. Myrick*, 18 Minn. 494 (447); *Waterman v. Millard*, 22 Minn. 261; *Forepaugh v. Hoffman*, 23 Minn. 295; *Lanier v. Irvine*, 24 Minn. 116;

the sale of property of the estate may sue on the bond.⁵² An administrator was entitled to a share of the estate. He assigned his interest and later committed a devastavit. Held, that the assignee might sue the surety on the administration bond.⁵³

694. Limitation of actions—The statute of limitations commences to run against an action on the bond of an administrator by a distributee for his share from the time of the final decree of distribution.⁵⁴ The statute of limitations probably does not run against a cause of action for failure of the representative to render an account.⁵⁵ The bond has no independent force apart from the administration proceedings, and, if a liability is barred which it was meant to secure, an action on the bond to enforce that liability is also barred.⁵⁶ A cause of action on a bond given to secure a partial distribution of an estate held not barred.⁵⁷ A cause of action on a bond for conversion of trust funds by an administrator held not barred.⁵⁸

695. Action against one of several obligors—Where the bond is joint and several, the action may be against only one of the obligors. If the order granting leave to sue on the bond is silent as to parties to be sued it is not necessary to join all the obligors.⁵⁹

696. Leave of court to sue on bond—An action cannot be maintained on a bond without leave of the probate court.⁶⁰ Leave of court is no part of the cause of action and need not be alleged in the complaint.⁶¹ After a probate court has granted leave and an action has begun it cannot vacate its order granting leave.⁶² The failure of the principal and sureties to appear and oppose granting leave does not estop them in making defences on the trial.⁶³ An order granting leave to sue on the

Huntsman v. Hooper, 32 Minn. 163, 164, 20 N. W. 127; *Engstad v. Syverson*, 72 Minn. 188, 75 N. W. 125.

⁵² *Stewart v. Phenice*, 65 Iowa 475, 22 N. W. 636.

⁵³ *Muller v. National Surety Co.*, 154 N. Y. S. 1096. See 29 Harv. L. Rev. 333.

⁵⁴ *Ganser v. Ganser*, 83 Minn. 199, 86 N. W. 18 (overruling *Wood v. Myrick*, 16 Minn. 494, 447; *Lanier v. Irvine*, 24 Minn. 116). See 18 Cyc. 1289.

⁵⁵ *Fuller v. Cushman*, 170 Mass. 286, 49 N. E. 631.

⁵⁶ *Biddle v. Wendell*, 37 Mich. 452.

⁵⁷ *Olson v. Fish*, 75 Minn. 228, 77 N. W. 818.

⁵⁸ *Martz v. McMahon*, 114 Minn. 34, 129 N. W. 1049.

⁵⁹ *O'Gorman v. Lindeke*, 26 Minn. 93, 1 N. W. 841. All bonds are now joint

and several in effect though joint in form. See G. S. 1913, § 7916.

⁶⁰ See § 670; *Eaton v. Gale*, 96 Minn. 161, 104 N. W. 833; *Connecticut Mutual Life Ins. Co. v. Schurmeier*, 125 Minn. 368, 373, 147 N. W. 246; *Wunsewich v. Olson*, 137 Minn. 98, 162 N. W. 1054. See *Wood v. Myrick*, 16 Minn. 494 (447); *Palmer v. Pollock*, 26 Minn. 433, 4 N. W. 1113; 18 Cyc. 1286; 24 C. J. 1090; 8 Ency. Pl. & Pr. 719; 2 A. L. R. 563.

⁶¹ *Hantzch v. Massolt*, 61 Minn. 361, 369, 63 N. W. 1069; *Ganser v. Ganser*, 83 Minn. 199, 201, 86 N. W. 18.

⁶² *Connecticut Mutual Life Ins. Co. v. Schurmeier*, 125 Minn. 368, 147 N. W. 246.

⁶³ *Hilton v. Briggs*, 54 Mich. 265, 20 N. W. 47. See *Clark v. Fredenburg*, 43 Mich. 263, 5 N. W. 306 (estopped from attacking order granting leave).

bond may be made without notice either to the representative or his sureties and is not subject to collateral attack.⁶⁴ An action between sureties on a bond to enforce contribution is not an action on the bond and no leave of court is necessary.⁶⁵

697. Demand before suit—It is probably not necessary to make a demand on a representative before bringing an action on his bond for a failure to pay legacies or distributive shares. The decree of distribution makes it his absolute duty to pay them.⁶⁶ A demand on the representative is probably not necessary before action on his bond for failure to pay claims duly allowed against the estate.⁶⁷ No demand is necessary against sureties in any case.⁶⁸

698. Remedy on bond not exclusive—Action on the bond is a cumulative remedy against the representative.⁶⁹ The fact that a creditor applies for an order of the probate court directing the representative to pay a claim does not prevent him from subsequently suing on the bond.⁷⁰ An order or decree on accounting will support an action at law against the representative by an heir, ward or other beneficiary.⁷¹ If a representative misapplies assets in his hands to the injury of creditors of the estate to whom distribution has been ordered, they may sue on the bond, or pursue the fund so misapplied, if they can trace and identify it, and no more than proof of substantial identity is required. These remedies are concurrent, and the election of one does not preclude resort to the other.⁷² The bond is in a sense a substitute for the estate for the payment of creditors.⁷³

699. Necessity of a judgment or decree before action on bond—A legatee or distributee cannot maintain an action on the bond until his right to the legacy or distributive share is determined by a decree of distribution in the probate court.⁷⁴ A creditor of the estate cannot maintain

⁶⁴ *Roberts v. Weadock*, 98 Wis. 400, 74 N. W. 93; *Clark v. Fredenburg*, 43 Mich. 263, 5 N. W. 306; *Fuller v. Cushman*, 170 Mass. 286, 49 N. E. 631.

⁶⁵ *Hardell v. Carroll*, 90 Wis. 350, 63 N. W. 275.

⁶⁶ See *Huntsman v. Hooper*, 32 Minn. 163, 20 N. W. 127; 18 Cyc. 1286; 24 C. J. 1089.

⁶⁷ See *Berkey v. Judd*, 31 Minn. 271, 17 N. W. 618; 18 Cyc. 1286.

⁶⁸ *Elwell v. Prescott*, 38 Wis. 274; 18 Cyc. 1286; 24 C. J. 1089.

⁶⁹ *Connecticut Mutual Life Ins. Co. v. Schurmeier*, 125 Minn. 368, 147 N. W. 246; *Williams v. Davis*, 18 Wis. 115; *Storer v. Storer*, 6 Mass. 390; *Michigan*

Trust Co. v. Ferry, 228 U. S. 346; *Cobb v. Kempton*, 154 Mass. 266, 28 N. E. 264.

⁷⁰ *Connecticut Mutual Life Ins. Co. v. Schurmeier*, 125 Minn. 368, 147 N. W. 246.

⁷¹ *Williams v. Davis*, 18 Wis. 115; *Storer v. Storer*, 6 Mass. 390; *Cobb v. Kempton*, 154 Mass. 266, 28 N. E. 626; *Michigan Trust Co. v. Ferry*, 228 U. S. 346.

⁷² *Pierce v. Holzer*, 65 Mich. 263, 32 N. W. 431.

⁷³ *Olson v. Fish*, 75 Minn. 228, 230, 77 N. W. 818.

⁷⁴ *Huntsman v. Hooper*, 32 Minn. 163, 20 N. W. 127; *Balch v. Hooper*, 32 Minn. 158, 161, 20 N. W. 124. See §§ 1060, 1073, 1105; 18 Cyc. 1280; 24 C. J. 1086; 8 Ency. Pl. & Pr. 717.

an action on the bond for failure of the representative to pay his claim until the claim has been allowed in the probate court, if it is a claim allowable therein, or has recovered judgment in the district court on his claim, if it is not allowable in the probate court. No order for payment is necessary.⁷⁵ If a representative has been guilty of a devastavit or other misconduct it is not necessary to obtain a judgment against him therefor before suit on his bond. In such a case a creditor may maintain an action on the bond though his claim has not been allowed by the probate court.⁷⁶

700. Accounting—In an action on a bond for the non-payment of claims the administrator is entitled to an accounting to determine the share to which the various claimants are entitled, where the assets are insufficient to pay all in full.⁷⁷

701. Insufficient assets as a defence—Insufficiency of assets is a good defence to an action on the bond for the non-payment of a claim. In the absence of fault on his part in the collection of assets a representative is not liable for the non-payment of claims beyond the assets of the estate.⁷⁸ To entitle a representative to defend an action on his bond for insufficiency of assets there must be an inventory filed and a settlement of his account in the probate court.⁷⁹

702. Validity of appointment—Estoppel of sureties—In an action on a bond the representative and sureties are estopped from denying the validity of his appointment.⁸⁰ Where an executor, who is also trustee to convert assets into cash and pay over the proceeds as directed, assumes such duties in the capacity of executor, his sureties, in an action on his bond, cannot question the capacity in which he was acting.⁸¹

703. Amount of recovery—The amount of the penalty provided in the bond is the limit of the sureties' liability, but it is not the measure thereof. In each case the amount of liability must be determined with reference to the damages proved.⁸² In an action on a bond for failure of

⁷⁵ *Wood v. Myrick*, 16 Minn. 494 (447); *Waterman v. Millard*, 22 Minn. 261; *Berkey v. Judd*, 31 Minn. 271, 17 N. W. 618; *Huntsman v. Hooper*, 32 Minn. 163, 20 N. W. 163; *Johanson v. Hoff*, 70 Minn. 140, 72 N. W. 965; 8 Ency. Pl. & Pr. 717; 11 A. & E. Ency. of Law (2 ed.) 899; 24 C. J. 1086; 18 Cyc. 1280; 51 Am. Dec. 529.

⁷⁶ *Forepaugh v. Hoffman*, 23 Minn. 295; *Walber v. Wilmanns*, 116 Wis. 246, 93 N. W. 47; *Blakeman v. Sherwood*, 32 Conn. 324 (failure to return inventory). See *First Nat. Bank v. How*, 28 Minn. 150, 9 N. W. 626; 18 Cyc. 1284; 24 C. J. 1088; 51 Am. Dec. 529.

⁷⁷ *Ames v. Slater*, 27 Minn. 70, 6 N. W. 418.

⁷⁸ *Ames v. Slater*, 27 Minn. 70, 6 N. W. 418. See 18 Cyc. 1291; 24 C. J. 1093.

⁷⁹ *Grant v. Crowley*, 217 Mass. 552, 105 N. E. 625.

⁸⁰ *Joy v. Elton*, 9 N. D. 428, 83 N. W. 875; *Nash v. Sawyer*, 114 Iowa 742, 87 N. W. 707. See 18 Cyc. 1292; 24 C. J. 1093.

⁸¹ *Bellinger v. Thompson*, 26 Or. 320, 37 Pac. 714, 40 Pac. 229.

⁸² *McAlpine v. Kratka*, 98 Minn. 151, 107 N. W. 961; *State v. French*, 60 Conn. 478, 23 Atl. 153; *McKim v. Bartlett*, 129 Mass. 226; 11 A. & E. Ency. of Law (2

the principal to account for funds of the estate, the amount of the liability of the sureties is *prima facie* the amount received by the principal, not to exceed the face of the bond.⁸³ Though the representative is a beneficiary under the will recovery of the full amount may be had in an action on his bond, no final order of distribution having been made. Distribution cannot be had in an action on the bond.⁸⁴ In an action on a bond for failure of the representative to render an account an accounting may be had to determine the amount of recovery.⁸⁵

SPECIAL BOND BY SOLE OR RESIDUARY LEGATEE

704. Statute—When the executor of a will, or administrator with the will annexed, is the sole or residuary legatee thereunder, instead of the bond required by § 7416 (666, *supra*) he may give bond in such sum and with such sureties as the court shall direct, conditioned only for the payment of debts and legacies of the testator, and in such case he shall not be required to return an inventory.⁸⁶

705. Scope and effect of statute—In general—In Massachusetts, where the statute originated, the effect of the bond is to take the estate very largely out of the ordinary course of administration. It has been held in that state that the legislative intent was to provide a special mode of payment for all claims against the estate, whether for debts or legacies—to substitute the bond for the assets of the estate as security to all persons entitled to be paid out of the assets; and that an executor giving such a bond is not required to retain any assets of the estate to pay claims or legacies.⁸⁷ Such a view of the statute ought not to be adopted in this state. It has been said in one of our cases that the bond is a substitute for the estate for the payment of creditors. This was said incidentally in the course of argument and should not be taken as committing our court to the doctrine that the bond affords the exclusive remedy of creditors and legatees and takes the estate out of the ordinary course of administration.⁸⁸ The bond is for the protection, not merely of those to whom debts and legacies are immediately due, but of all who are legally interested that they should be paid and who are prejudiced if they are not so paid.⁸⁹ The executor is bound to perform the condition of the bond though he has no assets.⁹⁰ A sole residuary legatee cannot hold the estate in his individual capacity until

ed.) 882: 18 Cyc. 1307; 24 C. J. 1107; 55 L. R. A. 392.

⁸³ *McAlpine v. Kratka*, 98 Minn. 151, 107 N. W. 961.

⁸⁴ *Walber v. Williams*, 116 Wis. 246, 93 N. W. 47.

⁸⁵ *Golder v. Littlejohn*, 30 Wis. 344.

⁸⁶ G. S. 1913, § 7417. The provision as to an inventory may have been repealed by Laws 1919, c. 385.

⁸⁷ *Lothrop v. Parke*, 202 Mass. 104, 88 N. E. 666.

⁸⁸ *Olson v. Fish*, 75 Minn. 228, 230, 77 N. W. 818.

⁸⁹ *Thayer v. Winchester*, 133 Mass. 447.

⁹⁰ *Jones v. Richardson*, 5 Met. (Mass.) 247.

all the directions of the will have been complied with or a special bond has been given under this statute.⁹¹

706. Optional with executor—The giving of the special bond is optional with the executor.⁹² It is of course not optional with the executor to give the special bond if he is not in fact a sole or residuary legatee. Extrinsic evidence to show the nature and extent of the testator's property is admissible to aid the court in determining whether the executor is a residuary legatee.⁹³

707. Giving of bond to be discouraged—The giving of such a bond ought to be allowed cautiously and only where there are few debts and small legacies, never when there is any doubt about the sufficiency of the assets.⁹⁴ Judges of probate should discourage the giving of such a bond.⁹⁵

708. Comments on statute—This statute originated in Massachusetts where the probate court did not have jurisdiction over the payment of legacies. It is out of place in our system of probate practice and ought to be repealed, and until repealed it should be strictly construed so as not to change the ordinary course of administration except as expressly provided. There are similar statutes in Wisconsin, Michigan, New Hampshire, Nebraska, Kansas and a few other states. They have given rise to conflicting decisions and much uncertainty.⁹⁶

709. A cumulative remedy—The remedy of creditors and legatees upon the bond is cumulative and not exclusive. They may proceed to collect their claims or legacies as if the executor had given the usual bond.⁹⁷

710. What are "debts" within statute—The word "debts" in the statute includes all claims enforceable against the estate, including a judgment for the fraud of the testator in a fiduciary relation.⁹⁸ A liability of the testator as surety on the bond of a public officer is within the

⁹¹ *Meyer v. Garthwaite*, 92 Wis. 571. 66 N. W. 704.

⁹² *Hatheway v. Weeks*, 34 Mich. 237; *Hatheway v. Sackett*, 32 Mich. 102.

⁹³ *Morgan v. Dodge*, 44 N. H. 263.

⁹⁴ *Jones v. Richardson*, 5 Met. (Mass.) 247.

⁹⁵ *Morgan v. Dodge*, 44 N. H. 262.

⁹⁶ See *Lafferty v. People's Sav. Bank*, 76 Mich. 35, 43 N. W. 34; *Thompson v. Pope's Estate*, 77 Neb. 338, 109 N. W. 498; 11 A. & E. Ency. of Law (2 ed.) 867; 18 Cyc. 130; *Woerner*, Am. Law of Adm. (2 ed.) § 202.

⁹⁷ *Wyman v. Brigden*, 4 Mass. 150;

Jones v. Richardson, 5 Met. (Mass.) 247; *Gore v. Brazier*, 3 Mass. 542; *Thompson v. Brown*, 16 Mass. 180; *Colwell v. Alger*, 5 Gray (Mass.) 67; *National Bank v. Stanton*, 116 Mass. 435; *Brooks v. Rice*, 131 Mass. 408; *Collins v. Collins*, 140 Mass. 502, 5 N. E. 632; *Thompson v. Pope's Estate*, 77 Neb. 338, 109 N. W. 498; *Pym v. Pym*, 118 Wis. 662, 96 N. W. 429. See *Olson v. Fish*, 75 Minn. 228, 230, 77 N. W. 818 (bond is a substitute for the estate for the payment of creditors).

⁹⁸ *Lothrop v. Parke*, 202 Mass. 104, 88 N. E. 666.

statute.⁹⁹ Costs awarded out of the estate to the contestants of the will are a debt within the statute.¹

711. Does not take administration out of court—The giving of the bond does not take the administration of the estate out of the probate court.² The giving of the bond does not pass the absolute title to the whole estate to the executor. It does not terminate the administration proceedings or limit the remedy of the general creditors to an action on the bond. The estate remains subject to the payment of the debts of the testator and the charges of administration.³ An executor giving the special bond is no less an executor than if he had given the usual bond and is subject to the control and supervision of the probate court. The court may require him to make a report at any time and may make or refuse to make an order closing the estate. It may control the application of the estate to the payment of creditors.⁴

712. Claims to be presented and allowed as usual—Claims against the estate are to be presented to the probate court and allowed as in ordinary cases.⁵ An action on the bond by a creditor will not lie until his claim is allowed by the probate court as in ordinary cases. The executor has the same time in which to pay debts that he would have had if he had given the usual bond.⁶ An executor giving the special bond may appeal from an order of the probate court allowing a claim against the estate without giving an appeal bond.⁷

713. Form and amount of bond—A bond is not invalidated, so far as the conditions therein are lawful, by the addition of unnecessary or illegal conditions.⁸ The bond should be ample to cover all probable claims.⁹

714. Effect of bond as an admission of assets—By giving the bond the executor conclusively admits the existence of assets sufficient to pay all legacies and debts, at least up to the amount of the bond.¹⁰ While it

⁹⁹ *Snyder v. State*, 5 Wyo. 318.

¹ *In re Cole's Will*, 52 Wis. 591, 9 N. W. 664.

² *Thompson v. Pope's Estate*, 77 Neb. 338, 109 N. W. 498; *Pym v. Pym*, 118 Wis. 662, 96 N. W. 429; *In re Vedders' Estate*, 122 Mich. 439, 81 N. W. 356.

³ *Pym v. Pym*, 118 Wis. 662, 96 N. W. 429.

⁴ *In re Vedders' Estate*, 122 Mich. 439, 81 N. W. 356.

⁵ *Blackmore v. Judge of Probate*, 95 Mich. 446, 54 N. W. 945; *In re Vedders' Estate*, 122 Mich. 439, 81 N. W. 356; *Thompson v. Pope's Estate*, 77 Neb. 338, 109 N. W. 498.

⁶ *Wheeler v. Hatheway*, 54 Mich. 547;

Blackmore v. Judge of Probate, 95 Mich. 446, 54 N. W. 945.

⁷ *Thompson v. Pope's Estate*, 77 Neb. 338, 109 N. W. 498.

⁸ *Probate Court v. Adams*, 27 R. I. 97, 60 Atl. 769.

⁹ *Thompson v. Pope's Estate*, 77 Neb. 338, 109 N. W. 498.

¹⁰ *Stebbins v. Smith*, 4 Pick. (Mass.) 97; *Colwell v. Alger*, 5 Gray (Mass.) 67; *Conant v. Stratton*, 107 Mass. 483; *Chapin v. Waters*, 110 Mass. 200; *National Bank v. Stanton*, 116 Mass. 438; *Thayer v. Winchester*, 133 Mass. 449; *Collins v. Collins*, 140 Mass. 502, 5 N. E. 632; *Jenkins v. Wood*, 144 Mass. 238, 10 N. E. 818; *Thompson v. Pope's Estate*, 77 Neb. 338, 109 N. W. 498.

is said in many cases that the giving of the bond is a conclusive admission of assets sufficient to pay the debts and legacies, this means conclusive as against a defence of no assets set up in an action on the bond, or in an action against the executor to recover a judgment against the estate, or in an action on his independent promise to pay. It does not mean that in a statutory proceeding for alleged waste of the estate the executor may not show that there was in fact no waste.¹¹

715. Application of property—Control of probate court—The right of the executor who has given the special bond to dispose of the property is subject to the authority of the probate court to compel the application of the property to the payment, ratably, of the decedent's debts, in case the executor fails to provide for them from other sources; therefore it is improper, where there is a deficiency of assets, for such an executor to mortgage the property, or to apply the proceeds of a sale thereof, in such manner as to work preferences among the creditors.¹²

716. License to sell realty—The probate court may grant an executor giving the special bond license to sell realty to pay the debts and charges of administration as in ordinary cases. It ought to be held that such an executor cannot sell the realty of the decedent for such purposes without such a license, there being no power in the will. When the special bond is given administration proceedings should be the same as in ordinary cases except as the statute expressly provides otherwise.¹³

717. Duty to pay legacies—In this state the liability of the executor giving this form of bond to pay legacies probably does not arise until they are duly assigned by the probate court in a decree of distribution as in ordinary cases.¹⁴

718. Right to possession of realty—An executor who has given this special bond is bound to surrender the possession of property specifically devised or bequeathed to another and is estopped from claiming the right of possession of such property until the final settlement of the estate.¹⁵

719. Bond does not vest title in representative—The giving of the bond does not vest title to the estate in the representative. The title vests in him only after a decree assigning the estate to him as "sole or residuary legatee."¹⁶

¹¹ *Lothrop v. Parke*, 202 Mass. 104, 88 N. E. 666.

¹² *In re Vedders' Estate*, 122 Mich. 439, 81 N. W. 356.

¹³ See *Lafferty v. People's Sav. Bank*, 76 Mich. 35, 43 N. W. 34; *In re Vedders' Estate*, 122 Mich. 439, 81 N. W. 356; *Thayer v. Winchester*, 133 Mass. 447.

¹⁴ See *Huntsman v. Hooper*, 32 Minn. 163, 20 N. W. 127; *Wiley v. Lockwood*

(Minn.) 186 N. W. 699; and § 699. *Contra*, *Kreamer v. Kreamer*, 52 Kan. 597, 35 Pac. 214; *Probate Court v. Adams*, 27 R. I. 97, 60 Atl. 769. In Rhode Island the estate merges in the bond and passes beyond the control of the probate court. *Bowler v. Emery*, 29 R. I. 310, 70 Atl. 7.

¹⁵ *Caulton v. Pope*, 83 Neb. 723, 120 N. W. 191.

¹⁶ *Jones v. Roberts*, 84 Wis. 465, 54 N.

720. Change to ordinary bond—It has been held that after giving a special bond an executor cannot have it canceled and be allowed to give an ordinary bond, if a considerable time has elapsed.¹⁷

721. Action on bond—In an action on the bond it is not necessary to prove that the executor has assets in his hands.¹⁸ It is no defence to an action on the bond that the assets are exhausted if there were enough exclusive of a claim of the executor against the testator.¹⁹ In this state an action on the bond will probably not lie for a claim which has not been allowed by the probate court or for a legacy which has not been assigned in a decree of distribution by the probate court.²⁰

GENERAL POWERS, DUTIES, AND LIABILITIES OF REPRESENTATIVES

722. Powers limited—Implied powers—A representative has only such powers as are conferred by law or will and his unauthorized acts are void. He has no implied powers except such as are reasonably necessary to effectuate the powers expressly conferred.²¹

723. Summary of duties—The fundamental duties of a representative are to collect, take charge of and manage the estate of a decedent, to settle and pay claims against the estate, and to distribute the remainder of the estate according to law.²²

724. Directions and instructions from probate court—A representative is an officer of the probate court and subject to its orders and directions.²³ He may apply to the probate court for license to sell real property of the estate though he might lawfully sell it under a power in a will.²⁴ He may apply to the probate court for authority to sell personal property of the estate though he might lawfully sell it without such authority.²⁵ He may apply to the court for authority to compromise claims in favor of the estate though he might lawfully compromise them without such authority.²⁶ It is doubtful whether a probate court can entertain an application merely for a construction of a will.²⁷ A probate

W. 917; *Collins v. Collins*, 140 Mass. 502, 5 N. E. 632.

¹⁷ *Alger v. Colwell*, 2 Gray (Mass.) 404.

¹⁸ *Jones v. Richardson*, 5 Met. (Mass.) 247. See § 714.

¹⁹ *Jenkins v. Wood*, 144 Mass. 238, 10 N. E. 818.

²⁰ *Blackmore v. Kent Probate Judge*, 95 Mich. 446, 54 N. W. 945. See §§ 699, 712, 717.

²¹ *Griggs v. Nadeau*, 221 Fed. 381; *In re Munger's Estate*, 168 Iowa 372, 150 N. W. 447.

²² *First Nat. Bank v. Towle*, 118 Minn. 514, 523, 137 N. W. 291. See 23 C. J. 1169.

²³ *Brown v. Strom*, 113 Minn. 1, 5, 129 N. W. 136; *State v. Probate Court*, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234; *Fischer v. Hintz*, 145 Minn. 161, 176 N. W. 177. See §§ 29, 631, 691, 728, 729, 739, 745, 757, 936, 937, 1043.

²⁴ See § 948.

²⁵ See § 736.

²⁶ See § 756.

²⁷ *In re John's Will*, 30 Or. 494, 47 Pac. 341.

court may order a representative to bring into court funds in his hands belonging to the estate to preserve them for distribution and settlement and to protect the rights of all interested parties. It need not leave such parties to their remedy on the bond of the representative.²⁸ Where, upon the petition of non-residents, they have been appointed executors or administrators by a probate court of this state, such court has the power to order that they submit to the service of a summons in a civil action brought in this state for the purpose of determining the liability of the estate they represent on a claim or demand not provable in the probate court in the due course of administration. Whether the remedy in case of a refusal to obey the order is by proceedings as for contempt, or by removal from office, is not decided.²⁹ To an extent not well defined a representative is entitled to instructions from the probate court as to his powers and duties.³⁰ A representative is not entitled to instructions as to matters in regard to which he is not called upon to act presently.³¹

725. Powers before letters—At common law an executor could do nearly all acts under the will before it was proved that he could do afterwards, and, when the will was proved, it related back and cured his acts. Such is not the law under our system of administration, but a deed of land in this state, executed by a foreign executor after the will had been probated at the domicile and he had qualified there, but before the will had been probated in this state, has been sustained.³² When necessary for the protection of the estate the title of an administrator will be held to relate back to the death of the intestate. An administrator is a mere officer of the law, and his title to the assets of the estate is official, and not personal, and cannot be affected, to the prejudice of the estate, by any acts of his prior to his appointment.³³ Where an administrator before his appointment without authority received payment on a note due the decedent, it was held that he could not, after his appointment ratify his acts and retain the money as administrator.³⁴

²⁸ *People v. County Court*, 3 Colo. App. 425, 44 Pac. 166; *Contra*, *In re Welch's Estate*, 110 Cal. 605, 42 Pac. 1089. See §§ 691, 1029, 1043.

²⁹ *State v. Probate Court*, 66 Minn. 246, 68 N. W. 1063.

³⁰ 11 A. & E. Ency. of Law (2 ed.) 910; 18 Cyc. 208; 23 C. J. 1174.

³¹ *Goodrich v. Henderson*, 221 Mass. 234, 108 N. W. 1062.

³² *Babcock v. Collins*, 60 Minn. 73, 61 N. W. 1020. See 11 A. & E. Ency. of Law (2 ed.) 906; 18 Cyc. 212; 23 C. J.

1179; *Woerner*, Am. Law of Adm. (2 ed.) §§ 185, 186; 78 Am. St. Rep. 171; 32 Harv. L. Rev. 318.

³³ *Wiswell v. Wiswell*, 35 Minn. 371, 29 N. W. 166; *First State Bank v. Braden*, 39 S. D. 53, 162 N. W. 929; 11 A. & E. Ency. of Law (2 ed.) 908; 18 Cyc. 213; 23 C. J. 1180; 11 R. C. L. 130; *Woerner*, Am. Law of Adm. (2 ed.) §§ 173, 186, 187. See §§ 77, 735, 738.

³⁴ *Braithwaite v. Bain*, 66 Minn. 325, 69 N. W. 4.

726. Pending contest over will—Pending a contest over the probate of a will an administrator, whether general or special, has no power except to conserve the estate under the direction of the probate court.³⁵

727. Care of family of decedent—It is no part of the duty of a representative to care for the family of the decedent except as directed by a will or statute. He has no common-law duties in that regard.³⁶

728. Duty to preserve estate—It is one of the fundamental duties of a representative to preserve the estate during administration, subject to its disposition for purposes of administration. It is his duty to do this without any special direction from the probate court, but in important matters it is advisable, for his own protection, to first obtain an order of court.³⁷ To protect the estate it is often the duty of a representative to employ persons to care for live stock, to cultivate and harvest crops, to protect property in danger of being lost, to complete work left unfinished by the decedent and to perform his contracts.³⁸

729. Keeping property in repair—Improvements—The statute provides that a representative shall keep in tenantable repair all houses, buildings, and fixtures thereon which are under his control.³⁹ A representative may be allowed reimbursement for repairs of realty which he inherits from the estate if he charges himself with the rents and profits of the property; otherwise not.⁴⁰ A representative is not authorized to make repairs on a homestead occupied as such by the widow of the decedent, though there has been no formal assignment of it to her as such by the probate court. He cannot be allowed reimbursement for such repairs on the allowance of his final account.⁴¹ An administrator of the estate of his deceased wife, who occupies her homestead, cannot charge her estate with improvements thereon made by him.⁴² A representative is not authorized under the statute to make permanent improvements unless under special circumstances they are necessary to keep the premises in tenantable condition.⁴³ An administrator has

³⁵ *Zimmer v. Saier*, 155 Mich. 338, 119 N. W. 433. See 18 Cyc. 214.

³⁶ *In re Moore's Estate*, 72 Cal. 342, 13 Pac. 883; *In re McSwain's Estate*, 176 Cal. 280, 168 Pac. 117. See § 1054.

³⁷ *In re Smith's Estate*, 118 Cal. 462, 50 Pac. 701; 11 A. & E. Ency. of Law (2 ed.) 944; 23 C. J. 1169; Woerner, Am. Law of Adm. (2 ed.) § 329.

³⁸ Woerner, Am. Law of Adm. (2 ed.) § 329.

³⁹ See § 738; *Glencoe Ditching Co. v. Martin*, 148 Minn. 176, 181 N. W. 108; 11 A. & E. Ency. of Law (2 ed.) 1274; 18 Cyc. 271; 24 C. J. 95; Woerner, Am. Law of Adm. (2 ed.) § 518.

⁴⁰ *Rice v. Tilton*, 14 Wyo. 101, 82 Pac. 577; *In re Graff*, 123 Mich. 456, 82 N. W. 248. See *Daniels v. Charles*, 154 Ky. 232, 157 S. W. 32 (administratrix not entitled to reimbursement for improvements on land assigned to her as dower).

⁴¹ *Wilson v. Proctor*, 28 Minn. 13, 8 N. W. 830. See *Norlund v. Dahlgren*, 130 Minn. 462, 153 N. W. 876; *In re Dalton's Estate* (Iowa) 168 N. W. 332.

⁴² *Nordlund v. Dahlgren*, 130 Minn. 462, 153 N. W. 876.

⁴³ *In re Clos' Estate*, 110 Cal. 494, 42 Pac. 971.

no power to bind the estate by a contract for an extensive drainage ditch improvement upon the land of the estate. If he contracts for such improvement he binds himself alone.⁴⁴ Under Mich. Comp. Laws, § 9354, authorizing an executor to keep in good, tenantable repair the property under his control until delivered to the devisees, an executor in a will, whereby testator gave to his wife the use of the income of this estate for life and such additional sum for her support as should be deemed necessary by the executor, and whereby he gave to the executor control of the estate until the death of the wife, could make reasonably necessary repairs on the premises during the life of the wife, and charge the remaindermen with the expenses thereof.⁴⁵ No order of court is necessary before making necessary repairs or improvements, but if they are extensive it is the better practice to procure an order of court.⁴⁶

730. Payment of taxes—It is the duty of a representative to list the personal property of the estate for purposes of taxation.⁴⁷ It is his duty to pay taxes assessed upon the personal property of the estate before his discharge and if he fails to do so he is personally liable therefor.⁴⁸ It is his duty to pay the taxes on the real property of the estate, other than the homestead, if he has funds available therefor, at least if ordinary prudence requires it in order to conserve the interests of the estate.⁴⁹ It is not his duty to pay taxes on the homestead.⁵⁰ Our statutes upon this subject are in a very unsatisfactory condition. It is provided by G. S. 1913, § 7390, that the final account of a representative shall only be allowed "if all taxes, including personal property taxes, assessed against the estate, have been paid so far as there were funds to pay them." This would seem to authorize or require the representative to pay the taxes in all cases. Where real property is in the possession of an heir or devisee it is unfair to the other beneficiaries to have the taxes thereon paid out of the personal assets.⁵¹ It is the duty of a representative to see that all inheritance taxes are paid and he cannot have a final accounting until they are paid and he has filed proper receipts therefor. Unless they are otherwise paid he must either deduct them from distributive shares or collect them from the distributees, and he is not authorized to deliver a devise or bequest until such taxes thereon are paid. He is authorized to sell property subject to such taxes for the pay-

⁴⁴ *Glencoe Ditching Co. v. Martin*, 148 Minn. 176, 181 N. W. 108.

⁴⁵ *In re Norton's Estate*, 169 Mich. 531, 135 N. W. 253.

⁴⁶ *In re Clos' Estate*, 110 Cal. 494, 42 Pac. 971.

⁴⁷ G. S. 1913, § 1904 (4).

⁴⁸ G. S. 1913, §§ 2082, 7390; *Nelson v. Becker*, 63 Minn. 61, 65 N. W. 119. See 11 A. & E. Ency. of Law (2 ed.) 946; 18

Cyc. 420; 24 C. J. 109; *Woerner*, Am. Law of Adm. (2 ed.) § 329.

⁴⁹ G. S. 1913, § 7390; *Winters v. Ellefson*, 128 Minn. 3, 150 N. W. 171; *Long v. Landman*, 118 Mich. 174, 76 N. W. 374.

⁵⁰ *Wilson v. Proctor*, 28 Minn. 13, 8 N. W. 830.

⁵¹ See 11 A. & E. Ency. of Law (2 ed.) 946; 18 Cyc. 420; 24 C. J. 109; *Woerner*, Am. Law of Adm. (2 ed.) § 518.

ment thereof.⁵² The federal inheritance tax is a charge on the estate and should be paid by the representative. He is entitled to a credit therefor as an expense of administration.⁵³ The life tenant in a homestead estate neglected and refused to pay taxes or make repairs thereon for many years, and to save the estate from entire loss to the reversioners the taxes were paid by the administrator with the will annexed, having the power to do so by the express terms of the will. Held, that such administrator might proceed in equity to have a receiver appointed to take charge of the premises, collect the income or rentals of the property, and apply the proceeds to pay the taxes and necessary expense of repairs, and reimburse the administrator for such taxes and expenses so paid, and also pay from such income any unpaid taxes or necessary expense for repairs necessarily made to save the property, and that, if such rental is insufficient, the receiver may, under authority and direction of the trial court, proceed to sell the life estate of the defendant in the premises, or so much thereof as may be sufficient for such purpose.⁵⁴ A special administrator cannot, without the authority of the probate court, and a showing made of necessity, under existing exigencies, to secure the personal estate, include in his account moneys paid to redeem land from taxes, and charge the same to the estate.⁵⁵ Personal property is not subject to taxation, while in the hands of the heirs, executor or administrator, for the amount it should have been taxed during the life of the owner.⁵⁶

731. Insuring property of the estate—It is the duty of a representative to insure both the real and personal property of the estate when ordinary business prudence requires it, and he is entitled to an allowance on his final account for premiums paid. This does not apply to the homestead or other property of the decedent not liable to the payment of debts, and it probably does not apply to real property in the possession of a devisee or heir and not needed for the payment of the debts of the decedent or the charges of administration.⁵⁷

732. Discharging liens on property of estate—A representative has no authority to discharge liens on either real or personal property of the estate by payment, except as authorized by the probate court.⁵⁸

733. Contracts of representative—In general—It is the general rule that an executor or administrator cannot bind the estate which he represents by a new and independent contract, though it is made in the

⁵² G. S. 1913, §§ 2274-2279. See §§ 1228-1258, *infra*.

⁵³ State v. Probate Court, 139 Minn. 210, 166 N. W. 125.

⁵⁴ St. Paul Trust Co. v. Mintzer, 65 Minn. 124, 67 N. W. 657.

⁵⁵ McAlpine v. Kratka, 92 Minn. 411, 100 N. W. 233.

⁵⁶ State v. Eberhard, 90 Minn. 120, 95 N. W. 1115.

⁵⁷ 11 A. & E. Ency. of Law (2 ed.) 945; 18 Cyc. 284; 24 C. J. 111; 11 R. C. L. 159; Woerner, Am. Law of Adm. (2 ed.) § 518; 42 L. R. A. (N. S.) 79.

⁵⁸ See § 937.

interest of and actually benefits the estate, and he assumes to make it only in his representative capacity. If he attempts to do so the contract binds him personally but not the estate. He cannot create a new liability against the estate not founded on the contract or obligation of the decedent.⁵⁹ If a representative borrows money for the purposes of the estate and uses it to pay valid debts, or if he contracts for services which are rendered and are beneficial to the estate, or if he executes a deed in his representative capacity, containing covenants which fail, he is individually liable and judgment must be against him personally. The estate is not bound.⁶⁰ It has been said *arguendo* in one of our cases that if the thing promised by the representative is such as he is lawfully authorized or empowered to do, or if he contracts to do what he has a right or it is his duty to do in his official capacity, then he is not personally bound.⁶¹ A representative may limit his liability on his contracts to the assets in his hands.⁶² Contracts of representatives for services in connection with the estate are their personal contracts and do not bind the estate, though beneficial thereto.⁶³ An administrator, though purporting to act in his representative capacity, who contracts with a real estate broker to pay commissions for the sale of his intestate's real estate is personally bound by the contract. The estate is not bound.⁶⁴ A representative has no authority to make a contract for services which will bind the court in the settlement of his final account; and an allowance cannot be made to a representative for agreed commissions on the sale of real estate; nor can any allowance be made to

⁵⁹ *Ness v. Wood*, 42 Minn. 427, 44 N. W. 313; *Hayes v. Crane*, 48 Minn. 39, 45, 50 N. W. 925; *Brown v. Farnham*, 55 Minn. 27, 56 N. W. 356; *Germania Bank v. Michaud*, 62 Minn. 459, 65 N. W. 70; *Glencoe Ditching Co. v. Martin*, 148 Minn. 176, 181 N. W. 108; *Sumner v. Williams*, 8 Mass. 162; *Ferrin v. Myrick*, 41 N. Y. 315; *Austin v. Munroe*, 47 N. Y. 360; *Schmittler v. Simon*, 101 N. Y. 554, 5 N. E. 452; *Van Slooten v. Dodge*, 145 N. Y. 327, 39 N. E. 950; *Parker v. Day*, 155 N. Y. 383, 49 N. E. 1046; *O'Brien v. Jackson*, 167 N. Y. 31, 60 N. E. 238; *In re Munger's Estate*, 168 Iowa 372, 150 N. W. 447; *Griggs v. Nadeau*, 221 Fed. 381; *Jabp v. Bradley*, 185 Ill. App. 215; 11 A. & E. Ency. of Law (2 ed.) 932; 18 Cyc. 247; 24 C. J. 63; *Woerner*, Am. Law of Adm. (2 ed.) § 356; 52 Am. St. Rep. 118; 78 Am. St. Rep. 201.

⁶⁰ *Ness v. Wood*, 42 Minn. 427, 44 N. W. 313.

⁶¹ *Brown v. Farnham*, 55 Minn. 27, 56 N. W. 352. This is doubtful. See 52 Am. St. Rep. 118; 78 Id. 202; *Exchange Nat. Bank v. Bett's Estate* (Kan.) 176 Pac. 660; 24 C. J. 65.

⁶² *Brown v. Farnham*, 55 Minn. 27, 34, 56 N. W. 352.

⁶³ *Ness v. Wood*, 42 Minn. 427, 44 N. W. 313; *Parker v. Day*, 155 N. Y. 383, 49 N. E. 1046; *Decillis v. Mascilli*, 136 N. Y. S. 573 (servant); *In re Munger's Estate*, 168 Iowa 372, 150 N. W. 447 (attorney); *Golden Gate Undertaking Co. v. Taylor*, 168 Cal. 94, 141 Pac. 922 (assistants in settling estate); *Griggs v. Nadeau*, 221 Fed. 381 (broker or agent to sell assets of estate); *In re Willard's Estate*, 139 Cal. 501, 73 Pac. 240 (broker to sell real estate); 11 A. & E. Ency. of Law (2 ed.) 935; 18 Cyc. 249; 24 C. J. 65.

⁶⁴ *Rosenthal v. Schwartz*, 214 Mass. 371, 101 N. E. 1070; *McFarland v. Howell*, 162 Iowa 110, 143 N. W. 860.

the broker personally for such services. But the court, in its discretion, may make an allowance to the representative for a reasonable compensation to a broker in effecting a sale beneficial to the estate.⁶⁵ If a representative submits a claim of the estate to arbitration and agrees to pay the amount of the award he is liable personally.⁶⁶ A representative is personally liable on a bond for a deed executed by him in his official capacity.⁶⁷ A representative cannot create a liability against the estate by making a new and independent contract to pay an alleged debt.⁶⁸ The mere fact that a will authorizes the executor to do certain things does not authorize him to enter into contracts to accomplish those things so as to bind the estate.⁶⁹ A representative has no authority to modify a contract of his decedent.⁷⁰ Representatives are personally liable on their contracts unless the parties with whom they contract expressly agree to look to the estate alone for payment, and a mere intention to look to the estate is not sufficient to exclude the individual liability of the representatives.⁷¹ While the estate is not directly liable on the contracts of the representative, if the contract is to do something which it is the right or duty of the representative to do he may be reimbursed out of the estate in the allowance of his final account. The contract is not, however, conclusive on the court as to the amount.⁷² Where an estate is not liable on a guaranty agreement made by the decedent the representative cannot by acquiescence and recognition, create such liability.⁷³ A representative cannot waive notice of protest on a note made by his decedent.⁷⁴ A representative cannot ratify a deed made by an insane decedent to the prejudice of the heirs.⁷⁵ One contracting with the representative of an estate in one jurisdiction has no privity of contract with a representative of the same estate in another jurisdiction.⁷⁶ The reason for the general rule that a representative cannot bind the estate by a new and independent contract is technical. The estate is not regarded as an entity or person and can have no agent. The representative has no principal that he can bind in contemplation of law. The representative is an officer of the court and not an agent of the estate. The common law does not recognize the estate of a decedent as

⁶⁵ *In re Willard's Estate*, 139 Cal. 501, 73 Pac. 240; *Hickman-Coleman Co. v. Leggett*, 10 Cal. App. 29, 100 Pac. 1072.

⁶⁶ *Brown v. Farnham*, 55 Minn. 27, 34, 56 N. W. 352.

⁶⁷ *Brown v. Farnham*, 55 Minn. 27, 34, 56 N. W. 352.

⁶⁸ *Haskell v. Manson*, 200 Mass. 599, 86 N. E. 937.

⁶⁹ *O'Brien v. Jackson*, 167 N. Y. 31, 60 N. E. 238.

⁷⁰ *Jenkins v. Brittin*, 185 Ill. App. 67.

⁷¹ *Dwane v. Miller*, 152 N. Y. S. 1060.

⁷² *Horton v. Robinson*, 212 Mass. 248, 98 N. E. 681 (representative advancing his own money to redeem land of the testator from a valid mortgage); *McFarland v. Howell*, 162 Iowa 110, 143 N. W. 860 (employment of brokers to sell land of decedent); *In re Willard's Estate*, 139 Cal. 501, 73 Pac. 240 (*id.*).

⁷³ *Metropolitan Trust Co. v. New York*, 139 N. Y. S. 181.

⁷⁴ *In re Mandelbaum*, 141 N. Y. S. 319.

⁷⁵ *Brown v. Brown*, 209 Mass. 388, 95 N. E. 796.

⁷⁶ *Dwane v. Miller*, 152 N. Y. S. 1060.

a contractor. There is no substantial reason why the acts of a representative done in the discharge of his duty should not bind the estate, but the contrary rule early became established in the common law and it has never been changed by statute in this state. It would work grave injustice to representatives if it were not largely mitigated by allowing them reimbursement in the settlement of their final accounts. It has been abolished or modified by some states.⁷⁷

734. Contracts of decedent—Liability of representative—Ratification—A representative is bound by all the contracts of his decedent, not of a personal nature, unless the contract expressly provides otherwise.⁷⁸ When it is said that the representative is bound to perform such contracts all that is meant is that if he does not do so the estate is liable in damages for the breach. It is discretionary with him to perform them or not. Often he ought to do so as a matter of ordinary business prudence, but if he does so he cannot bind the estate by new contracts in connection therewith.⁷⁹ A person making a contract is presumed to intend to bind his personal representative, unless the contract is of a personal nature or clearly expresses an intention not to bind the representative. The mere fact that the representative is not named or referred to in the contract does not relieve him.⁸⁰ A representative need not wait for legal proceedings against him to enforce the obligation.⁸¹ Contracts of the decedent of a personal nature, that is, contemplating personal performance by the decedent, are terminated by his death and his personal representative is not required to perform them.⁸² This rule does not apply where the services are of such a character that they may as well be performed by others, or where the contract, by its terms, shows that performance by others was contemplated.⁸³ If a

⁷⁷ See *Germania Bank v. Michaud*, 62 Minn. 459, 465, 65 N. W. 70; *Ferrin v. Myrick*, 41 N. Y. 315; *Grafton Nat. Bank v. Wing*, 172 Mass. 513, 52 N. E. 1067; *Lyman v. Nat. Bank*, 181 Mass. 437, 63 N. E. 923.

⁷⁸ *Denton v. Sanford*, 103 N. Y. 607, 9 N. E. 490 (bid of decedent at foreclosure sale); *Chapman v. Holmes*, 10 N. J. L. 20 (covenant of warranty); *McDonald v. O'Shea*, 58 Wash. 169, 108 Pac. 436 (building contract—surety on contractor's bond held liable for defaults of administrator after contractor's death—administrator may employ superintendent to complete building); *Klein v. Runk*, 114 N. Y. S. 1062 (promise of decedent to take care of note at maturity); *Kadish v. Lyon*, 229 Ill. 35, 82 N. E. 194 (ninety-nine year lease with option to purchase—construction of buildings by

administrator of lessee); *Jamin v. Browne*, 59 Cal. 37, 45 (promise to improve lands); 11 A. & E. Ency. of Law (2 ed.) 939; 18 Cyc. 239; 24 C. J. 148; 11 R. C. L. 163; *Woerner*, Am. Law of Adm. (2 ed.) § 328; 78 Am. St. Rep. 200.

⁷⁹ *Exchange Nat. Bank v. Bett's Estate* (Kan.) 176 Pac. 660. See § 728.

⁸⁰ *Chamberlain v. Dunlop*, 126 N. Y. 45, 26 N. E. 966; *Mearney v. Estate of Carbine*, 108 Ill. App. 282.

⁸¹ *Denton v. Sanford*, 103 N. Y. 607, 9 N. E. 490.

⁸² *Marvel v. Phillips*, 162 Mass. 399, 38 N. E. 1117; 11 A. & E. Ency. of Law (2 ed.) 940; 18 Cyc. 240; 24 C. J. 53; 11 R. C. L. 164; *Woerner*, Am. Law of Adm. (2 ed.) § 328.

⁸³ *Husheon v. Kelley*, 162 Cal. 656, 124 Pac. 231 (contract to occupy, farm and improve farm held not personal).

contract is of a personal nature it is terminated by death though it expressly provides that it shall be binding on heirs, executors, administrators or assigns.⁸⁴ If a contract is so far personal that the representative of one of the parties to it is not responsible in damages for refusing to complete its performance the representative of the other party is not responsible for a like failure.⁸⁵ As a general rule contracts of employment are personal and terminate with the death of either the employer or employee.⁸⁶ Building contracts are not personal and the representative of the contractor is bound to perform them if the latter dies pending performance.⁸⁷ When it is said that the representative is bound to perform such contracts all that is meant is that if he does not perform them the estate is liable for damages. He may perform them, but he is not strictly bound to do so. If he chooses to perform them he cannot bind the estate by new contracts in connection therewith. Building contracts are not an exception to the general rule in this regard.⁸⁸ Where one contracts to build on land owned by him a house for another by a certain time and dies before that time, his representative is bound to perform the contract. If the land descends to heirs the covenant remains in force and if the representative cannot compel the heirs to finish the building, he is liable for damages, if he has assets.⁸⁹ Leases are not generally of a personal nature and the representative of a deceased lessee is liable for rent, including that accruing after the death of the decedent. He is liable only to the extent of assets in his hands unless he enters and retains possession after the death of the lessee. If he desires to avoid personal liability he must surrender the premises immediately after his appointment.⁹⁰ Leasehold interests are personalty and pass to the representative who is liable for rent. In an action against an administrator on a covenant to pay rent contained in a lease from the plaintiff to the defendant's intestate, it is no defence that before the rent accrued the defendant obtained a responsible person ready to accept an assignment of the lease whom the plaintiff refused to accept as tenant, the obligation to pay rent being terminable only by a surrender of the lease accepted by the lessor. In case of an assignment the

⁸⁴ *Homan v. Redick*, 97 Neb. 299, 149 N. W. 782.

⁸⁵ *Homan v. Redick*, 97 Neb. 299, 149 N. W. 782.

⁸⁶ *Homan v. Redick*, 97 Neb. 299, 149 N. W. 782; *Lacey v. Getman*, 119 N. Y. 109, 23 N. E. 452. See 21 L. R. A. (N. S.) 914.

⁸⁷ *Kadish v. Lyon*, 229 Ill. 35, 82 N. E. 194; *Janin v. Browne*, 59 Cal. 37; *Bambrick v. Webster Grove Presb. Church Assn.*, 53 Mo. App. 225; *Russell v. Buckhout*, 34 N. Y. S. 271; *McDonald v. O'Shea*, 58 Wash. 169, 108 Pac. 436; 11

A. & E. Ency. of Law (2 ed.) 940; 18 Cyc. 240; 24 C. J. 53.

⁸⁸ *Exchange Nat. Bank v. Bett's Estate* (Kan.) 176 Pac. 660.

⁸⁹ *Chamberlain v. Dunlop*, 126 N. Y. 45, 26 N. E. 966.

⁹⁰ *Montagu v. Smith*, 13 Mass. 396; *Inchas v. Dickinson*, 2 Allen (Mass.) 71; *Alsup v. Banks*, 68 Miss. 664, 9 So. 895; *Legget v. Pelletreau*, 213 N. Y. 237, 107 N. E. 509; *Johnson v. Stone*, 215 Mass. 219, 102 N. E. 366. See *Johanson v. Hoff*, 63 Minn. 296, 65 N. W. 464; 1916E, 820.

estate is still liable.⁹¹ A contract whereby an agent or employee is allowed to occupy premises as part of his compensation may be personal so as to terminate with the death of the employer or employee.⁹² If a representative proceeds under a contract of his decedent he may be estopped from denying liability thereunder.⁹³ Where a person agrees to purchase realty and dies before it is conveyed to him and before he had paid for it, his heir or devisee is entitled to have his representative pay for it out of the personal estate.⁹⁴ A representative may ratify the acts of a third person done in the decedent's name where the decedent could have ratified them if living.⁹⁵

735. Right to personal property—Upon the appointment and qualification of a representative he becomes immediately invested, for the purposes of administration, with the legal title and right to the immediate possession of all the personal property owned by the decedent at the time of his death, which constitutes assets of his estate, wherever situated, regardless of whether he died testate or intestate.⁹⁶ A domiciliary representative succeeds to the title of the personal property of the decedent in other jurisdictions except where there is an ancillary administration.⁹⁷ Personal property does not pass directly from a decedent to legatees or distributees, but goes primarily to the executor or administrator, who is to apply it, so far as may be necessary, in paying the debts of the decedent and expenses of administration, and is then to pass the residue, if any, to the legatees or distributees. If the estate proves insolvent nothing passes to them. So, in a practical sense, their interests are contingent and uncertain until, in due course of administration, it is ascertained that a surplus remains after the debts of the decedent and the expenses of administration are paid. Until that is done, it properly cannot be said that the legatees or distributees are certainly entitled to receive or enjoy any part of the property.⁹⁸ The representative succeeds to any causes of action existing in favor of

⁹¹ *Johnson v. Stone*, 215 Mass. 219, 102 N. E. 366.

⁹² *Homan v. Redick*, 97 Neb. 299, 149 N. W. 782.

⁹³ *Michigan Iron & Land Co. v. Nester*, 147 Mich. 599, 111 N. W. 177.

⁹⁴ *Chamberlain v. Dunlop*, 128 N. Y. 45, 28 N. E. 906.

⁹⁵ *Seaver v. Weston*, 163 Mass. 202, 39 N. E. 1013.

⁹⁶ *State v. Probate Court*, 25 Minn. 22; *Greenwood v. Murray*, 26 Minn. 259, 261, 2 N. W. 945; *Wiswell v. Wiswell*, 35 Minn. 371, 29 N. W. 166; *Mitchell v. Mitchell*, 54 Minn. 301, 55 N. W. 1134; *In re Scheffer's Estate*, 58 Minn. 29, 59 N. W. 956; *Reiser v. Gigrich*, 59 Minn.

368, 377, 61 N. W. 30; *Vail v. Anderson*, 61 Minn. 552, 554, 64 N. W. 47; *Randall v. Macbeth*, 81 Minn. 376, 378, 84 N. W. 119; *Granger v. Harriman*, 89 Minn. 303, 94 N. W. 869; *Wellner v. Eckstein*, 105 Minn. 444, 470, 117 N. W. 830; *Brown v. Strom*, 113 Minn. 1, 4, 129 N. W. 136; *Brobst v. Brobst*, 190 Mich. 63, 155 N. W. 734; *United States v. Jones*, 236 U. S. 106; 11 A. & E. Ency. of Law (2 ed.) 984; 18 Cyc. 353; 24 C. J. 201; 11 R. C. L. 152; 78 Am. St. Rep. 179; 112 Am. St. Rep. 731; 3 L. R. A. (N. S.) 704.

⁹⁷ *State v. Holtcamp*, 267 Mo. 412, 185 S. W. 201. See §§ 1181, 1201.

⁹⁸ *United States v. Jones*, 236 U. S. 106.

the decedent at the time of his death, if they survive.⁹⁹ He is entitled to the immediate possession of the personal property of the decedent, if it is assets of the estate for purposes of administration, and it is his duty to take possession, peaceably, if it can be done, or by legal process. He cannot ordinarily use force in taking possession.¹ Those who come into possession of the personal property of an intestate upon his death are responsible for it to the representative when appointed and must deliver it to him.² No heir or other beneficiary of the estate can assert a right to the possession of any part of the personal property of the estate, subject to administration, as against the representative.³ When a representative takes possession of personalty of the decedent he does so in his representative capacity. When he has got it in his possession in that capacity he cannot discharge himself of responsibility for it. The court alone can discharge him. If he is also a legatee or next of kin, he cannot determine that his possession as officer of the court shall cease and that thereafter he will hold as legatee or next of kin. The court alone can do that. He cannot determine when the administration shall be closed and when the jurisdiction of the court shall cease. The court alone can do that.⁴ The title of a representative to the personalty of a decedent, while absolute for certain purposes, and greater than his title to the realty, is still a qualified one for administrative purposes only. He holds it as a trustee for the benefit of creditors, legatees or distributees. It is not a personal but an official title. The beneficial owners are those who are entitled to the estate, either under a will or the statutes of distribution, subject to the debts of the decedent and the charges and expenses of administration.⁵ While the representative holds *en autre droit* he has the legal title, and may at any time make an absolute disposition of the property for which he is accountable on his official bond. He holds both the possession and the property as an individual, though he holds them under a kind of trust.⁶ A representative is an officer of the law and his title to the assets of the estate is official and not personal, and cannot be affected, to the prejudice of the estate, by any acts of his prior to his

⁹⁹ *Randall v. Macbeth*, 81 Minn. 376, 84 N. W. 119. See § 1121.

¹ See § 738; *Mitchell v. Mitchell*, 54 Minn. 301, 55 N. W. 1134; *In re Scheffer's Estate*, 58 Minn. 29, 34, 59 N. W. 956; *Reiser v. Gigrich*, 59 Minn. 368, 377, 61 N. W. 30; *Vail v. Anderson*, 61 Minn. 552, 554, 64 N. W. 47; *Granger v. Harriman*, 89 Minn. 303, 94 N. W. 869; 18 Cyc. 354; 24 C. J. 204.

² *Cullen v. O'Hara*, 4 Mich. 132.

³ *Brown v. Strom*, 113 Minn. 1, 4, 129 N. W. 136.

⁴ *In re Scheffer's Estate*, 58 Minn. 29, 59 N. W. 956.

⁵ *Wiswell v. Wiswell*, 35 Minn. 371, 29 N. W. 166; *In re Scheffer's Estate*, 58 Minn. 29, 34, 59 N. W. 956; *Vail v. Anderson*, 61 Minn. 552, 554, 64 N. W. 47; *Granger v. Harriman*, 89 Minn. 303, 94 N. W. 869; *Brown v. Strom*, 113 Minn. 1, 9, 129 N. W. 136; *Foote v. Foote*, 61 Mich. 181, 28 N. W. 90; *Brobst v. Brobst*, 190 Mich. 63, 155 N. W. 734; 11 A. & E. Ency. of Law (2 ed.) 986; 18 Cyc. 353; 24 C. J. 203; *Woerner*, Am. Law of Adm. (2 ed.) § 174.

⁶ *Kent v. Bothwell*, 152 Mass. 341, 25 N. E. 721.

appointment.⁷ His title relates back to the death of the decedent whenever necessary for the protection of the estate and innocent persons.⁸ The title, possession and control of the personal property of the estate should remain in the representative until the property is assigned by order of the probate court. To allow legatees or distributees to hold and retain possession of such portion of the estate as they may claim would interfere with due and efficient administration proceedings in the probate court.⁹ It is not an inflexible rule that the representative should take into his actual custody the personal property of the estate. Its character and situation may be such as to render it impracticable and undesirable to do so.¹⁰ A representative has a right to the possession of the personalty of the decedent only when it is assets of the estate for purposes of administration and distribution under a will or the statute of distribution.¹¹ He is not entitled to the personal property of the estate which is set apart or allowed to the surviving spouse or children of the decedent under G. S. 1913, § 7243(1, 3). Such property is not assets of the estate.¹² A representative may seize and hold the personal property of the estate regardless of any division or disposition the heirs or distributees may have made thereof.¹³ He has no right to possession as against a chattel mortgagee, who has the right of possession under the terms of a contract. The death of the mortgagor does not affect the rights of the mortgagee under the contract, and the representative succeeds only to the rights of the mortgagor. On default in payment the mortgagee has the right of possession as against the representative as he would have had against the mortgagor had he lived.¹⁴ A representative is the officer of the court appointing him. His possession of the property of the decedent is a possession taken in obedience to the orders of that court. His possession is the possession of the court and cannot be disturbed by any other court.¹⁵ A representative, whether an executor or an administrator, derives his authority over property of the estate from the law, and his possession is the possession of the law.¹⁶

⁷ *Wiswell v. Wiswell*, 35 Minn. 371, 29 N. W. 166; *First State Bank v. Braden*, 39 S. D. 53, 162 N. W. 929.

⁸ *Wiswell v. Wiswell*, 35 Minn. 371, 29 N. W. 166; *Gilkey v. Hamilton*, 22 Mich. 283; 11 A. & E. Ency. of Law (2 ed.) 908; 18 Cyc. 213; 24 C. J. 204; *Woerner, Am. Law of Adm.* (2 ed.) § 173.

⁹ *Reiser v. Gigrich*, 59 Minn. 368, 377, 61 N. W. 30. Representatives frequently leave the family of the decedent in possession of household goods and farm stock and machinery, but they do so at their own risk. See *Brown v. Forsche*, 43 Mich. 492, 497, 5 N. W. 1011; *Kennedy v. Shaw*, 43 Mich. 359, 5 N. W. 396.

¹⁰ *Pourpore v. Stone-Ordean-Wells Co.*, 133 Minn. 421, 158 N. W. 703 (railroad ties piled along a railroad track in a sparsely settled country for sale to the railroad company after inspection).

¹¹ *Walter v. Hensel*, 42 Minn. 204, 207, 44 N. W. 57.

¹² See §§ 773, 822.

¹³ *Brobst v. Brobst*, 190 Mich. 63, 155 N. W. 734.

¹⁴ *Mathew v. Mathew*, 138 Cal. 334, 337, 71 Pac. 344. See 18 Cyc. 355.

¹⁵ *Byers v. McAuley*, 149 U. S. 608, 615.

¹⁶ *Cheshire Nat. Bank v. Jaynes*, 225 Mass. 432, 114 N. E. 727.

736. Sale of personal property—Gifts—A representative may sell, assign or otherwise dispose of the personal property of the estate, for a valuable consideration, as freely and in the same manner as an absolute owner and without any order of court. If the property to be sold is valuable it is advisable for the representative to obtain an order of court for self-protection.¹⁷ A representative ought not to sell personal property of the estate to himself, either directly or indirectly, but such a sale is not absolutely void, but is voidable only at the instance of those interested in the estate.¹⁸ A representative who has improperly purchased property of the estate may give a good title to one who purchases from him in good faith.¹⁹ He may in good faith purchase property of the estate after it has been assigned by a decree of distribution.²⁰ A fraudulent and collusive sale of personal property may be restrained at the instance of the heirs.²¹ A purchaser is not bound to see that the purchase money is applied to proper purposes, if he buys in good faith and without any notice of a wrongful purpose on the part of the representative. The mere fact that he knows of debts against the estate or claims for legacies does not charge him with the duty of seeing to the application of the purchase money thereto.²² A representative may indorse and transfer negotiable instruments payable to the decedent.²³ He may sell and transfer all choses in action belonging to the estate, including notes, bills, bonds and accounts, as freely as if he were the absolute owner thereof and without any order of court, but he cannot give them away.²⁴ He may assign a claim against a non-resident.²⁵ A power to sell personal property may be conferred on a representative by a will.²⁶ A representative may sell personal property though it

¹⁷ *Cone v. Hooper*, 18 Minn. 531 (476, 484); *State v. Probate Court*, 25 Minn. 22; *Williams v. Cobb*, 242 U. S. 307; *Flynn v. Chicago, G. W. R. Co.*, 159 Iowa 571, 141 N. W. 401; *Sherman v. Willett*, 42 N. Y. 146; *Leitch v. Wells*, 48 N. Y. 585; *Williams v. Ely*, 13 Wis. 1; *Muntelth v. Rahn*, 14 Wis. 210; *Kent v. Bothwell*, 152 Mass. 341, 25 N. E. 721; 11 A. & E. Ency. of Law (2 ed.) 1005, 1009; 18 Cyc. 356; 24 C. J. 207; *Woerner*, Am. Law of Adm. (2 ed.) §§ 175, 331; 78 Am. St. Rep. 179.

¹⁸ *Jones v. Hanna*, 81 Cal. 507, 22 Pac. 883; *Williams v. Cobb*, 242 U. S. 307; 11 A. & E. Ency. of Law (2 ed.) 1021-1025; 18 Cyc. 362; 24 C. J. 218.

¹⁹ *Williams v. Cobb*, 242 U. S. 307.

²⁰ *Cardoner v. Day*, 253 Fed. 572.

²¹ *Brown v. Strom*, 113 Minn. 1, 129 N. W. 136.

²² *Leitch v. Wells*, 48 N. Y. 585; *Keen*

v. James, 39 N. J. Eq. 534; 11 A. & E. Ency. of Law (2 ed.) 1031; 18 Cyc. 365; 24 C. J. 222.

²³ *Weider v. Osborn*, 20 Or. 307, 25 Pac. 715; *Mackay v. St. Mary's Church*, 15 R. I. 121, 23 Atl. 103; 11 A. & E. Ency. of Law (2 ed.) 1012; 18 Cyc. 358; 24 C. J. 212.

²⁴ *Marshall County v. Hanna*, 57 Iowa 372, 10 N. W. 745; *Beecher v. Buckingham*, 18 Conn. 110; *Lappin v. Mumford*, 14 Kan. 9; *Flynn v. Chicago, G. W. R. Co.*, 159 Iowa 571, 141 N. W. 401 (cannot give them away). See 18 Cyc. 358.

²⁵ *Petersen v. Chemical Bank*, 32 N. Y. 21; *Gove v. Gove*, 64 N. H. 503, 15 Atl. 121; *Mackay v. St. Mary's Church*, 15 R. I. 121, 23 Atl. 108; 11 A. & E. Ency. of Law (2 ed.) 1012; 18 Cyc. 1231; 24 C. J. 211.

²⁶ *Norris v. Harris*, 15 Cal. 255; *In re Durham's Estate*, 49 Cal. 490; 11 A. &

is specifically bequeathed.²⁷ He may sell and assign a mortgage of the decedent without any order of court.²⁸ He may sell the interest of the decedent in a partnership to a surviving partner or any one else.²⁹ While a representative may sell personal property on credit, if he does so he is personally liable in case of failure to collect the price.³⁰ He may sell personal property of the estate in satisfaction of a debt of the decedent.³¹ He cannot sell personal property of the estate in satisfaction of his individual debts unless they were incurred for the benefit of the estate.³² A leasehold interest is personal property and may be sold and assigned by a representative without leave of court.³³ Where land is taken in payment of debts due the estate it is treated as personalty and may be sold by the representative without any order of court.³⁴ If a representative sells personal property of the estate to a bona fide purchaser he is thereby estopped from asserting any claim to it as heir or legatee.³⁵ A representative who sells personal property of the estate for less than its appraised value is not accountable for the loss if the sale appears to be beneficial to the estate, but he must exercise ordinary prudence to secure the best price obtainable.³⁶ A bona fide purchaser from a representative gets a good title though the representative acted in bad faith or makes improper use of the purchase money.³⁷ A bona fide purchaser from an administrator gets a good title though a will is subsequently discovered and probated and the appointment of the administrator revoked.³⁸ An executor may sell and assign a sheriff's certificate of foreclosure held by him as executor and a sale legally and regularly so made conveys all the interest therein of the devisees under the will of which he is executor.³⁹ A representative cannot give away the per-

E. Ency. of Law (2 ed.) 1009; 18 Cyc. 357; 24 C. J. 210.

²⁷ *Roys v. Vilas*, 18 Wis. 169; *Hayes v. Hayes*, 45 N. J. Eq. 461; 11 A. & E. Ency. of Law (2 ed.) 1009; 24 C. J. 208.

²⁸ *Cullum v. Bottcher*, 58 Minn. 381, 59 N. W. 971; *Burt v. Ricker*, 6 Allen (Mass.) 77; *Williams v. Ely*, 13 Wis. 1; 11 A. & E. Ency. of Law (2 ed.) 1012; 18 Cyc. 359; 24 C. J. 213.

²⁹ *Roys v. Vilas*, 18 Wis. 169; *Lawrence v. Vilas*, 20 Wis. 381.

³⁰ 11 A. & E. Ency. of Law (2 ed.) 1018; 18 Cyc. 361; 24 C. J. 216.

³¹ *Parker v. Daugherty*, 111 Ala. 529, 20 So. 362; 11 A. & E. Ency. of Law (2 ed.) 1007; 24 C. J. 211.

³² *Horton v. Jack*, 115 Cal. 29, 37 Pac. 652; *Clark v. Coe*, 52 Hun (N. Y.) 379; *Williamson v. Branch Bank*, 7 Ala. 906; 11 A. & E. Ency. of Law (2 ed.) 1007;

24 C. J. 211; *Woerner*, Am. Law of Adm. (2 ed.) § 331.

³³ *Glaser v. Burns*, 154 N. Y. S. 21.

³⁴ *Stevenson v. Polk*, 71 Iowa 278, 32 N. W. 347; *Williams v. Towl*, 65 Mich. 204, 31 N. W. 835; *Batthey v. Batthey*, 94 Neb. 729, 144 N. W. 786.

³⁵ *Batthey v. Batthey*, 94 Neb. 729, 144 N. W. 786.

³⁶ G. S. 1913, § 7297. See 11 A. & E. Ency. of Law (2 ed.) 1017; 18 Cyc. 370; 24 C. J. 215.

³⁷ *Marshall County v. Hanna*, 57 Iowa 372, 10 N. W. 745; *Williams v. Ely*, 13 Wis. 7; *Leitch v. Wells*, 48 N. Y. 585; *Batthey v. Batthey*, 94 Neb. 729, 144 N. W. 786; 11 A. & E. Ency. of Law (2 ed.) 1027; 18 Cyc. 366; 24 C. J. 223.

³⁸ *Hewson v. Shelly*, 2 Ch. 13 (C. A.). See 28 Harv. L. Rev. 208.

³⁹ *Winterberg v. Van De Vorste*, 19 N. D. 417, 122 N. W. 866.

sonal property of the estate even though he considered it of no value.⁴⁰ The rule of caveat emptor applies to a sale of personal property by a representative. There is no implied warranty of title. If the representative makes an express warranty it binds him personally but not the estate, unless expressly authorized by will.⁴¹

737. Pledging personal property—A representative has authority to pledge the personal property of the estate for the purpose of raising money or securing debts, and if he unlawfully applies the proceeds to his own use this does not affect the rights of a bona fide pledgee.⁴² If a representative borrows money from a bank, pledging property of the estate in his charge to secure it, and the money is placed to the credit of that estate, his drawing out the money by a check payable to his own order gives no notice to the bank of an intent to misapply the fund. The contract of borrowing can bind the representative only personally in the first instance, but that is due to the fact that the estate as such is not a person and that the representative cannot contract otherwise.⁴³ A representative has no authority to pledge the personal property of the estate to secure his own debts, but such pledge is valid against the estate if it is based on a valuable consideration, and the pledgee has no notice, actual or constructive, that it is made by the representative to secure his own debts; otherwise if he had such notice. Where, on the face of the transaction, a representative pledges securities of the estate as his own, the pledgee deals with him at his own risk, and is liable in case of loss to the estate.⁴⁴

738. Right to possession of realty and personalty—Rents and profits—Repairs—Statute—Every executor and administrator shall be entitled to the possession of all real and personal estate of the decedent which has not been set apart for the surviving spouse or children, and shall be charged with all such property. He shall receive the rents and profits of the real estate until the estate is settled, or until delivered over, by order of the probate court, to the heirs or devisees. He shall keep in tenantable repair all houses, buildings, and fixtures thereon which are under his control. He may himself, or jointly with the heirs or devisees, maintain an action for the possession of the real estate or to quiet title to the same.⁴⁵ On the death of a person the title to his realty immediately vests in his heirs or devisees and they are also immediately enti-

⁴⁰ *Powers v. Powers*, 48 How. Pr. (N. Y.) 389; *In re Radovich*, 74 Cal. 536, 16 Pac. 321; *Flynn v. Chicago*, G. W. R. Co., 159 Iowa 571, 141 N. W. 401; 18 Cyc. 265; 24 C. J. 90.

⁴¹ *Westfall v. Duncan*, 14 Ohio St. 276; 11 A. & E. Ency. of Law (2 ed.) 1025; 18 Cyc. 368; 24 C. J. 224.

⁴² *Lyman v. Nat. Bank*, 181 Mass. 437, 63 N. E. 923; 11 A. & E. Ency. of Law

(2 ed.) 1031; 18 Cyc. 371; 24 C. J. 227; *Woerner*, Am. Law of Adm. (2 ed.) § 331; Ann. Cas. 1912C, 979; 78 Am. St. Rep. 184.

⁴³ *Lyman v. Nat. Bank*, 181 Mass. 437, 63 N. E. 923.

⁴⁴ *Goodell v. Monroe*, 87 N. J. Eq. 328, 100 Atl. 238. See Note, Ann. Cas. 1912C, 979.

⁴⁵ G. S. 1913, § 7296.

tled to the possession of such property, except as against his personal representative, as provided by this statute.⁴⁶ Real estate, within the meaning of the statute, includes "lands, tenements, hereditaments, and all rights thereto and interests therein."⁴⁷ The right to possession applies to lands held under an equitable as well as legal title.⁴⁸ The right of the representative to possession of the realty of the decedent until the estate is settled is sole and exclusive of the rights of the heirs or devisees and their grantees, or others. He is entitled to possession without any affirmative showing that it is necessary for purposes of administration, or that the personalty is insufficient to pay the debts of the decedent and charges and expenses of administration. To defeat his recovery it must be shown that in fact the personalty is sufficient for such purposes and that possession is not necessary for purposes of administration. The statute attaches no condition or qualification to his right of possession. He may sue for possession without leave of court. His right of possession continues until the estate is closed or until delivered over by order of the probate court.⁴⁹ The fact of the granting of letters to the representative is *prima facie* evidence that administration of the estate is necessary and that possession of the realty is required by him for purposes of administration.⁵⁰ The statute does not apply to the homestead. A representative has no right to the possession of a homestead as it does not form a part of the estate of a decedent for purposes of administration, except to a limited extent.⁵¹ The statute is permissive and not imperative.⁵² If the realty is in the possession of heirs or devisees the representative need not take possession, but if it is in the possession of others it is his duty to take possession and conserve it for the benefit of the heirs or devisees.⁵³ If the representative takes possession it relates back to the death of the decedent.⁵⁴ He has no title

⁴⁶ See §§ 77, 105, 1060, 1073, 1209.

⁴⁷ *Pabst Brewing Co. v. Small*, 83 Minn. 445, 86 N. W. 450.

⁴⁸ *Zeuske v. Zeuske*, 62 Or. 51, 124 Pac. 203 (land held by decedent under a contract of purchase).

⁴⁹ *Miller v. Hoberg*, 22 Minn. 249; *Noon v. Finnegan*, 29 Minn. 418, 13 N. W. 19; *Id.*, 32 Minn. 81, 19 N. W. 391; *Jordan v. Secombe*, 33 Minn. 220, 224, 22 N. W. 383; *Kern v. Cooper*, 91 Minn. 121, 97 N. W. 648; *Id.*, 97 Minn. 509, 106 N. W. 962; *Wellner v. Eckstein*, 105 Minn. 444, 470, 117 N. W. 830; *Eyre v. Faribault*, 121 Minn. 233, 237, 141 N. W. 170; *Winters v. Ellefson*, 128 Minn. 3, 150 N. W. 171; *Ingersoll v. Odendahl*, 136 Minn. 428, 431, 162 N. W. 525; 11 A. & E. Ency. of Law (2 ed.) 1037; 24 C. J. 135; 18 Cyc. 301. See *Vachon v.*

Nichols-Chisholm Lumber Co., 126 Minn. 303, 144 N. W. 223, 148 N. W. 288.

⁵⁰ *Kern v. Cooper*, 91 Minn. 121, 124, 97 N. W. 648.

⁵¹ *Wilson v. Proctor*, 28 Minn. 13, 8 N. W. 830; *Nordlund v. Dahlgren*, 130 Minn. 462, 153 N. W. 876; *Cooley v. Jansen*, 54 Neb. 33, 74 N. W. 391; *McManany v. Sheridan*, 81 Wis. 538, 51 N. W. 1011. See § 821.

⁵² *Palne v. First Div. etc. R. Co.*, 14 Minn. 65 (49); *Noon v. Finnegan*, 29 Minn. 418, 13 N. W. 197; *Jones v. Billstein*, 28 Wis. 221. See *Fleming v. McCutcheon*, 85 Minn. 152, 156, 88 N. W. 433.

⁵³ *Kern v. Cooper*, 91 Minn. 121, 123, 97 N. W. 648.

⁵⁴ *Noon v. Finnegan*, 29 Minn. 418, 13

or interest in the realty except a right of possession during administration and for the purposes thereof.⁵⁵ The beneficial interest in the realty is in the heirs or devisees. The representative has neither the rights nor responsibilities of an absolute owner. In special cases the right of the heirs or devisees may be shown to be superior to those of the representative and may be successfully asserted against him.⁵⁶ The representative has no estate or interest which he can sell.⁵⁷ The representative of an owner of an undivided interest in realty is not entitled to possession as against the surviving owner.⁵⁸ The right of the representative to possession covers lands specifically devised.⁵⁹ The interest of the representative under the statute is not a chattel interest.⁶⁰ He cannot take possession of lands leased by the decedent to another. He cannot terminate a lease given by the decedent and oust a tenant who is not in default.⁶¹ An executor who has given a special bond under the statute as sole or residuary legatee is not entitled to possession of the realty.⁶² The statute does not apply to lands held by the decedent as an entryman under the federal statutes where final proof has not been made nor a patent issued.⁶³ Upon the death or removal of a representative his possessory rights and the rents and profits pass to his successor or to the administrator de bonis non.⁶⁴ If a representative takes possession of the realty he must account for the rents and profits received therefrom, and if the amount received cannot be otherwise determined, the court may charge him with the rental value of the land.⁶⁵ The representative is entitled to money awarded in condemnation proceedings for taking land of the estate, without regard to the financial status of the estate.⁶⁶ If the realty is vacant the bringing of an action for injury to it is equivalent to taking possession.⁶⁷ The adverse possession of the decedent is not interrupted by his death, but is continued by the appointment and possession of a representative within a reasonable time after his death.⁶⁸ The right of the representative to possession may

N. W. 197; *Id.*, 32 Minn. 81, 19 N. W. 391.

⁵⁵ *Noon v. Finnegan*, 29 Minn. 418, 420, 13 N. W. 197; *Id.*, 32 Minn. 81, 19 N. W. 391; *Wellner v. Eckstein*, 105 Minn. 444, 471, 117 N. W. 830; *Brown v. Strom*, 113 Minn. 1, 9, 129 N. W. 136; *Glencoe Ditching Co. v. Martin*, 148 Minn. 176, 181 N. W. 108.

⁵⁶ *Brown v. Strom*, 113 Minn. 1, 9, 129 N. W. 136.

⁵⁷ *Kline v. Moulton*, 11 Mich. 370.

⁵⁸ *Spencer v. Lyman*, 27 S. D. 471, 131 N. W. 802.

⁵⁹ *Phillips v. Sleusher*, 3 Pin. (Wis.) 457.

⁶⁰ *Kline v. Moulton*, 11 Mich. 370; *Jones v. Billstein*, 28 Wis. 221.

⁶¹ *Rupp v. Rupp*, 11 Colo. App. 36, 52 Pac. 290.

⁶² *Caulton v. Pope*, 83 Neb. 723, 120 N. W. 101.

⁶³ *Walker v. Ehresman*, 79 Neb. 775, 113 N. W. 218; *Wittenbrock v. Wheadon*, 128 Cal. 150, 60 Pac. 664.

⁶⁴ *Kline v. Moulton*, 11 Mich. 370.

⁶⁵ *Nordlund v. Dahlgren*, 130 Minn. 462, 153 N. W. 876.

⁶⁶ *Eyre v. Faribault*, 121 Minn. 233, 141 N. W. 170.

⁶⁷ *Noon v. Finnegan*, 29 Minn. 418, 13 N. W. 197; *Id.*, 32 Minn. 81, 19 N. W. 391.

⁶⁸ *Ricker v. Butler*, 45 Minn. 545, 48 N. W. 407.

be barred by adverse possession.⁶⁹ If it is claimed that at the time of his death the decedent was wrongfully in possession and his representative continues the possession ejectment will lie against him in his representative capacity.⁷⁰ An executor has possession for the sole purpose of settling the estate as speedily as reasonably may be. It is no part of his duty as executor to hold an estate and administer a trust. The executor differs radically from the trustee in his relation to the estate. As to real estate he has no title but only a right of possession, and no power of disposition except as authorized by the will or the court.⁷¹ The representative is entitled to possession of mortgaged realty unless prevented by some proper proceedings by the mortgagee.⁷² Upon the death of a mortgagor in possession the right of the mortgagee to take possession and foreclose upon default is superior to the rights of the representative of the mortgagor.⁷³ It is not necessary for the representative to take possession in order to sell the land under a license from the probate court.⁷⁴ The possession of the representative is in privity with that of the decedent.⁷⁵ The possession of the representative may be added to that of an heir, or of his grantee, to make out continuous adverse possession.⁷⁶ If the representative takes possession the running of the statute of limitations against the heir is suspended during such possession, but the mere appointment of a representative does not affect the operation of the statute.⁷⁷ The representative may maintain ejectment against the heirs to recover possession of the realty.⁷⁸ He may maintain ejectment against grantees of the heirs or other third parties and it is not necessary to join the heirs.⁷⁹ He may maintain an action to quiet title to the realty of the estate without taking possession or showing that it is needed for administrative purposes.⁸⁰ He is entitled to in-

⁶⁹ Webb v. Winter, 135 Cal. 455, 67 Pac. 69.

⁷⁰ Pabst Brewing Co. v. Small, 83 Minn. 445, 86 N. W. 450. See Jenkins v. Jenkins, 92 Minn. 310, 100 N. W. 7.

⁷¹ Ryder v. Lyon, 85 Conn. 245, 82 Atl. 573.

⁷² Crow v. Day, 69 Wis. 637, 35 N. W. 45.

⁷³ Cocke v. Montgomery, 75 Iowa 259, 39 N. E. 386; Merchants' Nat. Bank v. Soesbe, 138 Iowa 354, 116 N. W. 123; Mathew v. Mathew, 138 Cal. 334, 71 Pac. 344. See, contra, Lingler v. Wesco, 79 Ohio St. 225, 86 N. E. 1004.

⁷⁴ Jones v. Billstein, 28 Wis. 221; In re Bazzuro's Estate, 161 Cal. 71, 118 Pac. 434.

⁷⁵ Ricker v. Butler, 45 Minn. 545, 548, 48 N. W. 407.

⁷⁶ Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738.

⁷⁷ Clark v. Bunday, 29 Or. 190, 44 Pac. 190.

⁷⁸ Kern v. Cooper, 91 Minn. 121, 97 N. W. 648; Id., 97 Minn. 509, 106 N. W. 962; Page v. Tucker, 54 Cal. 121.

⁷⁹ Miller v. Hoberg, 22 Minn. 249; Kern v. Cooper, 91 Minn. 121, 97 N. W. 648; Id., 97 Minn. 509, 106 N. W. 962; Carson v. Dundas, 39 Neb. 503, 58 N. W. 141; Tillson v. Holloway, 90 Neb. 481, 134 N. W. 232; Bacon v. Howard, 91 Ga. App. 660, 91 S. E. 1066 (ejectment proper remedy—no remedy under unlawful detainer act); 18 Cyc. 302; 24 C. J. 138.

⁸⁰ G. S. 1913, § 7296; Wheeler v. McKeon, 137 Minn. 92, 162 N. W. 1070; Rice v. Carey, 170 Cal. 748, 151 Pac. 135; Magoffin v. Watros (N. D.) 178 N. W.

junctive relief for the protection of his interest.⁸¹ If an heir refuses possession upon demand of the representative he renders himself liable for mesne profits.⁸² Until the representative takes possession the heirs or devisees have the right of possession and are not affected by the statute.⁸³ They have the right to the possession as against every one except the representative or his tenants.⁸⁴ They may maintain ejectment against third persons if the representative has not taken possession.⁸⁵ They cannot maintain ejectment against the representative pending administration.⁸⁶ They may enter and protect the premises from disseizors if the representative does not take possession.⁸⁷

739. Leasing realty of estate—A representative may lease the realty of the estate, without any license from the probate court, but only for the term of the administration.⁸⁸ Under a license from the probate court, realty of an estate may be leased, or an existing lease renewed, when it appears for the best interest of all concerned.⁸⁹ By leave of the probate court a special administrator may lease the realty of the estate for a term not exceeding one year.⁹⁰ An executor may be authorized to lease realty of the estate by the terms of a will.⁹¹ An administrator has no authority to lease lands of his intestate after the payment of the debts and the final settlement of the estate.⁹² Acceptance of rents by devisees under a will ratifies a lease by the executor.⁹³ If a representative leases realty of the estate without authority he is personally bound thereby.⁹⁴

740. Foreclosure of mortgages—Statute—When any mortgagee of real estate, or any person to whom a mortgage is assigned, dies without having foreclosed such mortgage, all the interest in the mortgaged premises conveyed by such mortgage and the debt secured thereby shall be considered as personal assets in the hands of the executor or admin-

133. Prior to statute he could not maintain an action to remove a cloud if he had not taken possession or obtained a license to sell. *Paine v. First Div. etc. Ry. Co.*, 14 Minn. 65 (49).

⁸¹ *Wendler v. Woodward*, 93 Wash. 684, 161 Pac. 1042.

⁸² *Craddock v. Kelly*, 129 Ga. 818, 60 S. E. 193.

⁸³ *Paine v. First Div. etc. R. Co.*, 14 Minn. 65 (49); *Noon v. Finnegan*, 29 Minn. 418, 420, 13 N. W. 197; *Jones v. Billstein*, 28 Wis. 221.

⁸⁴ *Miller v. Hoberg*, 22 Minn. 249; *Berry v. Eyraud*, 134 Cal. 82, 66 Pac. 74. See 18 C. J. 899.

⁸⁵ *Noon v. Finnegan*, 29 Minn. 418, 13 N. W. 197; *Jenkins v. Jenkins*, 92 Minn. 310, 100 N. W. 7. See 18 C. J. 900.

⁸⁶ *Plass v. Plass*, 121 Cal. 131, 53 Pac. 448.

⁸⁷ *Stevens v. Smoker*, 84 Conn. 569, 80 Atl. 788.

⁸⁸ *Smith v. Park*, 31 Minn. 70, 16 N. W. 490; *Glencoe Ditching Co. v. Martin*, 148 Minn. 176, 181 N. W. 108; 11 A. & E. Ency. of Law (2 ed.) 1058; 17 Cyc. 344; 24 C. J. 190.

⁸⁹ G. S. 1913, §§ 7345, 7348, 7350. See 11 A. & E. Ency. of Law (2 ed.) 1059; 18 Cyc. 343; §§ 955, 967, 969, *infra*.

⁹⁰ See § 1147.

⁹¹ 11 A. & E. Ency. of Law (2 ed.) 1058; 18 Cyc. 343; 24 C. J. 190.

⁹² *Jackson v. O'Rorke*, 71 Neb. 418, 98 N. W. 1068; *Doolan v. McCauley*, 66 Cal. 476, 6 Pac. 130.

⁹³ *Phillips v. Grubbs*, 112 Ark. 562, 167 S. W. 101.

⁹⁴ *Cohen v. Hayden*, 180 Iowa 232, 157 N. W. 217, 163 N. W. 238.

istrator; and he shall have the same right to foreclose the mortgage or collect the debt as the decedent could have had if living, and he may complete any proceeding commenced by decedent for such purpose.⁹⁵ In the notice of foreclosure the representative need not refer to the death of the decedent or his own appointment. It is sufficient if he signs the notice as executor or administrator.⁹⁶ A foreclosure commenced by an administrator but concluded after his removal and the appointment of a special administrator has been sustained, it not appearing that the special administrator made any objection to the sale.⁹⁷ Where excessive attorney's fees were charged in a foreclosure by a representative it was held that the owner might maintain an action against the representative, as for money had and received, to recover the amount improperly received.⁹⁸

741. Same—Release, redemption or sale—Purchase money—Bidding in at sale—Statute—When redemption is made, or a sale of the premises had, by virtue of a power of sale contained therein or otherwise, the executor or administrator shall receive the money paid, and execute any necessary satisfaction, release, or receipt. If, upon foreclosure sale, the mortgaged premises are bid in by the executor or administrator for such debt, he shall be seized of the same for the persons who would have been entitled to the money had the premises been redeemed or purchased at such sale by some other person.⁹⁹ The representative is authorized to bid in the property for the benefit of the estate. If he purchases the property at the sale in his own name and for his own benefit the sale is voidable at the instance of the beneficiaries of the estate. The mortgagor cannot object to such a sale.¹ Where an owner of a mortgage was appointed administrator of the estate of the mortgagor and foreclosed the mortgage, it was held that he might fairly and in good faith bid in the property in his own right for the full amount due on the mortgage, with the cost of foreclosure.² Where the representative bids in the property for the benefit of the estate the certificate should be made out to him as executor or administrator. It should not be made out to the estate of the decedent, the estate not being a legal entity entitled to hold property.³

742. Same—Disposition of property bid in for estate—Statute—Any real estate purchased by an executor or administrator as such at a foreclosure sale, or sale on execution for the recovery of a debt due the es-

⁹⁵ G. S. 1913, § 7310. See 11 A. & E. Ency. of Law (2 ed.) 999; 27 Cyc. 1460.

⁹⁶ Baldwin v. Allison, 4 Minn. 25 (11).

⁹⁷ Baldwin v. Allison, 4 Minn. 25 (11).

⁹⁸ Eliason v. Sidle, 61 Minn. 285, 63 N. W. 730.

⁹⁹ G. S. 1913, § 7311.

¹ Baldwin v. Allison, 4 Minn. 25 (11);

Wilson v. Bell, 17 Minn. 61 (40); Lewis

v. Welch, 47 Minn. 193, 48 N. W. 608, 49 N. W. 665; Eliason v. Sidle, 61 Minn. 285, 63 N. W. 730. See Fleming v. McCutcheon, 85 Minn. 152, 88 N. W. 433.

² Fleming v. McCutcheon, 85 Minn. 152, 88 N. W. 433.

³ Kenaston v. Lorig, 81 Minn. 454, 84 N. W. 323.

tate, shall be held, reported, and may be sold and conveyed as the personal estate of the decedent; and if not so sold it shall be assigned and distributed to the same persons and in the same proportions as if it had been part of the personal estate of the decedent, but the legal title of all real estate so acquired, or in any other manner whatever acquired, by a foreign executor, administrator or guardian, shall vest in such executor, administrator or guardian, who shall represent the interest of all parties concerned, and shall have full power of disposition over such real estate.⁴

743. Purchase of real property—A representative has no general authority by virtue of his office to purchase real property for the estate.⁵ He is authorized to purchase real property at a foreclosure or execution sale for the enforcement of claims of the estate.⁶ He is forbidden from purchasing at his own sales under a license.⁷

744. Sale of real property—A representative has no power to sell real property of the estate except as authorized by statute, or by the will of the decedent, or by an order of court. He has no general or implied authority to do so by virtue of his office.⁸ A representative with no power to sell real property has no power to give an option to purchase it.⁹

745. Platting lands—Statute—Whenever a guardian shall deem it for the best interests of his ward that the land of such ward be platted, or an executor or administrator shall think it necessary or beneficial to all persons interested to plat any tract of land in his charge as such, he may, with the approval of the probate court, cause a plat thereof to be made, and may execute and file the same for record, in like manner and with like effect as if he were the owner.¹⁰

746. Continuing business of decedent—Unless explicitly authorized by will a representative has no authority to continue the business of the decedent and the probate court has no authority to allow him to do so. He may, however, continue the business for a reasonable time for the purpose of winding it up.¹¹ A will should not be construed as giving authority to the executor to continue the business of the testator unless the authority is given by direct, explicit and unequivocal language.¹²

⁴ G. S. 1913, § 7312, as amended by Laws 1915, c. 40.

⁵ 11 A. & E. Ency. of Law (2 ed.) 1066; 18 Cyc. 350; 24 C. J. 200; 78 Am. St. Rep. 178.

⁶ See § 741.

⁷ See § 992.

⁸ 11 A. & E. Ency. of Law (2 ed.) 1040; 18 Cyc. 317; 24 C. J. 153; 78 Am. St. Rep. 178. As to testamentary powers of sale, see § 468.

⁹ Hedgecock v. Tate, 168 N. C. 660, 85 S. E. 34.

¹⁰ G. S. 1913, § 7382.

¹¹ In re S. Marks & Co.'s Estate, 66 Or. 340, 133 Pac. 777; 11 A. & E. Ency. of Law (2 ed.) 973; 18 Cyc. 241; 24 C. J. 55; 11 R. C. L. 135; Woerner, Am. Law of Adm. (2 ed.) § 328; 40 L. R. A. (N. S.) 201; 78 Am. St. Rep. 196.

¹² Willis v. Sharp, 113 N. Y. 587, 21 N. E. 705; Id., 115 N. Y. 396, 22 N. E. 149; In re Archer, 137 N. Y. S. 770.

Persons dealing with a representative are charged with notice of his powers in this regard.¹³ A representative who continues the retail mercantile business of the decedent without authority cannot bind the estate by buying and agreeing to pay for merchandise for resale in the business, but where the purchases are reasonably necessary for the preservation of the estate the administrator may be allowed reimbursement in the allowance of his final account.¹⁴ If all persons interested in the estate agree to a continuation of the business by the representative he is not personally liable for losses resulting therefrom.¹⁵ Minor beneficiaries of the estate are incapable of consenting to a continuance of the decedent's business by his representative.¹⁶ In continuing decedent's business without authority a representative assumes the risk of loss therein from any cause, including payment for additional expense in settling his account. As a rule the beneficiaries may charge him either with the value of the estate and interest, or at their option, with the net profit realized, and are entitled to an accounting of profits to determine which they will do. In estimating net profits only profits resulting from the employment of testator's estate should be considered, making allowance for the business skill and credit of the representative in conducting the business.¹⁷ If a representative is charged with the profits of continuing the business of the decedent he should be credited with his expenditures in the business.¹⁸ Where a testator provides in his will for the continuation of his business only that portion of the estate devoted to carrying on the business is liable for debts so contracted unless otherwise provided in the will. Generally it requires the most explicit language to charge the entire estate, but this rule does not apply where the entire estate is given to a trustee and there are no specific devises or legacies.¹⁹ If a representative continues a business of the decedent without authority in the will or agreement of the interested parties he is liable for resulting losses to an administrator de bonis non.²⁰ A representative who permits an heir to continue the business

¹³ *Donnelly v. Alden*, 229 Mass. 109, 118 N. E. 298.

¹⁴ *Silsby v. Wickersham*, 171 Mo. App. 128, 155 S. W. 1094; *C. W. Beggs, Sons & Co. v. Behrend's Estate*, 156 Wis. 34, 145 N. W. 207; 11 A. & E. Ency. of Law (2 ed.) 974; 24 C. J. 57; 40 L. R. A. (N. S.) 201.

¹⁵ *Swaine v. Hemphill*, 165 Mich. 561, 131 N. W. 68; *Howe v. Richardson*, 186 Mass. 259, 71 N. E. 543. See 40 L. R. A. (N. S.) 234.

¹⁶ *Gilligan v. Daly*, 79 N. J. Eq. 36, 80 Atl. 994; *Donnelly v. Alden*, 229 Mass. 109, 118 N. E. 298.

¹⁷ *Gilligan v. Daly*, 79 N. J. Eq. 36, 80 Atl. 994; *Hines v. Levers & Sargent*

Co., 226 Mass. 214, 115 N. E. 252; 11 A. & E. Ency. of Law (2 ed.) 974; 18 Cyc. 241; 24 C. J. 61; 40 L. R. A. (N. S.) 201.

¹⁸ *In re Rose's Estate*, 80 Cal. 166, 178, 22 Pac. 86.

¹⁹ *Moore v. McFall*, 263 Ill. 596, 105 N. E. 723; *Jones v. Walker*, 103 U. S. 444; *Smith v. Ayer*, 101 U. S. 320; *Wills v. Sharp*, 113 N. Y. 587, 21 N. E. 705; *Frey v. Eisenhardt*, 116 Mich. 160, 74 N. W. 501; *In re Ennis' Estate*, 96 Wash. 352, 165 Pac. 119; 18 Cyc. 244; 40 L. R. A. (N. S.) 201.

²⁰ *Hines v. Levers & Sargent Co.*, 226 Mass. 214, 115 N. E. 252.

of the decedent, and to contract debts in the name of the estate, is personally liable to the creditors, though he acts in good faith and in ignorance of such liability.²¹

747. Same—Farming operations—Crops—Ordinarily a representative has no authority, unless conferred by will, to operate and manage a farm of the decedent, but he may do what a person of ordinary prudence would do under similar circumstances in having growing crops cultivated and harvested. Often a farm is left by the representative in the hands of the family of the decedent. It is proper for him to put a tenant in charge during administration. He is expressly authorized by statute to keep the farm in tenantable repair. Any reasonable expense in cultivating, harvesting and marketing crops is properly allowed on final account.²²

748. Same—Partnership—The representative of a deceased partner has no authority as such to continue the business of the partnership. He may be authorized to do so by will or agreement.²³ An executor who continues the partnership business is personally liable for the debts of the firm contracted during such continuance, though he acts under express authority from the will. But he is not liable personally for debts of the firm contracted prior to the death of his testator. The mere fact of his continuing the business does not give the surviving partner implied authority to bind him for such debts.²⁴ A representative of a deceased partner, joining a surviving partner in a composition agreement, has been held personally liable thereon.²⁵ A clause in the will of a deceased partner has been construed as authorizing his executors to join with the surviving partner in the execution of a mortgage upon real property of the firm, and also to join with him in a mortgage to correct a mistake of description in a like instrument executed by the testator and his partner in his lifetime, upon firm property.²⁶ A representative continuing the partnership business with a surviving partner is a partner though he takes no active part but merely agrees to a continuance of the business.²⁷ The representative of a deceased partner cannot demand entrance into the firm in the absence of agreement.²⁸

²¹ *Martin Bros. Co. v. Peterson*, 38 S. D. 494, 162 N. W. 154.

²² *Lamb-Davis Lumber Co. v. Stowell*, 96 Wash. 46, 164 Pac. 593; *In re Fernandez' Estate*, 119 Cal. 579, 51 Pac. 851; *In re Smith's Estate*, 118 Cal. 462, 50 Pac. 701; *Farley v. Hord*, 45 Miss. 96; *In re Ring's Estate*, 132 Iowa 216, 109 N. W. 710; 11 A. & E. Ency. of Law (2 ed.) 974; 18 Cyc. 242; 24 C. J. 57; 40 L. R. A. (N. S.) 230.

²³ *Mattison v. Farnham*, 44 Minn. 95, 46 N. W. 347; *Brown v. Morrill*, 45 Minn. 483, 48 N. W. 328. See *Betcher v.*

Betcher, 83 Minn. 215, 86 N. W. 1; 11 A. & E. Ency. of Law (2 ed.) 981; 18 Cyc. 245; 24 C. J. 62; *Woerner, Am. Law of Adm.* (2 ed.) § 123.

²⁴ *Mattison v. Farnham*, 44 Minn. 95, 46 N. W. 347.

²⁵ *Brown v. Farnham*, 55 Minn. 27, 56 N. W. 352.

²⁶ *Brown v. Morrill*, 45 Minn. 483, 48 N. W. 328.

²⁷ *City Nat. Bank v. Stone*, 131 Mich. 588, 92 N. W. 99.

²⁸ *Chittenden v. Witbeck*, 50 Mich. 401, 15 N. W. 526.

749. Investment of funds—In the absence of authority from a will a representative ordinarily has no duty or right to invest the funds of the estate, but must proceed with reasonable promptness to settle the estate.²⁹ While it is ordinarily the duty of a representative to settle the estate and make distribution without delay, special circumstances may make it his duty to invest funds, or to change investments of the decedent, as where they are palpably unsafe.³⁰ There is no statute in this state expressly defining the securities in which a representative may invest the funds of an estate, but in the absence of express directions in the will the only safe course is to follow G. S. 1913, § 6393 as amended by Laws 1917, c. 88, and probate courts should not authorize investment in any other securities.³¹ A representative should not invest funds in the stock of banks or other private corporations.³² Where a trust company acted as executor it was held that the trial court was justified in approving an investment by the executor in certain bank certificates of deposit, originally payable to it as an individual, and afterwards renewed and indorsed to it as executor, as an investment for the estate, and in disapproving as such an investment certain certificates of deposit issued by the executor as a trust company to itself as executor.³³ An executor investing trust funds is not an insurer, but must exercise the degree of discretion which men of ordinary intelligence and prudence usually exercise in the investment of their own funds.³⁴ If a representative disregards the provisions of a will or a rule of law relating to investments, he takes the risk of any loss that may result, without the right to any profit that he may make by reason of such investment. It is optional with the beneficiaries of the estate to hold him liable for the amount of funds that he has invested improperly, or to accept the investment as made.³⁵

750. Loaning money of estate—A representative has no general or implied authority to loan money of the estate and is directly responsible to the estate for money improperly loaned.³⁶ An administrator who

²⁹ *Candee v. Skinner*, 40 Conn. 464; *Guthrie v. Wheeler*, 51 Conn. 214; *Brenham v. Story*, 39 Cal. 179; 11 A. & E. Ency. of Law (2 ed.) 950; 18 Cyc. 233; 24 C. J. 71; 11 R. C. L. 143; *Woerner, Am. Law of Adm.* (2 ed.) § 336; 78 Am. St. Rep. 197.

³⁰ *Villard v. Villard*, 219 N. Y. 482, 114 N. E. 789.

³¹ 11 A. & E. Ency. of Law (2 ed.) 952; *Woerner, Am. Law of Adm.* (2 ed.) § 336. See § 1312.

³² *Williams v. Cobb*, 219 Fed. 663.

³³ *St. Paul Trust Co. v. Kittson*, 62 Minn. 408, 61 N. W. 74.

³⁴ *In re Roach's Estate*, 50 Or. 179, 92 Pac. 118; *Villard v. Villard*, 219 N. Y. 482, 114 N. E. 789. See *Harding v. Canfield*, 73 Minn. 244, 75 N. W. 1112; 11 A. & E. Ency. of Law (2 ed.) 963; 18 Cyc. 254; *Woerner, Am. Law of Adm.* (2 ed.) § 336.

³⁵ *Villard v. Villard*, 219 N. Y. 482, 114 N. E. 789. See 44 L. R. A. (N. S.) 873.

³⁶ *In re Fretwell's Estate*, 154 Cal. 638, 98 Pac. 1058; 11 A. & E. Ency. of Law (2 ed.) 950; 18 Cyc. 264; 24 C. J. 89.

loans money of the estate may sue for it either as administrator or in his private capacity.³⁷

751. Using funds in business ventures—Estoppel of beneficiaries—In the absence of express authority in a will a representative is not authorized to use any part of the funds of the estate in trade, manufacturing, stock speculation, or other business venture, whereby the funds are put at hazard, and doing so is a breach of trust, rendering him personally liable for resulting losses and without right to share in resulting profits.³⁸ Where a representative, acting in good faith and with ordinary care and prudence for the good of the beneficiaries of the estate, deviates, with their consent and approval, from the strict line of his duty, and loss results therefrom, the consenting beneficiaries cannot hold him responsible for such loss.³⁹

752. Borrowing money—If a representative borrows money for purposes of the estate the contract does not bind the estate but only the representative personally, in the absence of authority from a will or statute. The fact that a promissory note is given for the loan does not change the rule. The lender must look to the representative individually for repayment. If the money is borrowed and used for a legitimate purpose of the estate and is repaid by the representative he is entitled to reimbursement in his final account.⁴⁰

753. Promissory notes—A representative cannot bind the estate in any way on any promissory note he may make. The only effect of his making a note is to render himself personally liable thereon.⁴¹ Under the law merchant a negotiable promissory note made by an administrator in his official capacity imports sufficient consideration to bind him personally. There is a sufficient consideration for such a note (1) when the maker has assets in his hands which he might have applied in fulfillment of his obligation, and (2) where a consideration for his promise has been received by the personal representative himself. But such a

³⁷ *Bond v. Corbett*, 2 Minn. 248 (209). See § 1122.

³⁸ *Matthews v. Sheehan*, 76 Conn. 654, 57 Atl. 694; *Warren v. Union Bank*, 157 N. Y. 259, 51 N. E. 1036; *Hayes v. Rich*, 101 Me. 314, 64 Atl. 659; *In re Delaney's Estate* (Nev.) 171 Pac. 383; 11 A. & E. Ency. of Law (2 ed.) 956; 18 Cyc. 241; 24 C. J. 55; 11 R. C. L. 136; *Woerner*, Am. Law of Adm. (2 ed.) § 336.

³⁹ *Poole v. Munday*, 103 Mass. 174; *Matthews v. Sheehan*, 76 Conn. 654, 57 Atl. 694; *Swaine v. Hemphill*, 165 Mich. 561, 131 N. W. 68.

⁴⁰ *Ness v. Wood*, 42 Minn. 427, 44 N. W. 313; *Germania Bank v. Michaud*,

62 Minn. 459, 65 N. W. 70; *Lyman v. Nat. Bank*, 181 Mass. 437, 63 N. E. 923; *Howe v. Richardson*, 186 Mass. 259, 71 N. E. 543; *O'Kelly v. McGinnis*, 141 Ga. 379, 81 S. E. 197; *Putney v. Bryan*, 142 Ga. 118, 82 S. E. 519; *Merchants' Nat. Bank v. Weeks*, 53 Vt. 115; *Exchange Nat. Bank v. Bett's Estate* (Kan.) 176 Pac. 660; 11 A. & E. Ency. of Law (2 ed.) 936; 18 Cyc. 251; 24 C. J. 69; *Woerner*, Am. Law of Adm. (2 ed.) § 356.

⁴¹ *Germania Bank v. Michaud*, 62 Minn. 459, 65 N. W. 70; 11 A. & E. Ency. of Law (2 ed.) 936; 18 Cyc. 252; 24 C. J. 69; *Woerner*, Am. Law of Adm. (2 ed.) § 356.

note given for the debt of the testator without any new consideration, and when the time to file claims has expired, and when the probate court has never allowed the claim or ordered it paid, is without consideration. An agreement to extend the time of payment of the debt of a third party is a sufficient consideration for the promise of the defendant to pay that debt. But such a consideration is not sufficiently adequate to make the defendant, who is an administrator, and who signed a note in his official capacity, personally liable thereon. Such a consideration would not warrant the court in invoking the fiction of law that makes a promise for him which he never intended to make, and by which he is held personally liable on the note.⁴² A representative cannot bind the estate by giving a note for the price of property purchased by the decedent in his lifetime, in the absence of express authority from the will.⁴³ If a representative renews a note made by the decedent he is personally liable thereon, and must look to the estate on his accounting for reimbursement if he pays the note.⁴⁴

754. Executing releases, satisfactions and receipts—Where mortgaged property is sold or redeemed the representative is authorized to execute a proper satisfaction, release or receipt.⁴⁵

755. Extension of time of payment—A representative cannot make an agreement with a debtor of the estate for an extension of the time of payment of a debt which would delay the settlement of the estate.⁴⁶

756. Compromising claims—A representative has authority, without leave of the probate court or the consent of the beneficiaries of the estate, to compromise any claim of the estate against a debtor of the decedent. This is an incident of his duty to prosecute and collect all claims of the estate.⁴⁷ For his own protection a representative should not compromise a claim or settle an action thereon without obtaining leave from the probate court to do so, especially where the amount in-

⁴² *Germania Bank v. Michaud*, 62 Minn. 459, 65 N. W. 70. See *Grafton Nat. Bank v. Wing*, 172 Mass. 513, 52 N. E. 1067.

⁴³ *Browne v. Fairhall*, 213 Mass. 290, 100 N. E. 556.

⁴⁴ *Brown v. Farnham*, 55 Minn. 27, 34, 56 N. W. 352.

⁴⁵ See § 741.

⁴⁶ *Maddock v. Russell*, 109 Cal. 417, 42 Pac. 139; *Hammond v. U. S. Fidelity & Guaranty Co.*, 29 Cal. App. 464, 155 Pac. 1023; 11 A. & E. Ency. of Law (2 ed.) 990; 18 Cyc. 226; 23 C. J. 1197; 78 Am. St. Rep. 190.

⁴⁷ *Jeffries v. New York Mutual Life*

Ins. Co., 110 U. S. 305; *Chouteau v. Suydam*, 21 N. Y. 179; *Johnson's Appeal*, 71 Conn. 590, 42 Atl. 662; *Olston v. Oregon Water Power & Ry. Co.*, 52 Or. 343, 96 Pac. 1095, 97 Pac. 538; *Moulton v. Holmes*, 57 Cal. 337; *Grece v. Helm*, 91 Mich. 540, 51 N. W. 1106. See *Foot v. Great Northern Ry. Co.*, 81 Minn. 493, 84 N. W. 342; *Aho v. Jesmore*, 101 Minn. 449, 112 N. W. 538; *Aho v. Republic Iron & Steel Co.*, 104 Minn. 322, 116 N. W. 590; 11 A. & E. Ency. of Law (2 ed.) 926; 18 Cyc. 226; 23 C. J. 1198; *Woerner, Am. Law of Adm.* (2 ed.) § 326; 11 R. C. L. 202; 18 L. R. A. 414; 78 Am. St. Rep. 187.

volved is large.⁴⁸ A representative cannot compromise a claim against the estate if it is provable in the probate court.⁴⁹

757. Compounding claims—Statute—When a debtor of a decedent is unable to pay his debts in full, the executor or administrator may, with the consent of the court, compound with such debtor on receipt of a fair and just dividend of his effects.⁵⁰ This statute applies to composition agreements with an insolvent debtor. It has no application to a claim for unliquidated damages and a representative may compromise such a claim without leave of the probate court.⁵¹ A similar statute relating to guardians has recently been amended so as to cover the compromise of claims.⁵²

758. Submitting claims to arbitration—A representative has authority, without leave from the probate court, to submit any claim of the estate against a debtor of the decedent to arbitration.⁵³ If a representative submits a claim to arbitration and promises to pay the award his promise does not bind the estate, but binds him personally.⁵⁴ A representative has no authority to submit to arbitration a claim against his estate if it is provable in the probate court.⁵⁵

759. Confession of judgment—A representative may confess judgment when sued on a claim against the estate not provable in the probate court.⁵⁶ A representative cannot confess judgment on a claim provable in the probate court.⁵⁷

760. Voting corporate stock—Statute—It is provided by statute that "every executor, administrator, guardian, or trustee shall represent the shares of stock in his hands, for all purposes, at all meetings of the corporation, but while acting in good faith shall not be personally liable; but the estates and funds in his hands shall be liable in like manner and to the same extent as the beneficiary or other represented party or interest would be if competent to act and holding the stock in their own names, respectively."⁵⁸ A representative may vote corporate stock of

⁴⁸ *In re Bush's Estate*, 89 Neb. 334, 131 N. W. 602.

⁴⁹ See § 873.

⁵⁰ G. S. 1913, § 7309.

⁵¹ *Olstou v. Oregon Water Power & Ry. Co.*, 52 Or. 343, 96 Pac. 1095, 97 Pac. 538.

⁵² See § 1307.

⁵³ *Coffin v. Cottle*, 4 Pick. (Mass.) 454; *Bean v. Farnham*, 6 Pick. (Mass.) 269; *Johnson's Appeal*, 71 Conn. 590, 42 Atl. 602; 11 A. & E. Ency. of Law (2 ed.) 924; 18 Cyc. 210; 23 C. J. 1176; 5 Ency. L. & P. 20; *Woerner, Am. Law of Adm.* (2 ed.) 327; 78 Am. St. Rep. 187.

⁵⁴ *Brown v. Farnham*, 55 Minn. 27, 35, 56 N. W. 352. Of course if he pays the

award he is ordinarily entitled to reimbursement in the allowance of his final account.

⁵⁵ See § 872.

⁵⁶ *Brown v. Brown*, 56 Conn. 249, 14 Atl. 718. See *Johanson v. Hoff*, 63 Minn. 296, 299, 65 N. W. 464; 11 A. & E. Ency. of Law (2 ed.) 932; 18 Cyc. 211; 8 Ency. Pl. & Pr. 689; 23 C. J. 1177; *Woerner, Am. Law of Adm.* (2 ed.) § 324.

⁵⁷ *Wright v. Stage*, 86 Kan. 475, 121 Pac. 491. See *Johanson v. Hoff*, 63 Minn. 296, 299, 65 N. W. 464.

⁵⁸ G. S. 1913, § 6196; *Markell v. Ray*, 75 Minn. 138, 77 N. W. 788.

the decedent without a formal transfer thereof on the books of the corporation. A foreign representative has the same right.⁵⁹

761. Employing assistants, bookkeepers, accountants, etc.—A representative has no general or implied authority to employ bookkeepers, accountants, or other assistants, at the expense of the estate. He is compensated for his services and the compensation covers the ordinary work of a representative such as keeping accounts, preparing accounts for the court, collecting assets, attending court, collecting testimony, supervising the estate and keeping the real estate in repair. But in special cases, as where the estate is exceptionally large, a representative may be credited on his final account for the expenses of assistants. The matter of allowing such credits is not governed by any inflexible rule but lies in the discretion of the probate court.⁶⁰ He may retain an employee hired by the decedent if his services are necessary for the protection of the estate.⁶¹ An estate is not directly liable to those who have been employed by a representative to assist him in the performance of his duties of administration. Their only remedy is against the representative individually, who in turn may, if the expenses were reasonably necessary and were incurred in good faith, be credited therewith in his final account.⁶²

762. Deposit of funds—Failure of bank—Liability of representative—If a representative deposits funds of an estate in a bank of good standing, to his credit as representative, and nothing occurs that would induce a person of ordinary prudence to withdraw the funds on account of the standing of the bank, he is not liable for loss of the funds through the subsequent failure of the bank. The rule is otherwise if he deposits the funds to his individual credit.⁶³ A representative may deposit funds of an estate with a trust company.⁶⁴ Where a representative kept money of an estate for over five years and made no effort to settle the estate, he was held liable for the loss of the money through the failure of a broker with whom he had deposited it for safe-keeping, though he was not otherwise negligent.⁶⁵

⁵⁹ 26 A. & E. Ency. of Law (2 ed.) 1000; 10 Cyc. 334; 14 C. J. 903; Woerner, Am. Law of Adm. (2 ed.) § 328.

⁶⁰ In re More's Estate, 121 Cal. 609, 54 Pac. 97; Newell v. West, 149 Mass. 520, 21 N. E. 954; In re McDowell, 163 N. Y. S. 164; 11 A. & E. Ency. of Law (2 ed.) 1238; 18 Cyc. 272; 24 C. J. 96; Woerner, Am. Law of Adm. (2 ed.) § 514.

⁶¹ In re Miner's Estate, 46 Cal. 564.

⁶² Golden Gate Undertaking Co. v. Taylor, 168 Cal. 94, 141 Pac. 922; Hick-

man-Coleman Co. v. Legget, 10 Cal. App. 29, 100 Pac. 1072.

⁶³ Harding v. Canfield, 73 Minn. 244, 75 N. W. 1112; People v. Faulkner, 107 N. Y. 488; Williams v. Williams, 55 Wis. 300, 12 N. W. 465; Curtis v. Edwards, 162 Mich. 47, 127 N. W. 36; 11 A. & E. Ency. of Law (2 ed.) 948; 18 Cyc. 235; 24 C. J. 50; 98 Am. St. Rep. 371; 45 L. R. A. (N. S.) 1.

⁶⁴ G. S. 1913, § 6409.

⁶⁵ Wood v. Myrick, 17 Minn. 408 (386).

763. Conversion of realty into personality—A representative has no general power to convert realty into personality.⁶⁶

764. Waste—Devastavit—Loss of assets—Statute—It is provided by statute that a representative shall not be liable for any waste or loss occurring without his fault.⁶⁷ In our practice the word "devastavit" is used to denote any wrongful act or omission of an executor or administrator, in relation to the estate intrusted to his care, resulting in loss to the estate and rendering him liable therefor to the estate or the beneficiaries.⁶⁸ The test of the liability of a representative for the loss of funds or property of the estate is whether he exercised the degree of care which men of ordinary prudence usually exercise in their own affairs of a like nature under similar circumstances.⁶⁹ A representative is not liable for the loss of property by theft unless he was at fault.⁷⁰ Where, at the commencement of an action against a representative, he had sufficient funds to satisfy any judgment that might be recovered against him therein, and during the pendency of the action he secured a final settlement and decree of distribution, it was held that the decree was no defence to an action on the judgment against the representative in the nature of devastavit.⁷¹

765. Torts of representative—As a general rule an estate is not liable for the torts of a representative committed in connection with the administration. A representative cannot be sued in his representative capacity for such torts.⁷² A representative is individually liable for fraud-

⁶⁶ *Townshend v. Goodfellow*, 40 Minn. 312, 318, 41 N. W. 1056.

⁶⁷ See § 1056.

⁶⁸ *Whitney v. Pinney*, 51 Minn. 146, 53 N. W. 198; *Howe v. People*, 7 Colo. App. 535; 44 Pac. 512; *Steel v. Holladay*, 20 Or. 70, 25 Pac. 69; 9 A. & E. Ency. of Law (2 ed.) 416; 11 Id. 970; 18 Cyc. 290; 24 C. J. 118; *Woerner*, Am. Law of Adm. (2 ed.) § 534.

⁶⁹ *Harding v. Canfield*, 73 Minn. 244, 75 N. W. 1112. See *Wood v. Myrick*, 17 Minn. 408 (386); *State v. Germania Bank*, 106 Minn. 164, 118 N. W. 683; *Winters v. Ellefson*, 128 Minn. 3, 150 N. W. 171; *Pourpore v. Stone-Ordean-Wells Co.*, 133 Minn. 421, 158 N. W. 703; 11 A. & E. Ency. of Law (2 ed.) 967; 18 Cyc. 233; 24 C. J. 123.

⁷⁰ See § 1056; *Pourpore v. Stone-Ordean-Wells Co.*, 133 Minn. 421, 158 N. W. 703.

⁷¹ *Whitney v. Pinney*, 51 Minn. 146, 53 N. W. 198.

⁷² *Fritz v. McGill*, 31 Minn. 536, 18 N. W. 753 (fraudulent misrepresentations in the sale of property of the estate); *Bannigan v. Woodbury*, 158 Mich. 206, 122 N. W. 531 (negligence in not keeping premises safe); *Helling v. Boss*, 121 N. Y. S. 1013 (Id.); *Andrews v. Platt*, 77 Conn. 63, 58 Atl. 458 (fraudulent misrepresentations in the sale of property of the estate); *Nicals v. Stanley*, 146 Cal. 724, 81 Pac. 117 (misappropriation of insurance money paid to an administrator for the widow of decedent); *Fetting v. Winch*, 54 Or. 600, 104 Pac. 722 (negligence); *T. L. Horn Trunk Co. v. Delano*, 162 Mo. App. 402, 142 S. W. 770 (negligence in not keeping leased premises safe—defective water tank in store building belonging to estate—immaterial that lease was made under order of court); 11 A. & E. Ency. of Law (2 ed.) 942; 18 Cyc. 296; 24 C. J. 128; 11 R. C. L. 172; *Woerner*, Am. Law of Adm. (2 ed.) § 356; 52 Am. St. Rep. 118.

ulent representations as to the financial condition of the estate.⁷³ Where a representative takes possession of property as a part of the estate, when in fact it belongs to a third party, it has never been definitely settled in this state whether such party can sue the representative in his official capacity, and the cases in other states are not harmonious. In the case of contracts we apply in this state the principle that a representative cannot create a new liability that will bind the estate. If we should apply this principle where the representative takes possession of the property of another and wrongfully treats it as part of the estate he could not be sued in his representative capacity. This would be unjust to the true owner of the property and according to the better view a representative may be sued by the true owner either in his representative or individual capacity.⁷⁴ The mere delivery of property to one who is the administrator of an estate, the estate not being entitled to it, does not make the estate responsible for such property to the person entitled to it, it not appearing that the property was treated or used as assets of the estate, or that the estate received any benefit from it.⁷⁵ Executors who, under a power of sale, convey land of which their testator was in equity a mere trustee, are liable, as executors, to the equitable owner for the damages sustained by him to the extent of the purchase money received by them.⁷⁶ A representative may render himself personally liable for trespass in taking possession of personal property of the estate with force. He has no right to break open doors or commit similar acts of violence in order to take possession of such property.⁷⁷ The general rule that an estate is not liable for false statements or warranties by a representative does not apply to a claim for the recovery of a payment on the price of realty by one who was induced to purchase it by fraudulent misrepresentations of the representative.⁷⁸

766. Failure to assert rights in property—Estoppel—Waiver—An administrator held a note and mortgage which his intestate had pledged to him as collateral security for a debt. As administrator he treated the note and mortgage as belonging to the estate, without asserting his right to hold the same for his personal benefit, and proceeded to fore-

⁷³ *Winston v. Young*, 47 Minn. 80, 49 N. W. 521; *Id.*, 52 Minn. 1, 53 N. W. 1015; *Kennedy v. Burr*, 101 Wash. 61, 171 Pac. 1022.

⁷⁴ *Simpson v. Snyder*, 54 Iowa 557, 6 N. W. 730; *Grimes v. Barndollar*, 58 Colo. 421, 148 Pac. 256; *White v. McFarland*, 148 Mo. App. 338, 128 S. W. 23; *Silsby v. Wickersham*, 171 Mo. App. 128, 155 S. W. 1094; *Newcomb v. Burbank*, 146 Fed. 400; *Hill v. Escort*, 38 Tex. Civ. App. 487, 86 S. W. 367; *Boyle v. Knaus*, 81 N. J. L. 330, 79 Atl. 1025; *Collins v. Denny Clay Co.*, 41 Wash. 136,

82 Pac. 1012; *Moran v. Morrill*, 80 N. Y. S. 120, 177 N. Y. 563, 60 N. E. 1127; 11 A. & E. Ency. of Law (2 ed.) 943; 18 Cyc. 884; 24 C. J. 129; *Woerner*, Am. Law of Adm. (2 ed.) § 305; 51 L. R. A. 261; 52 Am. St. Rep. 118. See § 852.

⁷⁵ *Fritz v. McGill*, 31 Minn. 536, 18 N. W. 753.

⁷⁶ *Wall v. Kellogg's Executors*, 16 N. Y. 385.

⁷⁷ *Mitchell v. Mitchell*, 54 Minn. 301, 55 N. W. 1134.

⁷⁸ *Chaney v. Wood (Ind.)* 115 N. E. 333.

close the mortgage by advertisement in behalf of the estate. Held, that he effectually waived his personal rights as a pledgee.⁷⁰

767. Purchase of property of estate or adverse title—A representative is forbidden by statute from buying real property of the estate sold by him under a license from the probate court.⁸⁰ He cannot properly sell to himself the personal property of the estate and if he does so the sale is voidable at the instance of those interested in the estate.⁸¹ He is expressly forbidden by statute from buying claims against the estate.⁸² Neither a representative nor his attorney can, for his personal use and profit by a sale thereof, purchase an outstanding life estate in realty of which the representative is trustee. If he does so the representative must account to the estate for the amount so realized.⁸³ He cannot acquire for his own use an interest in the estate, and if he attempts to do so equity impresses a constructive trust upon the title so acquired, regardless of whether such acquisition was accomplished with actual fraud or innocently, or even without knowledge of the fact that the property belonged to the estate.⁸⁴ He cannot acquire the property of the estate indirectly through a corporation in which he is interested. If he does so he is liable as for a conversion and is accountable for any profits.⁸⁵ A mortgagee of real estate who was also representative of the mortgagor has been held authorized to buy at his foreclosure sale. He had not taken possession of the mortgaged premises as representative and had not attempted to sell them for purposes of administration. The sale was made fairly and in good faith and the premises were bought for the full amount due on the mortgage, with the costs of foreclosure.⁸⁶ A representative may purchase the interest of heirs at a sale thereof on execution or otherwise, for in such case duty and self interest would not conflict.⁸⁷

768. Cannot purchase claims against estate—It is expressly provided by statute that a representative shall not purchase any claim against the estate he represents.⁸⁸

769. Keeping trust and personal property distinct—It is the duty of a representative to keep the property of the estate separate from his own or other property so that it may be easily identified. If he fails to do so he may render himself liable for a conversion in case of loss or for

⁷⁰ *Lewis v. Welch*, 47 Minn. 193, 48 N. W. 608, 49 N. W. 665.

⁸⁰ See § 902.

⁸¹ See § 736.

⁸² See §§ 768, 1056.

⁸³ *Turner v. Fryberger*, 94 Minn. 433, 103 N. W. 217.

⁸⁴ *Arnold v. Smith*, 121 Minn. 116, 140 N. W. 748; *Id.*, 137 Minn. 364, 163 N. W. 672. See *Dunnell*, Minn. Digest and Supplements, § 9934.

⁸⁵ *Macfadden v. Jenkins* (N. D.) 169 N. W. 151.

⁸⁶ *Fleming v. McCutcheon*, 85 Minn. 152, 88 N. W. 433. See *Lewis v. Welch*, 47 Minn. 193, 48 N. W. 608, 49 N. W. 665.

⁸⁷ *Fleming v. McCutcheon*, 85 Minn. 152, 156, 88 N. W. 433.

⁸⁸ See § 1056; 11 A. & E. Ency. of Law (2 ed.) 983; 18 Cyc. 447.

interest.⁸⁹ A representative holds all the property of the estate as a trustee and he is as much bound to keep the money distinct as he is any chattel.⁹⁰

770. Property held by decedent in trust—A representative does not succeed to the decedent as trustee of an express trust, but it is his duty to take possession of the trust property, settle the accounts of the decedent as trustee, and turn over the property under order of the district court.⁹¹

FAMILY ALLOWANCE

771. Statute—The widow or children, or both, constituting the family of the decedent, shall have such reasonable allowance out of his personal estate as the probate court deems necessary for their maintenance during the settlement of the estate according to their circumstances, which in case of an insolvent estate shall not be longer than one year after administration is granted, nor in any case after the distributive share of the widow in the residue of the personal estate has been assigned to her; and such reasonable allowance may be made by the court when the husband or father has left a will, as well as when he dies intestate, except when the testator makes provision in his will specifically in lieu of all other allowances.⁹²

772. Right to—In general—An allowance may be made in all cases whether there is a will or not and whether all the estate is disposed of by will or not. A testator cannot dispose of his property so as to prevent a court from granting an allowance.⁹³ Under the present statute an allowance may be made though the will makes provision for the widow, unless the will clearly manifests an intention that such provision shall be exclusive, in which case the widow is put to an election.⁹⁴ If a widow has received aid from charity, or borrowed money or secured credit for her necessities, or obtained them in any other way than out of her independent means, she is entitled to an allowance to the same extent as if she had applied therefor before obtaining such relief.⁹⁵ The separate

⁸⁹ *St. Paul Trust Co. v. Kittson*, 62 Minn. 408, 65 N. W. 74; 11 A. & E. Ency. of Law (2 ed.) 945; 18 Cyc. 291; 24 C. J. 121; *Woerner, Am. Law of Adm.* (2 ed.) §§ 336, 511.

⁹⁰ *Foster v. Bailey*, 157 Mass. 160, 31 N. E. 771.

⁹¹ *In re Belt's Estate*, 29 Wash. 535, 70 Pac. 74; *King v. Lawrence*, 14 Wis. 238; *Luco v. De Torro*, 91 Cal. 405, 18 Pac. 866; 11 A. & E. Ency. of Law (2 ed.) 982; 18 Cyc. 193; 11 R. C. L. 112; *Woerner, Am. Law of Adm.* (2 ed.) § 321.

⁹² G. S. 1913, § 7243 (3), as amended by Laws 1915, c. 331. See 2 A. & E. Ency. of Law (2 ed.) 156; 3 Ency. L. & P. 256; 18 Cyc. 373; 24 C. J. 230; 11 R. C. L. 239; *Woerner, Am. Law of Adm.* (2 ed.) §§ 77-93; *Church, Probate Law*, 563.

⁹³ *Baker v. Baker*, 57 Wis. 382, 15 N. W. 425.

⁹⁴ See §§ 771, 777.

⁹⁵ *Lisk v. Lisk*, 155 Mass. 153, 29 N. E. 375; *Welch v. Welch*, 181 Mass. 37, 62 N. E. 982; *Glover v. Glover*, 215 Mass. 576, 102 N. E. 945.

property and income of the widow are to be considered.⁹⁶ If a widow is possessed of an estate in her own right and a regular income sufficient for her support an allowance may be denied.⁹⁷ Where there is no dependency there is no right to an allowance. Where the dependency is partial the duty is partial. The necessity of support during administration may coexist with the expectance of future benefit from the estate; and the present enjoyment of an inadequate income, whether from the estate or otherwise, does not wholly relieve the estate from the duty of support.⁹⁸ An allowance is not a mere charity to be withheld if the widow has property out of which she might possibly support herself and children. She is not called upon to sacrifice her principal.⁹⁹ An allowance may be denied where the widow is in a state institution and supported by the state without expense to her or her estate.¹ Where a will provided an income for a widow it was held that she was not entitled to it while receiving an allowance under the statute.² No allowance can be made for adult children who have left the family home and are living independently of the family.³

773. Nature and object—The allowance is an expense of administration.⁴ It is purely statutory.⁵ It is not an interest in the estate and does not pass by descent.⁶ It is not an asset of the estate.⁷ It is no part of the estate for purposes of distribution.⁸ It is made to provide for the necessities of the widow and children for a short time, until they have an opportunity to adjust themselves to their new situation.⁹ It is in the nature of a continuance of the support after the husband's death which he or his estate had furnished the family before his death. Without it, the widow and children might be subjected to great inconvenience and hardship though the estate were ample for their support. There is at first no legal certainty as to the condition of the estate and until that certainty is arrived at by the completion of the settlement of the estate, the widow and children keep living on, ordinarily in the old home,

⁹⁶ *In re Frizzell's Estate* (Or.) 188 Pac. 707.

⁹⁷ *Hollenbeck v. Pixley*, 3 Gray (Mass.) 521; 2 A. & E. Ency. of Law (2 ed.) 163; 24 C. J. 232.

⁹⁸ *Havens' Appeal*, 69 Conn. 684, 38 Atl. 795.

⁹⁹ *Bushby v. Bushby*, 120 Iowa 536, 95 N. W. 191.

¹ *In re Manning's Estate*, 85 Neb. 60, 122 N. W. 711.

² *In re Stetson's Estate*, 184 Mich. 402, 151 N. W. 552.

³ *Wood v. Wood*, 63 Conn. 327, 28 Atl. 520; *In re McSwain's Estate*, 176 Cal. 280, 168 Pac. 117.

⁴ *Wilson v. Wilson*, 55 Colo. 70, 132 Pac. 67; *Grover v. Clover* (Colo.) 169 Pac. 578; *Johnson v. Johnson*, 154 Iowa 118, 134 N. W. 553. See 24 C. J. 230.

⁵ *In re McSwain's Estate*, 176 Cal. 280, 168 Pac. 117.

⁶ *Grover v. Clover* (Colo.) 169 Pac. 578.

⁷ *In re Manning's Estate*, 85 Neb. 60, 122 N. W. 711.

⁸ *Johnson v. Johnson*, 154 Iowa, 118, 134 N. W. 553.

⁹ *Dale v. Hanover Nat. Bank*, 155 Mass. 141, 29 N. E. 371; *Glover v. Glover*, 215 Mass. 576, 102 N. E. 945; *Rhode Island Hospital Trust Co. v. Hopkins*, 38 R. I. 59, 94 Atl. 724. See 24 C. J. 230.

supported by a reasonable allowance from the estate.¹⁰ It is not a mere charity or gift.¹¹ It is not a gift to the widow to repair any seeming injustice in the statute of distribution or the will of her husband, but is intended to furnish her and her minor children the means of temporary maintenance until the estate can be distributed.¹² It is analogous to a homestead exemption.¹³

774. Priority over other claims—The allowance has priority over all unsecured claims against the estate and expenses of administration, including funeral expenses and expenses of last sickness, though the estate is insolvent.¹⁴ It probably takes precedence of judgment liens attaching prior to the death of the decedent.¹⁵ It takes precedence over the lien of an attachment in an action against the husband alone, levied in his lifetime and left undetermined at his death.¹⁶ It is subordinate to the lien of taxes.¹⁷

775. Remarriage of widow—The allowance is to the "widow" of the decedent and if she ceases to be such by remarriage an allowance theretofore granted ceases without any order of court.¹⁸ The marriage of a widow after applying for an allowance does not defeat her right to it up to the time of her marriage. The allowance may cover the entire period of her widowhood and she may borrow money or obtain credit on the strength of her statutory right.¹⁹

776. Divorce—Separation—Desertion—A divorced wife is not entitled to an allowance.²⁰ If a wife enters into a separation agreement and voluntarily severs her connection with the family she is not entitled to an allowance.²¹ The fact that a widow was living apart from her husband

¹⁰ *Havens' Appeal*, 69 Conn. 684, 38 Atl. 795.

¹¹ *Bushby v. Bushby*, 120 Iowa 536, 95 N. W. 191; *Rhode Island Hospital Trust Co. v. Hopkins*, 38 R. I. 59, 94 Atl. 724.

¹² *Rhode Island Hospital Trust Co. v. Hopkins*, 38 R. I. 59, 94 Atl. 724; 2 A. & E. Ency. of Law (2 ed.) 156; 18 Cyc. 378; 24 C. J. 230.

¹³ *Landers v. Whitney*, 171 Cal. 750, 154 Pac. 855.

¹⁴ *Kingsbury v. Wilmarth*, 2 Allen (Mass.) 310; *Tetzloff v. May*, 151 Iowa 445, 131 N. W. 647; *Id.*, 172 Iowa 617, 154 N. W. 905; *Alken v. Davidson*, 146 Ga. 252, 91 S. E. 34. See *In re Smith's Estate*, 118 Cal. 462, 50 Pac. 701 (all funds expended for preservation of estate prior to application for allowance); 2 A. & E. Ency. of Law (2 ed.) 169; 18 Cyc. 387; 24 C. J. 247.

¹⁵ *First Nat. Bank v. Donald*, 112

Miss. 681, 73 So. 723. See 18 Cyc. 389; 24 C. J. 249.

¹⁶ *Tetzloff v. May*, 151 Iowa 445, 131 N. W. 647; *Id.*, 172 Iowa 617, 154 N. W. 905. See 18 Cyc. 389; 24 C. J. 249.

¹⁷ *Niland v. Niland*, 154 Wis. 514, 143 N. W. 170. See 18 Cyc. 387; 24 C. J. 248.

¹⁸ *In re Hamilton's Estate*, 66 Cal. 576, 6 Pac. 493. See 18 Cyc. 394; 24 C. J. 256.

¹⁹ *Bacon v. Perkins*, 100 Mich. 183, 58 N. W. 835; *In re Moore's Estate*, 170 Cal. 60, 148 Pac. 205. See 18 Cyc. 393; 24 C. J. 256.

²⁰ *Dobson v. Butler*, 17 Mo. 87. See 18 Cyc. 393; 24 C. J. 256.

²¹ *In re Yoell's Estate*, 164 Cal. 540, 129 Pac. 999. See *Deeble v. Alerton*, 58 Colo. 166, 143 Pac. 1096 (right held not waived by a separation agreement); 2 A. & E. Ency. of Law (2 ed.) 166; 18

at the time of his death does not necessarily bar an allowance.²² A wife who deserts her husband without cause is not entitled to an allowance.²³

777. Election to take under will—If the allowance is made before the widow has elected to take under the will or statute the order granting it is properly made provisional. She cannot be compelled to starve until she has made an election and she is entitled to a reasonable time in which to make her election and may have an allowance in the meantime. If she elects to take under the will the allowance must be treated as an advancement out of her share, at least where justice to the other beneficiaries requires it. Where a widow was given one-third of the estate "in lieu of all her right and interest in my estate under the statutes of the state of Minnesota," and she elected to take under the will, it was held that an allowance should be deemed an advancement out of her share, as against the other devisees.²⁴ Since the enactment of Laws 1915, c. 331, the widow is not put to an election, but may have an allowance though the will makes provision for her, unless the provision in the will is expressly made "in lieu of all other allowances." To put a widow to an election under the present statute it must clearly and unequivocally appear that the provisions made for her in the will were intended by the testator as in lieu of all statutory provisions for her. The mere fact that a legacy to a wife provides for payments at stated intervals beginning at the death of the testator does not bar an allowance, nor does the fact that the will disposes specifically of the entire estate.²⁵

778. Waiver—Antenuptial and postnuptial agreements—The allowance is a personal privilege and may be waived by the widow. It may be waived by a contract between the widow and other beneficiaries disposing of the estate in a manner contrary to the terms of a will.²⁶ A contract between a widow applying for an allowance and the other beneficiaries disposing of the estate contrary to the terms of a will is admissible on her application. So is a judgment of the district court involving the validity of the contract.²⁷ An allowance may be barred by an antenuptial agreement, but to have that effect the agreement must be very broad. Any reasonable doubt will be resolved against a waiver

Cyc. 392; 24 C. J. 255; Ann. Cas. 1916C, 866.

²² *Slack v. Slack*, 123 Mass. 443; *Welch v. Welch*, 181 Mass. 37, 62 N. E. 982. See 18 Cyc. 393; 24 C. J. 253; Ann. Cas. 1916C, 866.

²³ *Sammons v. Higbee's Estate*, 103 Minn. 448, 452, 115 N. W. 265.

²⁴ *Blakeman v. Blakeman*, 64 Minn. 315, 67 N. W. 69; *Baldwin v. Zien*, 117 Minn. 178, 186, 134 N. W. 498; *Benz v.*

Rogers, 141 Minn. 93, 169 N. W. 477. See 24 C. J. 253.

²⁵ *Landers v. Whitney*, 171 Cal. 750, 154 Pac. 855.

²⁶ *Benz v. Rogers*, 141 Minn. 93, 169 N. W. 477; *Hackley v. Muskegon Circuit Judge*, 58 Mich. 454, 25 N. W. 462; *In re Whitney's Estate*, 171 Cal. 750, 150 Pac. 855. See 18 Cyc. 390.

²⁷ *Benz v. Rogers*, 141 Minn. 93, 169 N. W. 477.

of the right.²⁸ In Iowa it is held that the right to an allowance is not cut off by an antenuptial agreement, however broad its terms, if there is actual need for the allowance at the time of the application therefor.²⁹ A right to an allowance may be barred by a postnuptial agreement.³⁰ The right to an allowance is not lightly waived.³¹ Where transfers to a widow by her husband are set aside as fraudulent and the property sold, an allowance to the widow which she has theretofore elected not to claim will not be made out of the proceeds.³² A widow may waive the right to an allowance by not claiming it and standing by and allowing a final decree of distribution to be made without opposition.³³

779. Death of widow—Abatement of allowance—The claim of a widow for an allowance abates with her death prior to an order of allowance.³⁴ The allowance is intended for the widow's personal and temporary relief, and not to confer an absolute or contingent right of property, which can survive her or go to her personal representative.³⁵ If a widow dies after an order of allowance but before it is paid and it appears that she has incurred expenses for her maintenance or secured credit or borrowed money therefor on the strength of her statutory right, the allowance should be paid to her representative, at least to an extent sufficient to discharge such liabilities.³⁶

780. Non-residents—Conflict of laws—An allowance may be made in this state out of assets here of a non-resident decedent, at least if it appears that he left no other property whatever.³⁷

²⁸ *In re Malchow's Estate*, 143 Minn. 53, 172 N. W. 915; *Landers v. Whitney*, 171 Cal. 750, 154 Pac. 855; *In re Cutting*, 174 Cal. 104, 161 Pac. 1137; *Staub's Appeal*, 66 Conn. 127, 33 Atl. 615; *Cowles v. Cowles*, 74 Conn. 24, 49 Atl. 195; *Paine v. Hollister*, 139 Mass. 144, 29 N. E. 541; *Yockey v. Marion*, 269 Ill. 342, 110 N. E. 34; *Wilson v. Wilson*, 55 Colo. 70, 132 Pac. 67; *Rieger v. Schaible*, 81 Neb. 33, 115 N. W. 560. See *Desnoyer v. Jordan*, 30 Minn. 80, 14 N. W. 259 (payments held under statute and not under antenuptial agreement); 2 A. & E. Ency. of Law (2 ed.) 166; 18 Cyc. 390; 24 C. J. 251; 3 Ency. L. & P. 301; 25 L. R. A. (N. S.) 751.

²⁹ *In re Miller's Estate*, 143 Iowa 120, 121 N. W. 700; *Johnson v. Johnson*, 154 Iowa 118, 134 N. W. 553; *In re Uker's Estate*, 154 Iowa 428, 134 N. W. 1061.

³⁰ *In re Holmberg's Estate* (Neb.) 187 N. W. 903; *Bliss v. Montague*, 149 Mich. 271, 112 N. W. 911. See 18 Cyc. 391; 24 C. J. 252.

³¹ *Deeble v. Alerton*, 58 Colo. 166, 143 Pac. 1096.

³² *Baldwin v. Frisbie*, 163 Wis. 28, 157 N. W. 526.

³³ See *Fischer v. Dolwig* (N. D.) 166 N. W. 793.

³⁴ *Zunkel v. Colson*, 109 Iowa 695, 81 N. W. 175; *Adams v. Adams*, 10 Met. (Mass.) 171; *Drew v. Gordon*, 13 Allen (Mass.) 120; 2 A. & E. Ency. of Law (2 ed.) 168; 18 Cyc. 395; 24 C. J. 258. See § 792.

³⁵ *Adams v. Adams*, 10 Met. (Mass.) 171; *Drew v. Gordon*, 13 Allen (Mass.) 120.

³⁶ *In re Rice's Estate*, 146 Iowa 48, 124 N. W. 792. See 24 C. J. 258.

³⁷ *Stromberg v. Stromberg*, 119 Minn. 325, 138 N. W. 428. See *Smith v. Howard*, 86 Me. 203, 29 Atl. 1008; *Shannon v. White*, 109 Mass. 148; *In re James' Estate*, 38 S. D. 107, 160 N. W. 525; *Caldwell v. Caldwell* (Iowa) 186 N. W. 58; 11 L. R. A. (N. S.) 361; 11 R. C. L. 241; 24 C. J. 245.

781. Amount—The amount to be allowed necessarily rests largely in the discretion of the probate court, taking into consideration the estate and the necessities of the widow and children.³⁸ The allowance should be limited to the reasonable necessities of the widow and children. It is not the object of the statute to maintain them in luxury at the expense of creditors or other beneficiaries of the estate.³⁹ If the estate is ample an allowance may be made for the education of minor children.⁴⁰ The allowance is to be made in view of the condition of things at or immediately after the death of the decedent.⁴¹ While some regard should be paid to the situation in life and previous manner of living of the family, the extent of the allowance should be determined by the value of the estate and the amount of the claims against it. Evidence of the financial condition of the estate at the time of the application is admissible. If it is clear that the estate is insolvent the allowance should be strictly limited to the reasonable necessities of the family.⁴²

782. Out of what property allowance made—G. S. 1913, § 7243 (3) provides that the allowance shall be made out of the "personal estate," but G. S. 1913, § 7336, provides that if the personal estate is insufficient real estate may be sold for the purpose. The personal property is the primary fund and the real property the secondary fund out of which to pay the allowance. If the personal estate is insufficient the allowance may be made out of the rents and profits of the real property.⁴³ When the testator makes provision by his will, or designates the estate to be appropriated for the payment of "family expenses," they shall be paid according to the provisions of the will.⁴⁴ The allowance may be made out of property specifically devised.⁴⁵ The allowance is not payable out of the homestead of the decedent.⁴⁶

³⁸ *In re Stetson's Estate*, 184 Mich. 402, 151 N. W. 552; *Ford v. Ford*, 80 Wis. 565, 50 N. W. 409; *Havens' Appeal*, 69 Conn. 684, 38 Atl. 795; *In re Pugsley's Estate*, 27 Utah 489, 76 Pac. 560; 2 A. & E. Ency. of Law (2 ed.) 161; 18 Cyc. 381; 24 C. J. 238.

³⁹ *Strauch v. Uhler*, 95 Minn. 304, 104 N. W. 535; *Rhode Island Hospital Trust Co. v. Hopkins*, 38 R. I. 59, 94 Atl. 724; *Dale v. Hanover Nat. Bank*, 155 Mass. 141, 29 N. E. 371; *Chase v. Webster*, 168 Mass. 228, 46 N. E. 705; *Glover v. Glover*, 215 Mass. 576, 102 N. E. 945; *Havens' Appeal*, 69 Conn. 684, 38 Atl. 795. See 24 C. J. 238.

⁴⁰ *Ford v. Ford*, 80 Wis. 565, 50 N. W. 409.

⁴¹ *Porter v. Porter*, 165 Mass. 157, 42 N. E. 565.

⁴² *Strauch v. Uhler*, 95 Minn. 304, 104 N. W. 535.

⁴³ *Blakeman v. Blakeman*, 64 Minn. 315, 67 N. W. 69; *Grover v. Clover (Colo.)* 169 Pac. 578. See, as to allowance out of insurance money, *German-American State Bank v. Godman*, 83 Wash. 231, 145 Pac. 221 (not allowable out of insurance specifically bequeathed); 46 L. R. A. (N. S.) 788.

⁴⁴ G. S. 1913, § 7343.

⁴⁵ *In re Whitney's Estate*, 171 Cal. 750, 154 N. W. 855.

⁴⁶ *In re Hadsall*, 82 Neb. 587, 118 N. W. 331.

783. Payment—What constitutes—Certain payments held to be in payment of a statutory allowance and not under an antenuptial agreement.⁴⁷

784. To whom payable—The allowance is payable only to the widow or children of the family.⁴⁸ Ordinarily the allowance is payable to the widow, the presumption being that she will care for the children out of it. In exceptional cases, however, the court may direct the expenditure for the benefit of the children.⁴⁹

785. Time of allowance—The allowance may be made before an inventory and appraisal of the estate.⁵⁰ It may be made before the probate of a will.⁵¹ It may be made before the widow elects to take under the will or the statute.⁵² Application for an allowance ought to be made at an early stage of the administration and it ought not to be granted if made so late that granting it would embarrass the settlement of the estate.⁵³

786. Duration—Insolvent estates—One-year limitation—The statute provides that if the estate is insolvent the allowance shall not be granted for more than one year after administration is granted, nor in any case after the distributive share of the widow in the residue of the personal estate has been assigned to her.⁵⁴ If the estate is insolvent an allowance for more than a year is unauthorized.⁵⁵ The phrase "nor, in any case, after the distributive share of the widow in the residue of the personal estate has been assigned to her" refers only to insolvent estates.⁵⁶ An allowance out of an insolvent estate terminates at the expiration of one year though the order does not specify the duration. The court cannot extend the time.⁵⁷ An order for maintenance during administration does not terminate with the entry of an order of distribution, so as to deprive the widow of the allowance pending an appeal from the order, but continues in force until actual distribution is made.⁵⁸ The right of a widow to an allowance continues through a special administration.⁵⁹

⁴⁷ *Desnayer v. Jordan*, 30 Minn. 80, 14 N. W. 250.

⁴⁸ *In re Service's Estate*, 155 Mich. 179, 118 N. W. 948.

⁴⁹ *In re McSwain's Estate*, 176 Cal. 280, 168 Pac. 117.

⁵⁰ *Strauch v. Uhler*, 95 Minn. 304, 104 N. W. 535.

⁵¹ *Golder v. Littlejohn*, 30 Wis. 344.

⁵² *Blakeman v. Blakeman*, 64 Minn. 315, 67 N. W. 69.

⁵³ *Lisk v. Lisk*, 155 Mass. 153, 29 N. E. 375; *Welch v. Welch*, 181 Mass. 37, 62 N. E. 982; *Glover v. Glover*, 215 Mass.

576, 102 N. E. 945; 2 A. & E. Ency. of Law (2 ed.) 163; 18 Cyc. 394.

⁵⁴ See § 771.

⁵⁵ *Strauch v. Uhler*, 95 Minn. 304, 308, 104 N. W. 535; *McDonald v. Hollywood's Estate*, 130 Mich. 691, 90 N. W. 666.

⁵⁶ *Marskey v. Lawrence*, 121 Mich. 577, 80 N. W. 571.

⁵⁷ *In re Treat's Estate*, 162 Cal. 250, 121 Pac. 1003.

⁵⁸ *Marskey v. Lawrence*, 121 Mich. 577, 80 N. W. 571.

⁵⁹ *In re Welch's Estate*, 106 Cal. 427, 39 Pac. 805.

787. Assignment—The right to an allowance cannot be assigned before it is formally allowed.⁶⁰

788. Advances by representative—A representative may advance money to a widow for her support before an allowance is granted, taking his chances of an allowance being made. He is entitled to credit in his account for such advances if an allowance is made.⁶¹

789. Bankruptcy—The allowance is protected by the bankruptcy act and the assets remaining in the hands of the trustee at the bankrupt's death are chargeable therefor.⁶²

790. Notice of application—An allowance may be made without notice, but if the amount sought is large and there is likely to be a contest it is well for the court to require a notice.⁶³

791. Vacation and modification—Further allowance—An order for an allowance is subject to vacation or modification at any time.⁶⁴ An allowance may be increased.⁶⁵ The court may require the widow to show her circumstances on an application for a further allowance.⁶⁶ An allowance may be decreased.⁶⁷

792. Appeal—An order granting or refusing an allowance is appealable.⁶⁸ An executor or administrator may appeal from an order of allowance. A creditor may appeal from such an order, at least if the estate is insolvent.⁶⁹ On an appeal from an order making an allowance the district court should try the cause de novo as if commenced in that court, and not merely review the propriety of the order appealed from upon the return of the probate court. New facts arising after the trial in the probate court are admissible in the district court.⁷⁰ The probate court made an ex parte order, making the widow an allowance out of the personal estate of her deceased husband for her maintenance during the settlement of the estate, and directing the executor to pay such allowance out of the personal estate. The executor moved the court to vacate or modify the order, on the ground that there was no personal estate out of which to pay it. The probate court denied the motion, and on

⁶⁰ *Hackley v. Muskegon Circuit Judge*, 58 Mich. 454, 25 N. W. 462; *In re Service's Estate*, 155 Mich. 179, 118 N. W. 948.

⁶¹ *King v. Whiton*, 15 Wis. 684. See § 1054.

⁶² *Hull v. Dicks*, 235 U. S. 584.

⁶³ *Wright v. Wright*, 13 Allen (Mass.) 207; *In re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 38; *Carlin v. Sewall*, 86 Neb. 367, 125 N. W. 606. See 18 Cyc. 400; 24 C. J. 265.

⁶⁴ *Marskey v. Lawrence*, 121 Mich. 577, 80 N. W. 571. See 18 Cyc. 404; 24 C. J. 272.

⁶⁵ *In re Bennison's Estate*, 173 Iowa 368, 155 N. W. 835. See 18 Cyc. 404; 24 C. J. 271.

⁶⁶ *Pulling v. Durfee*, 88 Mich. 387, 50 N. W. 319.

⁶⁷ *Dale v. Hanover Nat. Bank*, 155 Mass. 141, 29 N. E. 371. See 18 Cyc. 404; 24 C. J. 272.

⁶⁸ See § 53.

⁶⁹ *In re Fretwell's Estate*, 152 Cal. 573, 93 Pac. 283.

⁷⁰ *Strauch v. Uhler*, 95 Minn. 304, 104 N. W. 535; *Benz v. Rogers*, 141 Minn. 93, 169 N. W. 476.

the appeal of the executor the district court affirmed the action of the probate court. Thereupon the probate court made an order requiring the executor to pay the allowance in accordance with the terms of the original order. Held, that certiorari would not lie to review this last order; that the executor's remedy was by appeal from the order refusing to vacate or modify the order making the allowance.⁷¹ A widow made no claim against the estate of her deceased husband for an allowance of a year's support until about a year after his death. Her claim was disallowed by the probate court and, before making an appeal from the order of disallowance, the widow died. Held, that she had waived her right to such an allowance, and the administrator of her estate succeeded to no right which he could enforce.⁷²

INVENTORY AND APPRAISAL

INVENTORY

793. Statute—Within three months after his appointment, every executor and administrator shall make and return to the court a verified inventory and appraisement of all the real and personal estate of the decedent which shall have come to his possession or knowledge. Such property shall be classified therein as follows: 1. Real estate. 2. Furniture and household goods. 3. Wearing apparel and ornaments. 4. Stock in banks and other corporations. 5. Mortgages, bonds, notes, and other written evidence of debt. 6. All other personal property.⁷³

794. Object—The primary object of the inventory is to fix the amount and value of the property for the purpose of accounting with the representative.⁷⁴

795. Necessity—The duty to file an inventory is absolute. The probate court has no discretion in the matter and cannot excuse a representative from filing one. The court should require one regardless of the source of a complaint that none is filed.⁷⁵ An executor must file an inventory though the will attempts to excuse him from doing so.⁶¹ It is provided by statute that an executor who is the sole or residuary legatee, and who has given a special bond, need not file an inventory.⁷⁶

⁷¹ *State v. Steele*, 62 Minn. 28, 63 N. W. 1117.

⁷² *Smith v. Bayer's Estate*, 95 Neb. 532, 145 N. W. 1029.

⁷³ G. S. 1913, § 7305, as amended by Laws 1919, c. 385.

⁷⁴ *Morrison v. Burlington, etc. R. Co.*, 84 Iowa 663, 51 N. W. 75; *In re Higgin's Estate*, 15 Mont. 484, 39 Pac. 506; 11 A. & E. Ency. of Law (2 ed.) 855; 18 Cyc. 198; 23 C. J. 1159; *Woerner*, Am. Law of Adm. (2 ed.) § 315.

⁷⁵ *Poole v. Burnham*, 99 Iowa 493, 68 N. W. 816; *In re Duncanson's Estate*, 141 Iowa 564, 120 N. W. 88; *Hayes v. Welling*, 35 R. I. 76, 85 Atl. 630; *In re Higgin's Estate*, 15 Mont. 484, 39 Pac. 506; 23 C. J. 1158.

⁶¹ *Parker v. Robertson* (Ala.) 88 So. 418.

⁷⁶ See § 704. This may have been repealed by Laws 1919, c. 385.

The court may compel a representative to file an inventory and it may do so on the information of any one, whether interested in the estate or not.⁷⁷ A representative may be removed for failure to file an inventory.⁷⁸

796. Time—The statutory limitation of three months is merely directory and does not render invalid an inventory subsequently filed.⁷⁹ Where a representative is excused from filing an inventory within the prescribed time because he received no assets in that time, it is his duty to file one within a reasonable time after he first receives assets.⁸⁰

797. Verification—The statute requires the inventory and appraisal to be verified by the affidavit of the representative.⁸¹

798. Additional or supplementary inventory—Only one inventory need be returned. If property subsequently comes into the possession or knowledge of the representative it is sufficient for him to charge himself with it in his final account.⁸²

799. What property included—All property of the decedent, either real or personal, must be included.⁸³ Property which has come to the "knowledge" of the representative must be included, though he may not be charged with it in his final account if it has not come into his possession.⁸⁴ Property claimed by the representative must be included.⁸⁵ Property of the estate must be included though claimed by third parties.⁸⁶ Debts due from the representative to the estate must be included though he deems them invalid.⁸⁷ When claims are doubtful they should be so inventoried.⁸⁸ All choses in action, notes and other claims

⁷⁷ *Poole v. Burnham*, 99 Iowa 493, 68 N. W. 816; 11 A. & E. Ency. of Law (2 ed.) 858; 18 Cyc. 201; 23 C. J. 1159; Woerner, Am. Law of Adm. (2 ed.) § 316.

⁷⁸ *In re Graber's Estate*, 111 Cal. 432, 44 Pac. 165. See *Corey v. Corey*, 120 Minn. 304, 139 N. W. 509.

⁷⁹ *Phelan v. Smith*, 100 Cal. 158, 34 Pac. 667; 11 A. & E. Ency. of Law (2 ed.) 857; 18 Cyc. 198; 23 C. J. 1159; Woerner, Am. Law of Adm. (2 ed.) § 316.

⁸⁰ *Forbes v. McHugh*, 152 Mass. 412, 25 N. E. 622.

⁸¹ *Phelan v. Smith*, 100 Cal. 158, 34 Pac. 667; *In re Lux's Estate*, 100 Cal. 593, 35 Pac. 341; 11 A. & E. Ency. of Law (2 ed.) 860; 18 Cyc. 199; 23 C. J. 1160.

⁸² *Hooker v. Bancroft*, 4 Pick. (Mass.) 50. See 11 A. & E. Ency. of Law (2 ed.) 859; 18 Cyc. 200; 23 C. J. 1162; Woerner, Am. Law of Adm. (2 ed.) § 316.

⁸³ G. S. 1913, § 7305; *Bryant v. Livermore*, 20 Minn. 313 (271) (real property must be included); 11 A. & E. Ency. of Law (2 ed.) 855; 18 Cyc. 199; 23 C. J. 1161; 11 R. C. L. 105; Woerner, Am. Law of Adm. (2 ed.) § 317.

⁸⁴ *In re Simmons' Estate*, 43 Cal. 543, 549.

⁸⁵ *Buchser v. Buchser*, 72 Wash. 675, 131 Pac. 193; *Hartwig v. Flynn*, 78 Kan. 595, 100 Pac. 642; *State v. French*, 60 Conn. 478, 23 Atl. 153.

⁸⁶ *Bourne v. Stevenson*, 58 Me. 499; *Dilts v. Stevenson*, 17 N. J. Eq. 407; *In re Belt's Estate*, 29 Wash. 535, 70 Pac. 74.

⁸⁷ *Lynch v. Divan*, 66 Wis. 490, 29 N. W. 213; *In re Walker's Estate*, 125 Cal. 242, 57 Pac. 991; *In re Thomas' Estate*, 140 Cal. 397, 73 Pac. 1059; 11 A. & E. Ency. of Law (2 ed.) 857; 23 C. J. 1160.

⁸⁸ *Black v. Whitall*, 9 N. J. Eq. 572; *Gay v. Grant*, 101 N. C. 206, 8 S. E. 99.

must be included and it is immaterial that they are in the possession of a third party.⁸⁹ Domestic judgments should be included.⁹⁰ Interest in a partnership should be inventoried. It should be entered in a general way, giving the name, locality and business of the firm, and the decedent's share, without itemizing the property.⁹¹ It is proper, though perhaps not necessary, to inventory property fraudulently conveyed by the decedent. The fact of the fraud and the name of the grantee should be noted.⁹² Property held by the decedent in trust need not be included.⁹³ Property out of the state need not be inventoried unless it has come into the possession of the representative.⁹⁴ If a question arises whether property belongs to the estate and should be inventoried, the probate court has jurisdiction to hear evidence sufficient to determine whether it belongs to the estate, or whether the estate has any interest therein, or has any reasonable claim thereto; not for the purpose of judicially determining the title of any property claimed by a third person, but to determine the good faith and reasonable ground of the claim.⁹⁵

800. Not conclusive against representative—Prima facie evidence—

The inventory is prima facie evidence against the representative of the receipt of the assets included.⁹⁶ The inventory is not conclusive, either for or against the representative, as to the existence or value of assets, either on his final accounting or in an action against him. Any error, omission or mistake may be corrected on the final accounting.⁹⁷ The fact that a representative inventories property as part of the estate does not estop him from subsequently claiming title thereto in himself.⁹⁸

⁸⁹ *Williams v. Morehouse*, 9 Conn. 470; *Potter v. Titcomb*, 10 Me. 53.

⁹⁰ *In re Conser's Estate*, 40 Or. 138, 66 Pac. 607.

⁹¹ *Loomis v. Armstrong*, 63 Mich. 355, 29 N. W. 867; *In re Auerbach's Estate*, 23 Utah 529, 65 Pac. 488; *Cooley v. Miller*, 168 Cal. 120, 142 Pac. 83; *Hadley v. Hadley*, 73 Or. 179, 144 Pac. 80; 11 A. & E. Ency. of Law (2 ed.) 857; 18 Cyc. 199; 23 C. J. 1161.

⁹² *Sprague v. Walton*, 145 Cal. 228, 236, 78 Pac. 645; *Minor v. Mead*, 3 Conn. 289; *Andrus v. Doolittle*, 11 Conn. 283; *Andrews v. Tucker*, 7 Pick. (Mass.) 250; 11 A. & E. Ency. of Law (2 ed.) 856; 18 Cyc. 200; 23 C. J. 1161; *Woerner, Am. Law of Adm.* (2 ed.) § 317.

⁹³ *In re Belt's Estate*, 29 Wash. 555, 70 Pac. 74.

⁹⁴ *Strong v. White*, 19 Conn. 238; *Normand v. Grogard*, 17 N. J. Eq. 425; 11 A. & E. Ency. of Law (2 ed.) 856;

18 Cyc. 190, 199; 23 C. J. 1162; 45 Am. St. Rep. 664. See, contra, *In re Butler's Estate*, 38 N. Y. 397.

⁹⁵ *In re Belt's Estate*, 29 Wash. 535, 70 Pac. 74; *Buchser v. Buchser*, 72 Wash. 675, 131 Pac. 193.

⁹⁶ *Cameron v. Cameron*, 15 Wis. 1; *Hilton v. Briggs*, 54 Mich. 265, 20 N. W. 47; *In re Mullon*, 145 N. Y. 98, 39 N. E. 821; 11 A. & E. Ency. of Law (2 ed.) 861; 18 Cyc. 203; 23 C. J. 1166; *Woerner, Am. Law of Adm.* (2 ed.) §§ 320, 510.

⁹⁷ *Hilton v. Briggs*, 54 Mich. 265, 20 N. W. 47; *Peckham v. Hoag*, 57 Mich. 289, 23 N. W. 818; *Porter v. Long*, 124 Mich. 584, 83 N. W. 601; *In re Fletcher's Estate*, 83 Neb. 156, 119 N. W. 232; *Dodge v. Lunt*, 181 Mass. 320, 63 N. E. 891; 11 A. & E. Ency. of Law (2 ed.) 861; 18 Cyc. 202; 23 C. J. 1166; *Woerner, Am. Law of Adm.* (2 ed.) §§ 320, 510.

⁹⁸ *Baker v. Brickell*, 87 Cal. 329, 25 Pac. 489; *Rausch v. Rausch*, 14 Mont.

The fact that a representative includes notes or other claims against himself does not estop him from denying his indebtedness thereon.⁹⁹

801. Effect upon creditors—The duties of representatives in respect to inventorying property do not affect the rights of creditors of the decedent or their relation to the estate.¹

802. Notation of property assigned to surviving spouse—The statute requires the court to enter upon the inventory the items of personal property assigned to the surviving spouse or children under G. S. 1913, §§ 7243, 7308.²

APPRAISAL

803. Statute—The property inventoried shall be appraised by two or more disinterested persons appointed by the court for that purpose, and if any part of such property is situated in any other county the court may, in its discretion, appoint appraisers in such other county. The appraisers shall set down opposite each item in the inventory, in figures, the value thereof in money, and foot up by itself the amount of each class, and forthwith deliver such inventory and appraisal, certified by them, to the executor or administrator.³

804. Necessity—The court may refuse to accept an inventory not accompanied by an appraisal.⁴

805. At market value—The property is to be appraised at its market value—what it could be sold for. What it cost is immaterial.⁵ Bonds, stocks, notes, etc., should be appraised at their market or salable value and not at their face value.⁶ In appraising stocks and bonds their average market value during a period of several months may be taken.⁷

806. Omitted property—Appraisal by court—If property is omitted its value may be determined by the court on the final accounting without the appointment of appraisers.⁸

325, 36 Pac. 312; *In re Murphy's Estate*, 30 Wash. 1, 70 Pac. 107; 18 Cyc. 204; 23 C. J. 1167.

⁹⁹ *Lynch v. Divan*, 66 Wis. 490, 29 N. W. 213.

¹ *Ainsworth v. Bank of California*, 119 Cal. 470, 477, 51 Pac. 952.

² See § 808.

³ G. S. 1913, § 7306.

⁴ *Appeal of Bridgeport Trust Co.*, 77 Conn. 657, 60 Atl. 662.

⁵ *In re Bodman's Estate*, 166 N. Y. S.

714; *Woerner*, Am. Law of Adm. (2 ed.) § 320.

⁶ *In re Shipman*, 31 N. Y. S. 571.

⁷ See 13 McKinney's Consol. Laws, N. Y. § 122; *In re Crary*, 64 N. Y. S. 566; *In re Kennedy*, 155 N. Y. S. 192; *In re Chambers*, 155 N. Y. S. 153; *In re Gould*, 46 N. Y. S. 506, 156 N. Y. 426, 51 N. E. 287; *In re Proctor*, 83 N. Y. S. 643; *In re Curtice*, 97 N. Y. S. 444, 185 N. Y. 543, 77 N. E. 1184.

⁸ *In re Garrity's Estate*, 108 Cal. 463, 38 Pac. 628.

SETTING ASIDE HOMESTEAD AND PERSONAL PROPERTY TO SPOUSE

807. Petition—Statute—After the inventory has been returned to the court, the surviving spouse, or in case there be none the children, or when they are minors their guardian, may petition the court to set aside the homestead and assign the personal property allowed by law. Such petition shall show the right of the parties, and, if made by or for the children, their names and ages, a description of the homestead claimed, and of the personal property selected, and the appraised value thereof.⁹ The "personal property allowed by law" within the meaning of this statute is the personal property referred to in subdivisions 1 and 2 of G. S. 1913, § 7243. It does not include the allowance for the surviving spouse or children pending administration proceedings provided for by subdivision 3 of that section. For such allowance a separate petition should be presented.¹⁰

808. Order of court—Statute—Upon the filing of such petition, if it appears that the petitioner is entitled to have the homestead set aside and such allowance of personal property made, the court shall make an order setting apart such homestead and assigning such personal property, and shall enter upon the inventory the items so allowed. The property so set aside shall be delivered by the executor or administrator to the person entitled thereto, and shall not be treated as assets in his hands.¹¹ In case of intestacy no order setting aside the homestead is necessary, except for the purpose of determining its boundaries and to segregate it for purposes of administration. Where there is a will giving the homestead to the wife absolutely, and she elects to continue the homestead right, an order of the probate court setting it aside to her has the same effect as in case of intestacy and nothing more.¹² The rights of the surviving spouse and children in the homestead do not depend on the order under this statute. Their rights vest and become absolute on the death of the decedent, without any acts on their part or on the part of the probate court. The proceedings under this statute are merely to determine the boundaries of the homestead and to segregate it for purposes of administration. In setting apart the homestead the probate court has no jurisdiction to determine the title as against claimants claiming title otherwise than by descent or devise from the decedent.¹³

⁹ G. S. 1913, § 7307.

¹⁰ See *Strauch v. Uhler*, 95 Minn. 304, 104 N. W. 535; *Stromberg v. Stromberg*, 119 Minn. 325, 138 N. W. 428.

¹¹ G. S. 1913, § 7308. See §§ 99-102, 112, 113, 821, 822.

¹² *In re Murphy's Estate*, 146 Minn. 418, 178 N. W. 1003, 179 N. W. 728.

¹³ *Wilson v. Proctor*, 28 Minn. 13, 8 N. W. 830; *Nordlund v. Dahlgren*, 130 Minn. 462, 153 N. W. 876; *Rux v. Adam*, 143 Minn. 35, 172 N. W. 912; *In re Mur-*

The personal property set apart to the widow is not assets and is no part of the residue to be assigned by the final decree of distribution.¹⁴ The jurisdiction of the probate court to set aside the homestead continues until the administration is closed, in the absence of sale or other disposition placing it beyond the control of the court.¹⁵

ASSETS

809. Definition—The term “assets” is here used in the sense of property applicable to the payment of the debts of the decedent and the expenses of administration.¹⁶

810. Jurisdiction of probate court to determine what are assets—The probate court necessarily has implied power to determine what are assets of an estate for purposes of administration.¹⁷

811. What constitutes—In general—All kinds of property, real or personal, tangible or intangible, legal or equitable, contingent or absolute, in possession or in remainder, owned by the decedent at the time of his death, are assets of his estate excepting certain property hereinafter mentioned under sections 821–824.¹⁸

812. Property accruing after death of decedent—Assets are not limited to property owned or in possession of the decedent at the time of his death, but include all property accruing from the contracts of the decedent or by way of income, increase or revenue from his property, or which result from the dealings of the representative in relation to the estate—everything which comes into the hands of the representative by virtue of his office.¹⁹

813. Distinction between legal and equitable assets abolished—The distinction between legal and equitable assets which prevailed at common law does not prevail in this state. All property, whether legal or equitable, is treated alike and is subject to application to the payment of the debts of the decedent in the probate court without resort to the district court.²⁰

phy's Estate, 146 Minn. 418, 178 N. W. 1003, 179 N. W. 728. See §§ 100, 821.

¹⁴ Stromberg v. Stromberg, 119 Minn. 325, 138 N. W. 428; State v. Probate Court, 137 Minn. 238, 163 N. W. 285; Barrett v. Heim (Minn.) 188 N. W. 207. See §§ 112, 113.

¹⁵ In re Iltz's Estate (Or.) 202 Pac. 409.

¹⁶ Mutual Life Ins. Co. v. Farmers & Mechanics Nat. Bank, 173 Fed. 390; Barnard v. Bilby (Okla.) 171 Pac. 444; 11 A. & E. Ency. of Law (2 ed.) 828; 18 Cyc. 171; 23 C. J. 1125; 11 R. C. L.

107; Woerner, Am. Law of Adm. (2 ed.) § 305.

¹⁷ McWillie v. Van Vacter, 35 Miss. 428, 445.

¹⁸ Barnard v. Bilby (Okla.) 171 Pac. 444; 11 A. & E. Ency. of Law (2 ed.) 829; 18 Cyc. 171; 23 C. J. 1125; 11 R. C. L. 107; Woerner, Am. Law of Adm. (2 ed.) §§ 304–314; L. R. A. 1915D, 856.

¹⁹ 11 A. & E. Ency. of Law (2 ed.) 836; 18 Cyc. 174; 23 C. J. 1158; Woerner, Am. Law of Adm. (2 ed.) §§ 306, 307.

²⁰ Titterington v. Hooker, 58 Mo. 593; Hood v. Hood, 85 N. Y. 561; Mutual Life

814. Property in possession of decedent—Presumption—The fact that personal property is in the possession of a decedent at the time of his death gives rise to a presumption that it is an asset of his estate.²¹

815. Real property—At common law real property was not, as a general rule, assets, but in this state all the real property of the decedent, with certain exceptions hereinafter mentioned, under section 821, is assets and may be sold to pay the debts of the decedent and the expenses of administration, in case of a deficiency of personal property. The personal property is the primary fund for that purpose and the real property a secondary fund.²²

816. Rents and profits of realty—By virtue of common law the rents and profits of realty accruing during the lifetime of the decedent are personal property and pass to his representative as assets.²³ It is provided by statute that the representative "shall receive the rents and profits of the real estate until the estate is settled, or until delivered over, by order of the probate court, to the heirs or devisees."²⁴ The representative is not entitled to the rents and profits of the homestead.²⁵ If a representative takes possession of the realty he must account for the rents and profits received therefrom, and if the amount received cannot be otherwise determined, the court may charge him with the rental value of the land.²⁶ Under the statute the representative is entitled to the rents and profits accruing during administration proceedings whether the land is specifically devised or not.²⁷ Rents and profits of mortgaged real estate collected by the representative are not part of the proceeds of the property, and the owner of the mortgage has no lien upon them, and is not a preferred creditor in relation thereto.²⁸ Where a mortgage on real estate provides that the mortgagee shall have the rents and profits during a foreclosure action pending the sale of the property, it is proper for the receiver to apply the rents and profits upon

Ins. Co. v. Farmers & Mechanics Nat. Bank, 173 Fed. 390; 11 A. & E. Ency. of Law (2 ed.) 854; 18 Cyc. 172; 23 C. J. 1126; *Woerner, Am. Law of Adm.* (2 ed.) § 313.

²¹ *Christians v. Christians*, 108 Minn. 157, 121 N. W. 633. See *Ryan v. Williams*, 92 Minn. 506, 100 N. W. 380; 18 Cyc. 193; 23 C. J. 1157.

²² G. S. 1913, §§ 7296, 7336, 7344; *State v. Probate Court*, 25 Minn. 22; 11 A. & E. Ency. of Law (2 ed.) 838; 18 Cyc. 180; 23 C. J. 1136; 11 R. C. L. 118. See §§ 943-945, 953, 956.

²³ *Crawford v. Ginn*, 35 Iowa 543; *Codman v. American Piano Co.*, 229 Mass. 285, 118 N. E. 344; 11 A. & E.

Ency. of Law (2 ed.) 841; 18 Cyc. 182; 23 C. J. 1138; *Woerner, Am. Law of Adm.* (2 ed.) 300.

²⁴ G. S. 1913, § 7296. This is contrary to the common law. See 11 A. & E. Ency. of Law (2 ed.) 841; 18 Cyc. 182; 23 C. J. 1139; 11 R. C. L. 123; *Woerner, Am. Law of Adm.* (2 ed.) § 300.

²⁵ *Nordlund v. Dahlgren*, 130 Minn. 462, 153 N. W. 876.

²⁶ *Nordlund v. Dahlgren*, 130 Minn. 462, 153 N. W. 876.

²⁷ *Washington v. Black*, 83 Cal. 290, 23 Pac. 300; *In re De Bernal's Estate*, 165 Cal. 223, 131 Pac. 375; 23 C. J. 1141.

²⁸ *In re McDougald's Estate*, 146 Cal. 196, 79 Pac. 875.

the indebtedness, even after the death of the mortgagor, and as against the administrator of the estate.²⁹

817. Personal property—In general—Independent of statute all forms of personal property pass to the representative as assets and constitute the primary fund for the payment of the debts of the decedent and the expenses of administration.³⁰

818. Contingent interests in personalty—Contingent as well as absolute interests in personalty are assets.³¹

819. Debts and rights of action—All debts due the decedent and all rights of action on which he might have sued pass to his representative as assets if the cause of action survives. This includes all moneys due the decedent by virtue of any bond, note, judgment, or otherwise, whether payable at the death of the decedent, or becoming payable afterwards.³²

820. Debts due from representative—Debts due from the representative to the decedent are assets.³³

821. Homestead—The homestead of a decedent is not liable for his debts or for the charges of administration unless made so by his will as authorized by G. S. 1913, § 7237(3), or unless he left no surviving spouse or children or issue of deceased children, excepting debts for labor and material as provided in section 12 of article 1 of the constitution. In other words it is not ordinarily an asset of his estate for purposes of administration. Neither the land itself nor the rents and profits thereof can be used for the purpose of satisfying claims against the estate or the charges of administration.³⁴ The constitution makes an exception to the general rule of exemption as follows: Provided, however, that all property so exempted shall be liable to seizure and sale

²⁹ Tetzloff v. May, 172 Iowa 617, 154 N. W. 905.

³⁰ State v. Probate Court, 25 Minn. 22; 11 A. & E. Ency. of Law (2 ed.) 830; 18 Cyc. 173; 23 C. J. 1127; 11 R. C. L. 108. See § 735.

³¹ Clapp v. Stoughton, 10 Pick. (Mass.) 468; State v. Moore, 18 Mo. App. 406; 11 A. & E. Ency. of Law (2 ed.) 831.

³² Connolly v. Connolly, 26 Minn. 350, 4 N. W. 233; Lowry v. Tilleney, 31 Minn. 500, 18 N. W. 452; 11 A. & E. Ency. of Law (2 ed.) 832; 18 Cyc. 175; 23 C. J. 1130; 11 R. C. L. 109.

³³ Peterson v. Vanderburgh, 77 Minn. 218, 79 N. W. 828; McEwen v. Fletcher, 164 Iowa 517, 146 N. W. 1; Wachsmuth v. Penn. Mutual Life Ins. Co., 241 Ill. 409, 89 N. E. 787; In re Mark's Estate,

81 Or. 632, 160 Pac. 540; 11 A. & E. Ency. of Law (2 ed.) 834; 18 Cyc. 177; 23 C. J. 1132; 11 R. C. L. 115; Woerner, Am. Law of Adm. (2 ed.) § 311; 26 L. R. A. (N. S.) 411; 112 Am. St. Rep. 406; 132 Am. St. Rep. 230. See §§ 691, 799, 1056, 1057.

³⁴ Wilson v. Proctor, 28 Minn. 13, 16, 8 N. W. 830; Larson v. Curran, 121 Minn. 104, 140 N. W. 337; Nordlund v. Dahlgren, 130 Minn. 462, 153 N. W. 876. See § 103. Prior to Laws 1889, c. 46, the fee of the homestead was an asset of the estate. McCarthy v. Van Dermey, 42 Minn. 189, 44 N. W. 53; McGowan v. Baldwin, 46 Minn. 477, 49 N. W. 251; Dunn v. Stevens, 62 Minn. 380, 64 N. W. 924, 65 N. W. 348.

for any debts incurred to any person for work done or materials furnished in the construction, repair, or improvement of the same; and provided further, that such liability to seizure and sale shall also extend to all real property for any debt incurred to any laborer or servant for labor or service performed.³⁵

822. Household goods, wearing apparel, etc., of decedent—The household goods, wearing apparel, etc., to which a surviving spouse is entitled under G. S. 1913, § 7243(1), are not assets.³⁶

823. Statutory interest of surviving spouse in realty—The statutory interest of a surviving spouse in the real estate of a deceased spouse is subject to the claims of administration. In other words, land of a decedent is assets of his estate without regard to the statutory interest of a surviving spouse.³⁷

824. Allowance to surviving spouse and children—The allowance to a surviving spouse and minor children pending administration is not an asset.³⁸

825. Property held by decedent in trust—Property held by the decedent in trust is not assets of his estate if it is distinguishable from his own property. If it is not distinguishable it is assets and the beneficiaries of the trust are forced to come in as general creditors of the estate.³⁹ Money held in trust does not lose its character as such merely because the particular coins or bills cannot be identified. It is enough if the trust fund can be substantially followed, and the present tendency is not to require the same strictness of proof as formerly.⁴⁰

826. Money payable to heirs under contract—Money payable by the terms of a contract between the decedent and a third party to the heirs of the decedent is not an asset of his estate.⁴¹

827. Legacies and distributive shares—Annuities—Legacies and distributive shares are personal property and pass to a representative as assets.⁴² Death between the regular period of payment of one to whom the income of an estate is given for life, does not defeat the right

³⁵ Const. art. 1 § 12; *Ramstadt v. Thunem*, 136 Minn. 222, 161 N. W. 413. See *Dunnell*, Minn. Digest, § 4210.

³⁶ *Stromberg v. Stromberg*, 119 Minn. 325, 138 N. W. 428; *State v. Probate Court*, 137 Minn. 238, 163 N. W. 285; *Barrett v. Helm* (Minn.) 188 N. W. 207. See § 113; G. S. 1913, § 7320.

³⁷ See §§ 104, 105.

³⁸ See § 773.

³⁹ G. S. 1913, § 6723; *Cooper v. Hayward*, 71 Minn. 374, 376, 74 N. W. 152; *In re Belt's Estate*, 20 Wash. 535, 70 Pac. 74; 11 A. & E. Ency. of Law (2 ed.)

849; 18 Cyc. 193; 23 C. J. 1150; 11 R. C. L. 112; 8 L. R. A. 789; *Woerner*, Am. Law of Adm. (2 ed.) § 305.

⁴⁰ *First Nat. Bank v. Hummel*, 14 Colo. 259, 23 Pac. 986; *Woerner*, Am. Law of Adm. (2 ed.) § 305.

⁴¹ *Bomash v. Supreme Sitting*, 42 Minn. 241, 44 N. W. 12.

⁴² *Gale v. Nickerson*, 151 Mass. 428, 24 N. E. 400; *In re Murphy*, 144 N. Y. 557, 60 N. E. 691; 11 A. & E. Ency. of Law (2 ed.) 837; 18 Cyc. 174; 23 C. J. 1129; 11 R. C. L. 108.

of his administrator to all the income accrued since the last payment. All the income accruing prior to the death belongs to the estate of the beneficiary as assets.⁴³

828. Judgments—Judgments in favor of the decedent are personal property and pass to his representative as assets of his estate and the representative may have execution thereon.⁴⁴

829. Shares of stock—Shares of stock in private corporations are personal property and pass to the representative as assets.⁴⁵

830. Trade secrets—A trade secret is property and passes to the representative as assets.⁴⁶

831. Lands patented to heirs under federal statute—Land patented to heirs of a deceased entryman under the federal statute is no part of his estate and is not subject to administration as such.⁴⁷

832. Interest of vendor in land contract—The interest of a vendor in an executory contract for the sale of land does not pass to his representatives but descends to his heirs. It is regarded as realty and as such is an asset of the estate and may be sold under a license to sell realty for the payment of debts.⁴⁸

833. Interest of vendee in land contract—The interest of a vendee in an executory contract for the sale of land does not pass to his representative but descends to his heirs.⁴⁹ Such interest, however, is assets of his estate and may be sold to pay his debts and the charges of administration.⁵⁰

834. Cause of action for death by wrongful act—A cause of action under the statute for the wrongful death of a decedent is not strictly an asset of his estate. The damages recoverable are not applicable to the payment of his debts. But the cause of action is an asset sufficient to give the probate court jurisdiction to appoint an administrator to prosecute an action therefor, though the decedent left no other property

⁴³ *Held v. Keller*, 135 Minn. 192, 196, 160 N. W. 487; *Welch v. Apthorp*, 203 Mass. 249, 89 N. E. 432.

⁴⁴ *Lough v. Pitman*, 25 Minn. 120; *Johnson v. Wallis*, 112 N. Y. 230, 19 N. E. 653; *Simmons v. Heman*, 17 Mo. App. 444; *Brown v. Harding*, 170 N. C. 253, 86 S. E. 1010. See § 1126.

⁴⁵ *Citizens' St. R. Co. v. Robbins*, 128 Ind. 449, 26 N. E. 116; *Reichard v. Hutton*, 133 N. Y. S. 44 (stock indorsed to another but not delivered); *Russell v. Hooker*, 67 Conn. 24, 34 Atl. 711; 18 Cyc. 173; 23 C. J. 1128; 11 R. C. L. 108.

⁴⁶ *Peabody v. Norfolk*, 98 Mass. 452.

⁴⁷ *Dawson v. Mayall*, 45 Minn. 408, 48 N. W. 12; *Wittenbrock v. Wheadon*, 128 Cal. 150, 60 Pac. 664.

⁴⁸ *Abbott v. Moldestad*, 74 Minn. 293, 298, 77 N. W. 227; *Bowen v. Lansing*, 129 Mich. 117, 66 N. W. 384; 18 Cyc. 187; 57 L. R. A. 646.

⁴⁹ *Stearns v. Kennedy*, 94 Minn. 439, 103 N. W. 212; *Shrailberg v. Hanson*, 138 Minn. 80, 163 N. W. 1032; *Cutler v. Meeker*, 71 Neb. 732, 99 N. W. 514; *Palmer v. Morrison*, 104 N. Y. 132. See *Davis v. Townsend*, 45 Minn. 523, 48 N. W. 405; 18 Cyc. 188, 11 R. C. L. 124.

⁵⁰ See § 961.

within the jurisdiction of the court and was not a resident.⁵¹ The damages recovered are assets in the sense that funeral expenses and any demand for the support of the decedent, duly allowed by the probate court, must be paid out of them.⁵²

835. Land entered under federal statutes—Land entered under the federal statutes is an asset of the entryman's estate if he received a patent therefor before his death or had made final proof and was entitled to a patent; otherwise not.⁵³ Land entered as a homestead under the federal statutes and commuted to a cash purchase is an asset.⁵⁴ Land patented to the heirs of a deceased entryman under the federal statute is not an asset of his estate.⁵⁵

836. Patent right—A patent right is personal property and passes to a representative as assets.⁵⁶

837. Claim for services—A claim for services rendered by the decedent passes to his representative as an asset.⁵⁷

838. Mortgaged realty—The interest of a mortgagee of real estate before foreclosure is personal property and passes to his representative as personal assets.⁵⁸ A certificate on foreclosure of a real estate mortgage is personal property and passes to the representative as personal assets.⁵⁹ The interest of a mortgagor of real estate does not pass to his representative as personalty but descends to his heirs as realty. It is a real asset of his estate and may be sold under a license to sell realty for the payment of debts.⁶⁰

839. Crops—Annual crops growing on the land of the decedent and owned by him, at the time of his death, pass to the representative as personal assets, though the land is specifically devised, but if not needed

⁵¹ *Hutchins v. St. Paul, etc. Ry. Co.*, 44 Minn. 5, 46 N. W. 79; *Aho v. Republic Iron & Steel Co.*, 104 Minn. 322, 326, 116 N. W. 590; *Vukmirovich v. Nickolich*, 123 Minn. 165, 167, 143 N. W. 255; *State v. Probate Court*, 149 Minn. 464, 184 N. W. 43. See § 1198.

⁵² G. S. 1913, § 8175; *State v. Probate Court*, 51 Minn. 241, 53 N. W. 463; *Sykora v. Case Threshing Machine Co.*, 59 Minn. 130, 60 N. W. 1008; *Siebert v. Great Northern Ry. Co.*, 76 Minn. 269, 79 N. W. 95.

⁵³ See §§ 738, 953.

⁵⁴ *Doran v. Kennedy*, 122 Minn. 1, 141 N. W. 851, 237 U. S. 362.

⁵⁵ *Dawson v. Mayall*, 45 Minn. 408, 48 N. W. 12. See § 831.

⁵⁶ *Shaw Relief Valve Co. v. New Bed-*

ford, 19 Fed. 753; *Woerner, Am. Law of Adm.* (2 ed.) § 299.

⁵⁷ *Lappin v. Mumford*, 14 Kan. 9; *Hawkins v. McCalla*, 95 Ga. 192, 22 S. E. 141 (wages due decedent). See *Dunnell, Minn. Digest and Supplements*, § 566.

⁵⁸ G. S. 1913, § 7310; *Johnson v. Williams*, 4 Minn. 260 (183); *Loy v. Home Ins. Co.*, 24 Minn. 315; 11 A. & E. Ency. of Law (2 ed.) 840; *Woerner, Am. Law of Adm.* (2 ed.) § 279. See § 740.

⁵⁹ *Boschker v. Van Beek*, 19 N. D. 104, 122 N. W. 338; *Winterberg v. Van De Vorste*, 19 N. D. 417, 122 N. W. 866.

⁶⁰ *Hill v. Townley*, 45 Minn. 187, 47 N. W. 653; *McQuilty v. Wilhite*, 218 Mo. 586, 117 S. W. 730; 18 Cyc. 189; 23 C. J. 1146; *Woerner, Am. Law of Adm.* (2 ed.) § 471. See § 963.

for purposes of administration they pass to the devisee.⁶¹ Crops sown on a leasehold of a decedent after his death are assets and the representative is entitled to reimbursement for his expenses in caring for them.⁶²

840. Interest in a partnership—The interest of a partner in a firm is not an asset of his estate until a final settlement of the firm affairs. Upon the death of one member of a partnership the surviving members become the legal owners of the assets of the firm and have the exclusive right to sell, mortgage and dispose of them in the performance of their duty of closing up the affairs of the firm. The assent of the representative of a deceased partner is not necessary to such disposition. The surviving partners do not take such assets as trustees, but as survivors, holding the legal title, subject to the equitable right of the representative of the deceased partner to have them applied to the payment of the firm debts and to the distribution of any surplus. The time, manner, and mode of paying the firm debts, however, is under the exclusive control of the survivors. The rules regulating the distribution of the estates of deceased persons have no application in the control of the affairs of an insolvent firm being administered by surviving partners.⁶³ The good will of a partnership is an asset in which the heirs and representatives of a deceased partner are entitled to share.⁶⁴

841. Good will of business—The good will of a business is personal property and passes to the representative as an asset.⁶⁵

842. Vendor's lien—A vendor's lien is personal property and passes to the representative as assets.⁶⁶

⁶¹ *Penhallow v. Dwight*, 7 Mass. 34; *Wadsworth v. Allcott*, 6 N. Y. 64; *Bradner v. Faulkner*, 34 N. Y. 347; *In re Chamberlain*, 140 N. Y. 300, 35 N. E. 602; *In re Ring's Estate*, 132 Iowa 216, 109 N. W. 710; *McGee v. Walker*, 106 Mich. 521, 64 N. W. 482. See *State v. Williams*, 32 Minn. 537, 21 N. W. 746; *Sparrow v. Pond*, 49 Minn. 412, 52 N. W. 36; *In re Anderson's Estate*, 83 Neb. 8, 118 N. W. 1108; *In re Pope's Estate*, 83 Neb. 723, 120 N. W. 191; 11 A. & E. Ency. of Law (2 ed.) 844; 18 Cyc. 184; 23 C. J. 1142; 11 R. C. L. 124; *Woerner, Am. Law of Adm.* (2 ed.) § 282.

⁶² *In re Ring's Estate*, 132 Iowa 216, 109 N. W. 710.

⁶³ *Williams v. Whedon*, 109 N. Y. 333, 16 N. E. 365; *Hanson v. Metcalf*, 46 Minn. 25, 48 N. W. 441; *Brown v. Furnham*, 55 Minn. 27, 35, 56 N. W. 352; *Bar-*

ton v. Lovejoy, 56 Minn. 350, 57 N. W. 935. See *Dunnell, Minn. Digest*, §§ 7388-7404; 11 A. & E. Ency. of Law (2 ed.) 837, 980; 18 Cyc. 189; 23 C. J. 1147; *Woerner, Am. Law of Adm.* (2 ed.) §§ 123-130.

⁶⁴ *Witkowsky v. Affeld*, 283 Ill. 557, 119 N. E. 630; *Macfadden v. Jenkins* (N. D.) 169 N. W. 151. See *Haugen v. Sundseth*, 106 Minn. 129, 118 N. W. 666; *Woerner, Am. Law of Adm.* (2 ed.) § 127.

⁶⁵ *Thompson v. Winnebago County*, 48 Iowa 155; 11 A. & E. Ency. of Law (2 ed.) 831; 18 Cyc. 174; 23 C. J. 1129. See § 840.

⁶⁶ *Evans v. Enloe*, 70 Wis. 345, 34 N. W. 918. See *Hammond v. Peyton*, 34 Minn. 529, 27 N. W. 72; *Law v. Butler*, 44 Minn. 482, 47 N. W. 53.

843. Power of appointment—A power of appointment is not property in the sense of being an asset of the estate of a deceased donee of the power.⁶⁷

844. Leasehold interests—Leasehold interests are personal property and pass to the representative as personal assets.⁶⁸ He may enforce, for the benefit of the estate, any covenant of the lease, whether it runs with the land or not. If a decedent, at the time of his death, owns an unexpired lease for years, containing an optional clause permitting the lessee to purchase the premises, his representative may sue to compel specific performance of the covenant to convey.⁶⁹

845. Proceeds of sale of real property—Unpaid purchase money on a land contract passes to the representative of the vendor as personal assets, unless it is otherwise provided by contract or will.⁷⁰

846. Pension money—Pension money from the federal government is not assets.⁷¹

847. Liquor licenses—A liquor license is not assets but terminates with the death of the licensee.⁷²

848. Gifts causa mortis—Property disposed of by the decedent during his life by a valid gift causa mortis is not assets.⁷³

849. Proceeds of life insurance—Mutual benefit insurance—If a policy of life insurance is made payable to the insured or his representatives, or according to his will, or for his own use and benefit, the proceeds thereof are assets of his estate and it is the duty of his representative to collect and inventory them as such. But if the policy is made payable to a third person, as, for example, his wife, children, or heirs, the proceeds thereof are not assets of his estate and if the beneficiary dies before the insured the proceeds are assets of the estate of the beneficiary.⁷⁴ Money due under a certificate of membership in a mutual bene-

⁶⁷ Shattuck v. Burrage, 229 Mass. 448, 118 N. E. 889; United States v. Field, 255 U. S. 257. See § 454.

⁶⁸ In re Ring's Estate, 132 Iowa 216, 109 N. W. 710; Johnson v. Stone, 215 Mass. 219, 102 N. E. 366; Schmitt v. Stoss, 207 N. Y. 731, 100 N. E. 1119 (statute); 11 A. & E. Ency. of Law (2 ed.) 839; 18 Cyc. 186; 23 C. J. 1143; 11 R. C. L. 124; Woerner, Am. Law of Adm. (2 ed.) § 277; 22 L. R. A. (N. S.) 301. See §§ 734, 736, 953.

⁶⁹ Walker v. Bradley, 153 N. Y. S. 686.

⁷⁰ Vachon v. Nichols-Chisholm Lumber Co., 126 Minn. 303, 144 N. W. 223, 148 N. W. 288; Loring v. Cunningham, 9 Cush. (Mass.) 87; Denham v. Cornell, 67 N. Y. 556; 11 A. & E. Ency. of Law

(2 ed.) 843; 18 Cyc. 187; 23 C. J. 1145; 11 R. C. L. 124.

⁷¹ Treadway v. Board, 14 Cal. App. 75, 111 Pac. 111; Tama County v. Kepler (Iowa) 173 N. W. 912.

⁷² In re Mitchell, 250 Fed. 1003; In re Mueller, 190 Pa. St. 601, 42 Atl. 1021; People v. Sykes, 96 Mich. 452, 56 N. W. 12. See Hillsdale Distillery Co. v. Briant, 129 Minn. 223, 152 N. W. 265; Woerner, Am. Law of Adm. (2 ed.) § 307; 18 Cyc. 174; 4 L. R. A. (N. S.) 626.

⁷³ Deneff v. Helmes, 42 Or. 161, 70 Pac. 390. See § 858.

⁷⁴ Schultz v. Citizens' Mut. Life Ins. Co., 59 Minn. 308, 61 N. W. 331; State v. Probate Court, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234; Rose v. Marches-

fit society is not assets of the estate of the member unless the certificate so provides.⁷⁵ When a life policy is bequeathed the representative is entitled to the proceeds as against the legatee and they are assets in his hands.⁷⁶

850. Proceeds of fire insurance—The proceeds of fire insurance effected by the decedent, accruing from a loss after his death, stand in the place of the property destroyed, and, unless the policy is made payable to some one other than the insured and his successors in interest, are assets if the property destroyed would have been; otherwise not. If the property was real estate the proceeds will be treated as such. If the property was exempt from liability for the debts of the decedent the proceeds are likewise exempt.⁷⁷ A policy of fire insurance insuring the estate of a deceased person is valid.⁷⁸

851. Foreign assets—All the personal property of the decedent passes to the domiciliary representative, wherever it may be situated, in the absence of ancillary administration. If such property, situated in a foreign state or country, comes into the possession or control of such representative he is accountable therefor. In the absence of ancillary administration it is the duty of the domiciliary representative to collect, take possession of, and administer such property.⁷⁹

852. Effect of receipt of property not belonging to estate—Estoppel—The mere delivery of property to one who is administrator of an estate, the estate not being entitled to it, does not make the estate responsible for such property to the person entitled to it, it not appearing that the property was treated as assets of the estate or that the estate received

sault, 146 Minn. 6, 177 N. W. 658; Meyer v. Meyer, 25 S. D. 596, 127 N. W. 595; Heydenfeldt v. Jacobs, 107 Cal. 373, 40 Pac. 492; 11 A. & E. Ency. of Law (2 ed.) 846; 18 Cyc. 886; 11 R. C. L. 111; Woerner, Am. Law of Adm. (2 ed.) § 306. See G. S. 1913, §§ 3465, 3466, 7951 (14); L. R. A. 1917F, 1143 (statutory exemptions), 30 L. R. A. 609; 32 L. R. A. (N. S.) 247.

⁷⁵ Bomash v. Supreme Sitting, 42 Minn. 241, 44 N. W. 12; Devaney v. Ancient Order etc. Ins. Fund, 122 Minn. 221, 142 N. W. 316; Sharpless v. Grand Lodge, 135 Minn. 35, 159 N. W. 1086; Logan v. Modern Woodmen, 137 Minn. 221, 163 N. W. 292; Rose v. Marchessault, 146 Minn. 6, 177 N. W. 658; Finn v. Walsh, 19 N. D. 61, 121 N. W. 766; Burke v. Modern Woodmen, 2 Cal. App. 611, 84 Pac. 275; 11 A. & E. Ency. of

Law (2 ed.) 847; 29 Cyc. 154; 11 R. C. L. 111; Woerner, Am. Law of Adm. (2 ed.) § 306.

⁷⁶ Meyer v. Meyer, 25 S. D. 596, 127 N. W. 595. See Winterhalter v. Workmen etc. Fund Assn., 75 Cal. 245, 17 Pac. 1, 25 Cyc. 896.

⁷⁷ Culbertson v. Cox, 29 Minn. 309, 13 N. W. 177; Wyman v. Wyman, 26 N. Y. 253; Sauner v. Phoenix Ins. Co., 41 Mo. App. 480; Georgia Home Ins. Co. v. Kinnier, 28 Gratt. (Va.) 88; Nichols' Appeal, 128 Pa. St. 428, 18 Atl. 333; In re Reynolds' Estate (Vt.) 109 Atl. 60; 11 A. & E. Ency. of Law (2 ed.) 845; 19 Cyc. 887; 11 R. C. L. 111; Woerner, Am. Law of Adm. (2 ed.) § 306.

⁷⁸ Magoun v. Fireman's Fund Ins. Co., 86 Minn. 486, 91 N. W. 5.

⁷⁹ See §§ 691, 735, 856, 1058, 1201.

any benefit from it.⁸⁰ If a representative wrongly takes and treats as assets property which does not belong to the estate, he may probably be sued therefor in his representative capacity by the true owner.⁸¹ Where an owner knowingly and intentionally turns his property over to the executor or administrator of an estate of a decedent, as the property of such decedent, and permits and assists in the conversion thereof to the uses and purposes of the estate and in the administration thereof, he cannot thereafter hold such executor or administrator liable as for a conversion of the property. In such case both the owner and the representative are estopped from disputing the title of the estate to the property.⁸²

853. Representative acts at his peril—A representative must decide at his peril what property belongs to the estate.⁸³

854. Dealings of heir with assets before administration—Estoppel—The acts of heirs of an intestate before administration with reference to the assets of the estate may bind them though not binding on a subsequently appointed administrator.⁸⁴

COLLECTION OF ASSETS

855. Duty to collect—It is one of the primary duties of a representative to collect with reasonable diligence all assets of the estate and hold them, either in his actual possession or under his control, to be paid out or distributed in due course of administration.⁸⁵ A representative is not accountable for debts due decedent which remain uncollected without fault on his part.⁸⁶ If a representative delays to take steps for the collection of a claim of the estate until it is outlawed, and the delay is not caused by a mistake of law or advice of counsel or otherwise justified, he is liable to the estate for the loss occasioned by his negligence.⁸⁷ Where a representative has reasonable grounds to believe that legal steps to collect assets will be ineffectual, and he is so advised by his counsel, in the absence of any claim of bad faith, his failure to take them will not render him liable as for a devastavit. The onus is upon the representative to show a fair reason why he did not com-

⁸⁰ *Fritz v. McGill*, 31 Minn. 536, 18 N. W. 753. See § 765.

⁸¹ See § 765.

⁸² *Wrigley v. Watson*, 81 Minn. 251, 83 N. W. 989. See 19 Ann. Cas. 560; and § 765.

⁸³ *Pattison v. Coons*, 56 Mo. 169, 172.

⁸⁴ *Vail v. Anderson*, 61 Minn. 552, 64 N. W. 47; *Cooper v. Hayward*, 71 Minn. 374, 74 N. W. 152; *Wheeler v. Benton*, 71 Minn. 456, 74 N. W. 154.

⁸⁵ *State v. Probate Court*, 25 Minn. 22, 25; 11 A. & E. Ency. of Law (2 ed.) 994; 18 Cyc. 218; 23 C. J. 1189; 11 R. C. L. 267; *Woerner, Am. Law of Adm.* (2 ed.) §§ 321-324.

⁸⁶ See § 1056; 11 A. & E. Ency. of Law (2 ed.) 1002; 18 Cyc. 231; 23 C. J. 1203.

⁸⁷ *State v. Germania Bank*, 106 Minn. 164, 171, 118 N. W. 683.

mence proceedings to collect a debt, or to obtain possession of property which he claims belongs to the estate. It is only necessary for one claiming a devastavit to show, in the first instance, the existence of a debt or claim, and that the representative has taken no steps to collect the debt or enforce the claim. When, however, the representative meets the proof as to a debt by showing the absolute insolvency of the debtor, or, as to a claim to property, by showing that he knows of no proof to establish that the property belongs to the estate, and is advised by his counsel in good faith and believes that he cannot make such proof he cannot be held liable. It is not the duty of a representative to maintain a lawsuit to win a mere Pyrrhic victory.⁸⁸

856. Foreign assets—It is the duty of a domiciliary representative to exercise reasonable diligence to collect foreign assets known to him, if there is no local administration.⁸⁹

857. Right of representative to collect exclusive—Collusion—While administration proceedings are pending the representative has the exclusive right to collect and enforce claims of the estate, in the absence of special circumstances.⁹⁰ Except under special circumstances the representative is the only person authorized to maintain an action for the recovery of a debt due the estate or other assets.⁹¹ If a representative refuses to collect assets by collusion with a debtor of the estate or otherwise wrongfully obstructs the collection of assets the heirs or distributees may maintain an action for the benefit of the estate, joining the debtor and the representative as defendants.⁹² A creditor of an estate cannot bring an action to remove a cloud from the title of land belonging to the estate, except by leave of court, after the refusal of the

⁸⁸ *O'Connor v. Gifford*, 117 N. Y. 275, 22 N. E. 1036; *McQuaide v. Perot*, 223 N. Y. 75, 119 N. E. 230; 11 A. & E. Ency. of Law (2 ed.) 1004; 18 Cyc. 220; 23 C. J. 1191; *Woerner*, Am. Law of Adm. (2 ed.) § 324.

⁸⁹ *In re Ortiz's Estate*, 86 Cal. 306, 24 Pac. 1034; *Schultz v. Pulver*, 11 Wend. (N. Y.) 361; *Shinn's Estate*, 166 Pa. St. 121, 30 Atl. 1126; *Klein v. French*, 57 Miss. 662, 670; 11 A. & E. Ency. of Law (2 ed.) 997; 18 Cyc. 190, 223; 23 C. J. 1195; *Woerner*, Am. Law of Adm. (2 ed.) §§ 160, 308, 321, 537; 45 Am. St. Rep. 664.

⁹⁰ *Hollowell v. Cole*, 25 Mich. 345; *Drury v. Natick*, 10 Allen (Mass.) 169; *Lewis v. Lewis* (Iowa) 156 N. W. 332; *Holland v. Kelly* (Cal.) 171 Pac. 421; 11 A. & E. Ency. of Law (2 ed.) 906; 18 Cyc. 944; 11 R. C. L. 260.

⁹¹ *Cullen v. O'Hara*, 4 Mich. 132; *Gilkey v. Hamilton*, 22 Mich. 283; *Hollowell v. Cole*, 25 Mich. 345; *Parks v. Norris*, 101 Mich. 71, 59 N. W. 428; *Brobst v. Brobst*, 190 Mich. 63, 155 N. W. 734; *Buchanan v. Buchanan*, 75 N. J. L. 274, 71 Atl. 745; *Holland v. Kelly* (Cal.) 171 Pac. 421; *McQuaide v. Perot*, 223 N. Y. 75, 119 N. E. 230; 13 Ency. Pl. & Pr. 2; 18 C. J. 901; 23 C. J. 1193.

⁹² *Rowell v. Rowell*, 122 Wis. 1, 99 N. W. 473; *Trotter v. Mutual Reserve Fund Life Assn.*, 9 S. D. 596, 70 N. W. 843; *Hillman v. Young*, 64 Or. 73, 127 Pac. 793, 129 Pac. 124; *Prusa v. Everett*, 78 Neb. 251, 113 N. W. 571. See *Brown v. Strom*, 113 Minn. 1, 129 N. W. 136; 11 A. & E. Ency. of Law (2 ed.) 906; 18 Cyc. 945; 18 C. J. 902; 23 C. J. 1193; 11 R. C. L. 262; 4 Ann. Cas. 193; 20 Id. 95.

representative to do so.⁹³ The executor or administrator, in actions affecting decedent's personal property in due course of administration, is the proper party to prosecute or defend, but an exception to that rule permits an heir or legatee to appear in a suit to protect his own rights where there is collusion between parties asserting adverse interests and the legal representative of decedent.⁹⁴ In an action by one other than the representative the complaint must set forth the special circumstances taking the case out of the general rule.⁹⁵

858. Action for recovery of assets—In general—A representative may sue for the recovery of assets until he is discharged and his official responsibility has ceased. The fact that his final account has been allowed and an order of distribution has been made does not affect his right to do so.⁹⁶ An action for the recovery of assets must be brought in the district court and not in the probate court.⁹⁷ A representative may maintain an action, as for money had and received, against a third party who has received damages awarded in condemnation proceedings belonging to the estate, without regard to the financial status of the estate.⁹⁸ A representative cannot maintain an action to set aside a transfer of personal property made by the decedent in anticipation of death where the estate is not prejudiced thereby.⁹⁹

859. Notice to county treasurer—A representative cannot take possession of securities or other assets of the decedent held by a safe deposit company, bank, or other institution or person, except upon notice to the county treasurer.¹

860. Surrender of property not assets by owner—Estoppel—Where an owner of property which does not in fact belong to an estate knowingly and intentionally turns it over to the representative of the estate as the property of the decedent, and permits and assists in the conversion thereof to the uses of the estate by the representative, he cannot afterwards hold the representative liable as for a conversion of the property. In such case both the owner and the representative are estopped from disputing the title of the estate to the property.²

861. Disposal of assets by heir—Recovery by representative—Where, before the appointment of an administrator, the personal property left by the intestate is disposed of by one who it conclusively appears is the sole heir and distributee, and it also conclusively appears that there are

⁹³ *Marshall v. Blass*, 82 Mich. 518, 46 N. W. 947, 47 N. W. 516.

⁹⁴ *Rine v. Rine*, 91 Neb. 248, 135 N. W. 1051.

⁹⁵ *Holland v. Kelly* (Cal.) 171 Pac. 421; 13 Ency. Pl. & Pr. 5.

⁹⁶ *Lowry v. Tilleny*, 31 Minn. 500, 18 N. W. 452; *Eyre v. Faribault*, 121 Minn. 233, 141 N. W. 170.

⁹⁷ *State v. Ueland*, 30 Minn. 277, 281. 15 N. W. 245.

⁹⁸ *Eyre v. Faribault*, 121 Minn. 233, 141 N. W. 170.

⁹⁹ *Ober v. Brewster*, 113 Minn. 388, 129 N. W. 776.

¹ G. S. 1913, § 2282.

² *Wrigley v. Watson*, 81 Minn. 251, 83 N. W. 989. See § 852.

no debts to be proved against the estate, an administrator, subsequently appointed on the petition of such distributee, cannot recover the property so disposed of.³

862. Debt paid to heir—Recovery by representative—The bona fide payment of a debt due to an intestate, made to his sole heir before administration is granted, will, if justice requires it, and the estate is solvent, be held to discharge the debtor from liability to a subsequently appointed administrator. An action by an administrator on such a claim may be stayed, pending administration, until the solvency of the estate is definitely determined by the probate court.⁴

863. Discovery of assets concealed, embezzled, etc.—Statute—If any executor or administrator, heir, legatee, creditor, or other person interested in the estate of any deceased person, complains to the probate court, in writing, that any person is suspected to have concealed, embezzled, carried away, or disposed of any money, goods, or chattels of the decedent, or that such person has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings which contain evidence of or tend to disclose the right, title, interest, or claim of the decedent to any real or personal estate, or any claim or demand, or any last will and testament of the decedent, the court may cite such suspected person to appear before it, and may examine him on oath upon the matter of such complaint.⁵

864. Same—Refusal of person cited to appear—Contempt—Interrogatories—Statute—If the person so cited refuses to appear and submit to such examination or to answer such interrogatories as may be put to him touching the matter of such complaint, he shall be deemed guilty of contempt, and punished therefor according to law. All such interrogatories and answers shall be in writing, signed by the party examined, and filed in the probate court.⁶ The proceeding under the statute is inquisitorial in its nature, primarily designed as an economical and efficient mode of discovering property of an estate. It is but preliminary to the bringing of some proper action for the recovery of the property discovered. Only the person cited to appear may be examined and the matters involved are not to be heard as on a trial. The procedure is informal. Issues are not formed and tried as in an ordinary civil action. The proceeding is strictly limited to the disclosure of property. The court cannot try issues of fact or determine the right to the possession of property or make any order with reference to property based on the disclosure. It cannot order the property turned over to the repre-

³ *Cooper v. Hayward*, 71 Minn. 374, 74 N. W. 152.

⁴ *Vall v. Anderson*, 61 Minn. 552, 64 N. W. 47.

⁵ G. S. 1913, § 7315. See 11 A. & E. Ency. of Law (2 ed.) 993; 18 Cyc. 215,

221; 23 C. J. 1192; 11 R. C. L. 270; 115 Am. St. Rep. 208; *Woerner*, Am. Law of Adm. (2 ed.) § 325; *Church*, Probate Law, 542.

⁶ G. S. 1913, § 7316.

sentative or the estate. Resort must be had to an ordinary action or other proceeding to recover the property or to determine the rights of parties thereto.⁷ The statute cannot be employed to enforce the payment of a debt or liability for the conversion of property of an estate, or to try controverted questions of the right to property as between the representative of the estate and others.⁸ The court cannot enforce the payment of a debt due the estate by commitment as for contempt.⁹ Liability on a note cannot be determined in the proceeding.¹⁰ It is not for the court to determine whether a charge of concealment is sustained or not.¹¹ One of the objects of the statute is to enable the representative to discover property to be inventoried and appraised.¹² The representative himself may be cited for examination under the statute.¹³ An administrator de bonis non may proceed under the statute against the executor of a previous administrator.¹⁴ A grantee from the decedent may be examined to show that the conveyance was fraudulent as to creditors, at least if there is a deficiency of assets.¹⁵ The complaint need not go into particulars to show the grounds for the suspicions.¹⁶ Objections to the complaint are waived by appearing and answering without objection.¹⁷ An amended complaint may be filed.¹⁸ The party cited cannot be compelled to furnish a schedule of documents and a description of their character. It is sufficient if he shows them.¹⁹ The party cited cannot be required to submit to an oral examination. An order requiring an oral examination is unauthorized but not appealable.²⁰ The person cited for examination may be assisted by counsel in an-

⁷ *Vick Roy v. Morgan*, 62 Colo. 122, 160 Pac. 1030; *Durst v. Haenni*, 23 Colo. App. 431, 130 Pac. 77; *Saddington's Estate v. Hewitt*, 70 Wis. 240, 35 N. W. 552; *Dodge v. McNeil*, 62 N. H. 168; *Gardner v. Gillihan*, 20 Or. 598, 27 Pac. 320; *Ex parte Casey*, 71 Cal. 269, 12 Pac. 118; *Humbarger v. Humbarger*, 72 Kan. 412, 83 Pac. 1095; *Main v. Hadfield*, 41 Wash. 504, 84 Pac. 12; *Stuparich Mfg. Co. v. Superior Court*, 123 Cal. 290, 55 Pac. 985; *In re Barrett's Estate*, 167 Iowa 218, 149 N. W. 247 (what witnesses may be examined); 18 Cyc. 216; 11 R. C. L. 270; 115 Am. St. Rep. 208.

⁸ *Vick Roy v. Morgan*, 62 Colo. 122, 160 Pac. 1030; *Humbarger v. Humbarger*, 72 Kan. 412, 83 Pac. 1095.

⁹ *In re Wolford*, 10 Kan. App. 283, 62 Pac. 731. See *Tomsky v. Superior Court*, 131 Cal. 620, 63 Pac. 1020.

¹⁰ *Humbarger v. Humbarger*, 72 Kan. 412, 83 Pac. 1095.

¹¹ *Dodge v. O'Neill*, 62 N. H. 168.

¹² *In re O'Brien*, 27 N. Y. S. 1001.

¹³ *Case's Appeal*, 35 Conn. 115; *O'Dee v. McCrate*, 7 Me. 467; *Stewart v. Glenn*, 58 Mo. 481; *Melnzer v. Berrington*, 42 Ohio St. 325; *Mitchell v. Bay Probate Judge*, 155 Mich. 550, 119 N. W. 916 (may be questioned as to omissions of property from his inventory).

¹⁴ *Perrin v. Calhoun Circuit Judge*, 49 Mich. 342, 13 N. W. 767.

¹⁵ *Dickey v. Taft*, 175 Mass. 4, 55 N. E. 318 (statute in Massachusetts expressly mentions fraudulent conveyances).

¹⁶ *Dickey v. Taft*, 175 Mass. 4, 55 N. E. 318.

¹⁷ *Wade v. Pritchard*, 69 Ill. 279.

¹⁸ *Blair v. Sennott*, 134 Ill. 78, 24 N. E. 969.

¹⁹ *Manly v. Washtenaw Prob. Judge*, 99 Mich. 441, 58 N. W. 367.

²⁰ *Palmer v. Jackson Circuit Judge*, 90 Mich. 1, 50 N. W. 1086.

swering interrogatories.²¹ The person cited is not entitled to any more than the statute accords him, either in terms or by necessary implication, and it does not accord him the right to a formal procedure. All the interrogatories need not be reduced to writing and submitted before any are answered.²² Possibly the statute is not exclusive of an equitable action in the district court.²³ There is apparently no provision for an appeal.²⁴ The disclosure is competent evidence in a proceeding against a representative for his removal for failure to bring an action to set aside an alleged fraudulent conveyance of the decedent.²⁵

865. Property fraudulently conveyed by decedent—Action to recover—Statute—Whenever the property of a decedent available for the payment of his debts is insufficient to pay the same in full, the executor or administrator may recover any property, real or personal, which said decedent may have disposed of with intent to defraud his creditors, or by conveyance which for any reason is void as to them. And upon the application of a creditor and the payment of or security for such part of the expenses as the court shall direct, such representative shall prosecute all actions necessary to recover the property so disposed of.²⁶ An action under the statute is ancillary to and in aid of the administration proceedings.²⁷ The right of a representative to maintain an action under the statute is unaffected by the fact that he has purchased the claims of creditors.²⁸ A representative may maintain an action under the statute though he is the sole creditor of the estate.²⁹ A special administrator is not authorized to maintain an action under the statute.³⁰ Where one of the executors is the fraudulent grantee the other executor may maintain an action under the statute.³¹ The cause of

²¹ *Martin v. Clapp*, 99 Mass. 470.

²² *Main v. Hadfield*, 41 Wash. 504, 84 Pac. 12.

²³ *Elsentraut v. Cornelius*, 134 Wis. 532, 115 N. W. 142. See *Wilson v. Leishman*, 12 Met. (Mass.) 316; *Grimes v. Hilliary*, 38 Ill. App. 246; *Starkweather v. Williams*, 21 R. I. 55, 41 Atl. 1003.

²⁴ See *Palmer v. Jackson County*, 90 Mich. 1, 50 N. W. 1086; *Mallory v. Wheeler*, 151 Wis. 136, 138 N. W. 97; *Kubil v. Kubil*, 19 Vt. 579; *Bradley v. Veazle*, 47 Me. 85; *In re Robert's Estate*, 48 Mont. 40; 135 Pac. 909; 18 Cyc. 218.

²⁵ *In re McCluskey*, 116 Me. 212, 100 Atl. 977.

²⁶ G. S. 1913, § 7313; *Little v. Simonds*, 46 Minn. 380, 382, 49 N. W. 186; *Donohue v. Campbell*, 81 Minn. 107, 83 N. W. 469; *Thysell v. McDonald*, 134 Minn. 400, 159 N. W. 958. See 11 A. &

E. Ency. of Law (2 ed.) 847; 18 Cyc. 195; 23 C. J. 1153; 11 R. C. L. 274; *Woerner*, Am. Law of Adm. (2 ed.) § 296; *Church*, Probate Law, 1060; 50 L. R. A. (N. S.) 320; 18 Ann. Cas. 36; 135 Am. St. Rep. 336.

²⁷ *Johnson v. Rutherford*, 28 N. D. 87, 147 N. W. 300.

²⁸ *Howd v. Breckenridge*, 97 Mich. 65, 56 N. W. 221.

²⁹ *Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34.

³⁰ *Richmond v. Campbell*, 71 Minn. 453, 73 N. W. 1099. This is an exceedingly narrow, technical and unsatisfactory construction of the statutes. See, contra, *Howard v. Farr*, 115 Minn. 86, 131 N. W. 1071; *Forde v. Exempt Fire Co.*, 50 Cal. 299.

³¹ *Lichtenberg v. Herdtfelder*, 103 N. Y. 302, 8 N. E. 526.

action in the representative cannot be assigned.³² One effect of the statute is to make the representative a trustee for creditors.³³ The statute can only be invoked for the benefit of creditors. It cannot be invoked for the benefit of legatees or heirs.³⁴ It is probably not necessary to first sell other realty of the decedent.³⁵ To justify an action there must be a deficiency of assets to pay the claims against the estate in full.³⁶ It is not essential that the creditors of the estate should have been creditors at the time of the fraudulent transfer.³⁷ It is not necessary to allege or show that all the property sought to be recovered is needed to pay creditors.³⁸ A representative need not wait until final settlement but may proceed as soon as it appears probable that there will be a deficiency of assets. He may determine the probability of a deficiency from an examination of the claims filed and the inventory.³⁹ The statute is declaratory of common-law principles and should be liberally construed. It authorizes an action where the decedent pays the consideration and has the title made to his wife in fraud of creditors.⁴⁰ It applies to voluntary conveyances.⁴¹ A conveyance of both a homestead and unexempt land is valid as to the homestead though fraudulent and void, as against creditors, as to the unexempt land.⁴² Where goods fraudulently transferred by the decedent are wrongfully taken from a representative under such transfer he may recover them in an action of replevin without first bringing an action to set aside the transfer.⁴³ A representative may assert the constructive fraud arising from a sale of personal property without a change of possession under G. S. 1913, § 7011.⁴⁴ Our statute expressly includes fraudulent transfers of personal property and such transfers may be set aside independent of statute.⁴⁵ A representative may set aside a chattel mortgage under the statute.⁴⁶ A fraudulent gift of money may be recovered in an

³² *Morris v. Morris*, 5 Mich. 171.

³³ *Porter v. Williams*, 9 N. Y. 142.

³⁴ *McQuaide v. Perot*, 223 N. Y. 75, 119 N. E. 230.

³⁵ See *Tenney v. Poor*, 14 Gray (Mass.) 500.

³⁶ *Holland v. Kelly* (Cal.) 171 Pac. 421.

³⁷ *Sawyer v. Metters*, 133 Wis. 350, 113 N. W. 682.

³⁸ *Ackerman v. Merle*, 137 Cal. 157, 69 Pac. 982.

³⁹ *Andrew v. Hinderman*, 71 Wis. 148, 36 N. W. 624. In some states it is held that in determining a deficiency of assets claims not yet allowed cannot be considered. *O'Connor v. Boylan*, 49 Mich. 209, 13 N. W. 519; *Hoffman v. Tucker*, 58 Neb. 457, 78 N. W. 941; *Field v. Andrada*, 106 Cal. 107, 39 Pac. 323;

Murphy v. Clayton, 114 Cal. 526, 43 Pac. 613. See 50 L. R. A. (N. S.) 330.

⁴⁰ *Beith v. Porter*, 119 Mich. 365, 78 N. W. 336.

⁴¹ *McCord v. Knowlton*, 79 Minn. 299, 82 N. W. 589; *Thysell v. McDonald*, 134 Minn. 400, 159 N. W. 958; *Johnson v. Rutherford*, 28 N. D. 87, 147 N. W. 390; *Dirke v. Union Sav. Assn.* (S. D.) 168 N. W. 578.

⁴² *Thysell v. McDonald*, 134 Minn. 400, 159 N. W. 958.

⁴³ *Bennett v. Schuster*, 24 Minn. 383. See *Quackenbush v. Graf*, 37 S. D. 385, 158 N. W. 409.

⁴⁴ *Quackenbush v. Graf*, 37 S. D. 385, 158 N. W. 409.

⁴⁵ *Mutual Life Ins. Co. v. Farmers & Mechanics Nat. Bank*, 173 Fed. 390.

⁴⁶ *Donohue v. Campbell*, 81 Minn. 107,

action for money had and received.⁴⁷ An action does not lie under the statute where the decedent died seized, the fraudulent deed not being delivered until after his death.⁴⁸ A representative may recover from a fraudulent grantee the proceeds of the sale of the property to an innocent purchaser, or the value of the land conveyed.⁴⁹ The validity of claims of creditors of the estate cannot be determined in an action under the statute. If claims have been allowed in the probate court the allowance is conclusive in the district court. If claims have not yet been allowed in the probate court the district court may stay proceedings in an action under the statute until claims have been allowed in the probate court.⁵⁰ In an action under the statute the right of the grantee to retain the land is the same as if the action were by the creditors against him and the decedent.⁵¹ The judgment in an action under the statute may be framed with reference to the facts of the particular case so as to protect the rights of the grantee.⁵² The statute does not authorize an action to set aside a preference founded on a valuable consideration though it was made to defraud other creditors.⁵³ If a representative refuses to bring an action upon the demand of a creditor he may be compelled to do so by the probate court.⁵⁴ A refusal of a representative, without just cause, to bring an action is ground for his removal.⁵⁵ Failure of a representative to prosecute an action under the statute in a proper case is a breach of his bond. Where the representative is the fraudulent grantee he cannot claim ignorance of the fraud.⁵⁶ The proceeds go into the estate for the benefit of all creditors whether the transfer was void as to all or not.⁵⁷ The proceeds may be used to pay the expenses of the action, including attorney's fees.⁵⁸ The proceeds may be used to pay the expenses of administration.⁵⁹ Any surplus not needed for the payment of debts and expenses goes to the fraudulent grantee. It does not go to the estate for the benefit of legatees or heirs.⁶⁰ The statute is not exclusive and a creditor may pro-

83 N. W. 469; *Haugen v. Hachemeister*, 114 N. Y. 566, 21 N. E. 1046.

⁴⁷ *McLean v. Weeks*, 61 Me. 277.

⁴⁸ *Rosseau v. Bleau*, 131 N. Y. 177, 30 N. E. 52. See *Blackman v. Schierman*, 21 Tex. Civ. App. 517, 51 S. W. 886.

⁴⁹ *O'Connor v. Boylan*, 49 Mich. 209, 13 N. W. 519; *Doney v. Clark*, 55 Ohio St. 294, 45 N. E. 316.

⁵⁰ *Johnson v. Rutherford*, 28 N. D. 87, 147 N. W. 390.

⁵¹ *Daniels v. Spear*, 65 Wash. 121, 117 Pac. 737. See *Thysell v. McDonald*, 134 Minn. 400, 159 N. W. 958.

⁵² *Johnson v. Rutherford*, 28 N. D. 87, 147 N. W. 390.

⁵³ *Stockwell v. Shalit*, 204 Mass. 270,

90 N. E. 570; *Mead's Appeal*, 46 Conn. 417.

⁵⁴ *Lichtenberg v. Herdtfelder*, 103 N. Y. 302, 8 N. E. 526.

⁵⁵ *In re McCluskey*, 116 Me. 212, 100 Atl. 977.

⁵⁶ *McIntire v. Conlon*, 223 Mass. 389, 111 N. E. 852.

⁵⁷ *Norton v. Norton*, 5 Cush. (Mass.) 524.

⁵⁸ *Lynch v. Murray*, 86 Vt. 1, 83 Atl. 746.

⁵⁹ *Abbott v. Tenney*, 18 N. H. 109; *McLean v. Weeks*, 61 Me. 277.

⁶⁰ *Mallow v. Walker*, 115 Iowa 238, 88 N. W. 452; *Allen v. Ashley School Fund*, 102 Mass. 262; *Johnson v. Rutherford*,

ceed independently.⁶¹ If a creditor proceeds independently he must establish his status as a creditor and the order or judgment allowing his claim in the probate court is not evidence of that fact.⁶² If a creditor proceeds independently the property recovered is not assets of the estate.⁶³ When the estate has been closed a creditor cannot maintain an action.⁶⁴

866. Same—Disposal of recovered property—Statute—All real estate recovered as provided in § 7313 (865, *supra*) shall be sold under license from the court, for the payment of debts, in the same manner as if the decedent had died seized thereof, and the proceeds of all personal estate recovered as aforesaid shall be appropriated for payment of the debts in the same manner as other assets in the hands of the executor or administrator.⁶⁵

867. Property in hands of coroner—Statute—Whenever personal property of a decedent comes into the hands of any coroner, and there is no proper person to receive it, he shall immediately return an inventory of all such property to the probate court.⁶⁶

868. Same—Sale—Disposition of proceeds—Statute—If no one entitled to such property demands the same within six months, the coroner shall report that fact to the court, which may order the same sold at public auction by such coroner upon such notice as it directs. The coroner shall sell the same as directed and make report thereof. He shall be allowed his reasonable expenses for the care and sale of the property, and deposit the remainder of the proceeds of such sale with the county treasurer in the name of the decedent. The treasurer shall give the coroner duplicate receipts therefor, one of which he shall file with the county auditor and the other in the probate court. In case an executor or administrator shall qualify within six years from the time of such deposit, the treasurer shall pay the same to said executor or administrator.⁶⁷

869. Property embezzled before letters—Statute—If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the personal estate of a decedent, such person shall be liable, in an action by the executor or administrator for the benefit of such estate, for double the value of the property so embezzled or alienated.⁶⁸

28 N. D. 87, 147 N. W. 390; *Chester County Trust Co. v. Pugh*, 241 Pa. 124, 88 Atl. 319; *McQualde v. Perot*, 223 N. Y. 75, 119 N. E. 230; *Woerner, Am. Law of Adm.* (2 ed.) § 296.

⁶¹ *McCord v. Knowlton*, 79 Minn. 290, 304, 82 N. W. 589; *Corey v. Corey*, 120 Minn. 304, 139 N. W. 509. See *First Nat. Bank v. Towle*, 118 Minn. 514, 137

N. W. 201; *Woerner, Am. Law of Adm.* (2 ed.) § 296.

⁶² *Johnson v. Powers*, 139 U. S. 156.

⁶³ *Byrd v. Hall*, 196 Fed. 762.

⁶⁴ *Vestal v. Allen*, 94 Ind. 268.

⁶⁵ G. S. 1913, § 7314.

⁶⁶ G. S. 1913, § 7318.

⁶⁷ G. S. 1913, § 7319.

⁶⁸ G. S. 1913, § 7317.

CLAIMS AGAINST ESTATES

IN GENERAL

870. Claims not liens on estate—Claims against an estate are not strictly liens on the property of the decedent and this is so even though they have been duly allowed by the probate court.⁶⁹ Under the laws of the state of Wisconsin, the creditors of a deceased person acquire a lien upon real property, of which the deceased was seized at the time of his death, for the payment of their claims in due course of administration, which lien is subordinate to the dower rights of a widow, but is prior to the interests of the heirs at law. This lien continues until barred by a statute of limitations, or, in the absence of a statute, by the rules of the common law, or by laches on the part of the creditors.⁷⁰

871. Claims in litigation at death of decedent—Statute—All actions pending against a decedent at the time of his death may, if the cause of action survives, be prosecuted to final judgment, and the executor or administrator may be admitted to defend the same. If judgment be rendered against the executor or administrator the court rendering it shall certify the same to the probate court, and it shall be paid in the same manner as other claims against the estate.⁷¹ This statute does not apply so as to exempt a claim from presentation to and allowance by the probate court unless the specific claim was actually in litigation at the death of the decedent. It is not enough that an action was pending against the decedent at the time of his death for another purpose. The character of the judgment finally rendered will not preclude an inquiry into the nature and status of an action pending at his death in order to determine whether a particular claim was then in litigation.⁷² The statute is applicable to actions in the federal courts.⁷³ It is not applicable to actions pending in another state.⁷⁴ When a decedent dies pendente lite and his representative is admitted to defend under this statute the claim in litigation need not be presented to the probate court.⁷⁵ Where a party dies after verdict or judgment against him the claim involved in the action need not be presented to the probate court for al-

⁶⁹ *Whitney v. Burd*, 29 Minn. 203, 12 N. W. 530; *In re Ackerman's Estate*, 33 Minn. 54, 21 N. W. 852; *Nelson v. Rogers*, 65 Minn. 246, 68 N. W. 18. It is sometimes said, loosely, that the creditors have a general lien. *Byrnes v. Sexton*, 62 Minn. 135, 138, 64 N. W. 155.

⁷⁰ *Mowry v. McQueen*, 80 Minn. 385, 83 N. W. 348.

⁷¹ G. S. 1913, § 7329. See § 1126.

⁷² *Fern v. Leuthold*, 29 Minn. 212, 39 N. W. 399.

⁷³ *In re Kittson's Estate*, 45 Minn. 197, 48 N. W. 419.

⁷⁴ *Commercial Bank v. Slater*, 21 Minn. 172.

⁷⁵ *Moss v. Mosely*, 148 Ala. 168, 41 So. 1012; 8 A. & E. Ency. of Law (2 ed.) 1063; 18 Cyc. 453.

lowance although his personal representative was not substituted.⁷⁶ The action must be revived within the time for the presentation of claims to the probate court.⁷⁷

872. Arbitration of claims—A representative has no authority to submit to arbitration a claim against an estate provable in the probate court.⁷⁸

873. Compromise of claims—A representative has no authority to compromise a claim against the estate provable in the probate court.⁷⁹ It being supposed that an estate was insolvent a creditor whose claim was reduced to judgment accepted an amount less than his claim in full satisfaction thereof. Held, that there was sufficient consideration for such accord and satisfaction though the estate was not in fact insolvent.⁸⁰ One rightfully in possession of the entire estate of a decedent can, in good faith, to avoid the expenses of administration and possible litigation, compromise a claim against the estate.⁸¹

874. Liability of estate of joint debtor—Statute—Whenever two or more persons are indebted on any joint contract, or upon a judgment founded on a joint contract, and one of them dies, his estate shall be liable therefor, and the amount thereof may be allowed by the probate court the same as though the contract had been joint and several or the judgment had been against him alone.⁸² This statute was probably not intended to abrogate all equitable priorities of partnership and individual estates, or to introduce any new rule for marshaling the assets of the joint and separate estates.⁸³ The statute is remedial and is to be liberally construed. Its object was to abolish the common-law rule whereby, at the death of one of two or more joint obligors all remedy at law against his estate was extinguished. No action at law could be maintained against his personal representatives, jointly or severally. The statute is applicable to an action in the district court against personal representatives on a contingent joint obligation for the payment of money, not absolute or capable of liquidation when the time expires for the presentation of claims to the probate court.⁸⁴

⁷⁶ *Berkey v. Judd*, 27 Minn. 475, 8 N. W. 383.

⁷⁷ *Bush v. Adams*, 22 Fla. 177; 18 Cyc. 453.

⁷⁸ *Clark v. Hoyle*, 52 Ill. 427; *Reitzell v. Miller*, 25 Ill. 67. See *Yarborough v. Leggett*, 14 Tex. 677; *Callaghan v. Grenet*, 66 Tex. 236, 18 S. W. 507; *Woerner*, *Am. Law of Adm.* (2 ed.) § 327.

⁷⁹ *Fish v. Morse*, 8 Mich. 34; *Clark v. Davis*, 32 Mich. 154; *Barry v. Davis*, 33 Mich. 515; *White v. Ledyard*, 48 Mich.

264, 12 N. W. 216; *Durfee v. Abbott*, 50 Mich. 278, 15 N. W. 450.

⁸⁰ *Rice v. London etc. Co.*, 70 Minn. 77, 72 N. W. 826.

⁸¹ *Bull v. Hepworth*, 159 Mich. 662, 124 N. W. 569.

⁸² G. S. 1913, § 7331.

⁸³ *Hawkins v. Mahoney*, 71 Minn. 155, 164, 73 N. W. 720.

⁸⁴ *Berryhill v. Peabody*, 72 Minn. 232, 75 N. W. 220.

875. Judgment creditors—Rights lost by laches—In an equitable action by a judgment creditor of the estate of a deceased person to subject real property formerly belonging to the estate to the satisfaction of his judgment, held, that the plaintiff should be denied such relief on the ground of his laches, the action not being instituted until about seven years after a final adjudication which determined the plaintiff's rights as against the estate, and the obligation of the executors to pay the debt; such delay not being justified, and the lands now sought to be charged having been conveyed by the executors, and under mesne conveyances having been purchased by the defendants, strangers to the estate, and parts of such lands having been improved by them. The continued neglect of the plaintiff to enforce against the executors and their bondsmen a judgment recovered against them for their neglect or misconduct in respect to the payment of the plaintiff's debt, is an additional reason for refusing the relief sought against these defendants.⁸⁵

876. Payment by widow—Subrogation—A widow who advances money to be used in the payment of claims against her husband's estate has such an interest in the estate as entitles her to be subrogated to the rights of the creditors whose claims she paid.⁸⁶

877. Acknowledgment of debt by decedent and direction to present claim against estate—A decedent wrote a letter to his brother stating that he was indebted to him in a certain amount for services and that he might present a claim therefor against his estate. The letter was signed by the decedent but was not witnessed as required by the statute regulating the execution of wills. The letter was presented as a claim against the estate. Held, that the recital of a consideration in the letter was evidence of a consideration but not conclusive; that if there was no consideration the instrument could only take effect as a will; that if there was a consideration the instrument might be allowed as a claim against the estate; that if it appeared from the evidence that the decedent intended to evade the statute relating to wills the claim should be allowed only to the extent of the actual consideration or the reasonable value of the services; and that such intent might be inferred from a gross inadequacy of consideration.⁸⁷

878. Allowance upon citation to representative—A complaint alleging an allowance of a claim upon a citation to the representative held not to allege facts sufficient to show a due allowance of the claim by the probate court.⁸⁸

⁸⁵ *Berkey v. St. Paul Nat. Bank*, 54 Minn. 448, 56 N. W. 53.

⁸⁶ *Merrill v. Comstock*, 154 Wis. 434, 143 N. W. 313. See *State v. Probate Court*, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234.

⁸⁷ *Fitzgerald v. English*, 73 Minn. 266, 76 N. W. 27.

⁸⁸ *First Nat. Bank v. How*, 28 Minn. 150, 9 N. W. 626.

879. Allowance of claims by federal courts—Federal courts in equity have jurisdiction to establish the claim of a foreign creditor against the estate of a decedent by a decree to that effect. Such a decree, when a certified copy thereof is filed in the proper probate court, stands as a claim duly proved and allowed against the estate of the decedent. It is the duty of the personal representative of the decedent to pay the claim in the due course of administration, and no order of the probate court allowing the claim or directing its payment is necessary.⁸⁹ After an estate is closed an action will not lie in a federal court on a claim provable in the probate court.⁹⁰ A judgment of a federal court, with jurisdiction, allowing a claim, is conclusive, though erroneous, and cannot be questioned in the probate court.⁹¹

880. Allowance of claims by commissioners—Formerly claims were presented to and allowed by commissioners appointed by the probate court.⁹²

PRESENTATION AND ALLOWANCE

881. Necessity of presenting claims to probate court—Statute—All claims against the estate of a decedent, arising upon contract, whether due, not due, or contingent, must be presented to the court for allowance, within the time fixed by the order, or be forever barred: Provided, that contingent claims arising on contract, which do not become absolute and capable of liquidation before final settlement, need not be

⁸⁹ Connecticut Mutual Life Ins. Co. v. Schurmeler, 117 Minn. 473, 136 N. W. 1; Id., 125 Minn. 368, 147 N. W. 246. See § 871.

⁹⁰ Security Trust Co. v. Black River Nat. Bank, 187 U. S. 211; Connecticut Mutual Life Ins. Co. v. Schurmeler, 117 Minn. 473, 136 N. W. 1. See § 936.

⁹¹ Ames v. Slater, 27 Minn. 70, 6 N. W. 418; Connecticut Mutual Life Ins. Co. v. Schurmeier, 117 Minn. 473, 136 N. W. 1. See *In re Kittson's Estate*, 45 Minn. 197, 48 N. W. 419.

⁹² *Wilkinson v. Estate of Winne*, 15 Minn. 159 (123) (time of appointing commissioners—failure to appoint—absence of commissioner from state—cumulative remedies); *Bryant v. Livermore*, 20 Minn. 313 (271) (effect of disallowance of claim by commissioners on right of action); *Capehart v. Logan*, 20 Minn. 442 (395) (appeal); *Commercial Bank v. Slater*, 21 Minn. 172 (claim barred if not presented to commissioners); *Commercial Bank v. Slater*, 21 Minn. 174 (id.); *Lanier v. Irvine*, 24 Minn. 116 (decree di-

recting payment of claims allowed by commissioners—presumption as to notice by commissioners); *Massachusetts Mutual Life Ins. Co. v. Estate of Elliot*, 24 Minn. 134 (application for further time to present claims to commissioners—renewal of commission to commissioners); *State v. Probate Court*, 25 Minn. 22 (effect of allowance of claims by commissioners—nature of proceeding); *Gage v. Stimson*, 26 Minn. 64, 1 N. W. 806 (proof of claim by agent in his own name—remedy of principal—effect of allowance of claims by commissioners); *Cummings v. Halsted*, 26 Minn. 151, 1 N. W. 1052 (probate judge acting as commissioner); *Palmer v. Pollock*, 26 Minn. 433, 4 N. W. 1113 (contingent claim becoming absolute after the time limited for presenting claims to commissioners); *Ames v. Slater*, 27 Minn. 70, 6 N. W. 418 (claim disallowed by commissioners—subsequent action thereon in federal court); *Berkey v. Judd*, 27 Minn. 475, 8 N. W. 383 (death after verdict—unnecessary to present claim to commissioners).

so presented or allowed. Claims presented for allowance shall be itemized, and be verified by an affidavit of the claimant or his agent or attorney showing the balance due, that no payments have been made thereon that are not credited, and that there are no offsets thereto known to the affiant. Any such claim may be pleaded as an offset or counterclaim in any action brought against the claimant by the executor or administrator. If the claim presented be contingent, or not due, the particulars thereof shall be stated.⁹³ A "claim" within the meaning of the statute is a demand of a pecuniary nature, arising out of contract, which could have been enforced against the decedent in his lifetime, or had he lived to the time of presentation, in a personal action for the recovery of money only; or a pecuniary obligation imposed on his estate by a contract made by him, though not enforceable against him in his lifetime.⁹⁴ The statute is not applicable to claims *ex delicto*.⁹⁵ It does not apply to obligations incurred by the representative.⁹⁶ It is not applicable to claims arising out of administration.⁹⁷ It is not applicable where a guardian has been appointed for a mentally incompetent person.⁹⁸ A representative cannot waive compliance with the statute, pay a claim himself, and then, after it has been barred, present it as a debit item in his account, and have it allowed by the court.⁹⁹ Claims in litigation at the time of the death of the decedent or which have passed into verdict or judgment need not be presented.¹ Special provision is made for the payment of secured claims with leave of court without formal proof and allowance.²

882. Claims not presented forever barred—Setoff—If claims required to be presented to the probate court are not so presented they are forever barred.³ This statutory provision is commonly called a statute of non-

⁹³ G. S. 1913, § 7323. See § 882; 18 Cyc. 448; 11 R. C. L. 192.

⁹⁴ *Knutsen v. Krook*, 111 Minn. 352, 127 N. W. 11; *Hayford v. Dougherty*, 144 Minn. 89, 174 N. W. 442; *Kline v. Gingery*, 25 S. D. 16, 124 N. W. 958; *Meade County v. Welch*, 34 S. D. 348, 148 N. W. 601.

⁹⁵ *Comstock v. Matthews*, 55 Minn. 111, 56 N. W. 583 (trespass to land). See *First Nat. Bank v. Strait*, 65 Minn. 162, 167, 87 N. W. 987; *Gilman v. Maxwell*, 79 Minn. 377, 82 N. W. 669; *Clark v. Gates*, 84 Minn. 381, 87 N. W. 941; *Knutsen v. Krook*, 111 Minn. 352, 358, 127 N. W. 11; *Payne v. Meisser* (Wis.) 187 N. W. 194 (claim for waste).

⁹⁶ *Winston v. Young*, 52 Minn. 1, 53 N. W. 1015; *Smith v. Pence*, 62 Minn. 321, 64 N. W. 822; *Knutsen v. Krook*,

111 Minn. 352, 358, 127 N. W. 11. See § 733.

⁹⁷ *Dampier v. St. Paul Trust Co.*, 46 Minn. 526, 49 N. W. 286; *Knutsen v. Krook*, 111 Minn. 352, 358, 127 N. W. 11.

⁹⁸ *Pflaum v. Babb*, 86 Minn. 395, 90 N. W. 1051.

⁹⁹ *Gilman v. Maxwell*, 79 Minn. 377, 82 N. W. 669. See *L. R. A.* 1915B, 1042.

¹ See §§ 871, 936.

² See § 937.

³ See § 881; *Backus v. Ames*, 79 Minn. 145, 147, 81 N. W. 766; *Clark v. Gates*, 84 Minn. 381, 383, 87 N. W. 941; *Innis v. Flint*, 106 Minn. 343, 119 N. W. 48; *Bolles v. Boyer*, 141 Minn. 404, 170 N. W. 229; *In re Evans' Estate*, 145 Minn. 344, 177 N. W. 354; 8 A. & E. Ency. of Law (2 ed.) 1078; 18 Cyc. 493; 24 C. J. 363;

claim. There was a similar statutory provision in force in this state when claims were required to be presented to commissioners.⁴ If a claim is barred under this statute no action will lie thereon against representatives or heirs.⁵ The statute runs against non-residents.⁶ It runs against minors, whether they have a guardian or not.⁷ It runs against insane persons.⁸ It runs against married women.⁹ It runs against the estate of a deceased creditor.¹⁰ Courts cannot make any exceptions to the statute or extend the time except as expressly authorized.¹¹ Though a claim not presented is barred as the basis of an independent action, it may be used as a setoff in an action against the claimant by the representative of the estate.¹² It is the duty of representatives to plead the bar of the statute, and they are personally liable to any one who is injured if they fail to do so.¹³ The operation of the statute cannot be defeated by an agreement between the decedent and a creditor.¹⁴ Even if the fraudulent representations of the representative induced a creditor to omit to present his claim to the probate court within the time limited, there is no remedy against the estate. By no act of the representative can the bar of the statute of nonclaim be waived or lifted after once closed.¹⁵ The statute is designed to secure the speedy settlement of estates and is to be strictly enforced.¹⁶ Statutes of nonclaim are applied more rigorously than ordinary statutes of limitation.¹⁷

883. Five-year limitation on presentation of claims—Statute—It is provided by statute that "no claim against a decedent shall be a charge upon his estate unless presented to the probate court for allowance within five years after his death."¹⁸ This limitation applies though there is no administration.¹⁹ This statute does not apply to claims

Woerner, *Am. Law of Adm.* (2 ed.) §§ 400, 402.

⁴ *Fern v. Leuthold*, 39 Minn. 212, 39 N. W. 399.

⁵ See §§ 1123, 1210.

⁶ *Morgan v. Hamlet*, 113 U. S. 449; 8 A. & E. Ency. of Law (2 ed.) 1080; 18 Cyc. 468; 24 C. J. 335.

⁷ *Van Haaren v. Tierney*, 180 Mich. 192, 146 N. W. 660; *Morgan v. Hamlet*, 113 U. S. 449; 8 A. & E. Ency. of Law (2 ed.) 1079; 18 Cyc. 468; 24 C. J. 336.

⁸ *Rowell v. Patterson*, 76 Me. 196; 8 A. & E. Ency. of Law (2 ed.) 1079; 18 Cyc. 468; 24 C. J. 336.

⁹ *Barry v. Minahan*, 127 Wis. 570, 107 N. W. 448.

¹⁰ *Beasley v. Waugh*, 51 Ala. 156; *Barry v. Minahan*, 127 Wis. 570, 107 N. W. 488.

¹¹ *Barry v. Minahan*, 127 Wis. 570, 107

N. W. 488; *Van Haaren v. Tierney*, 180 Mich. 192, 146 N. W. 660; *Morrow v. Barker*, 119 Cal. 65, 51 Pac. 12; 8 A. & E. Ency. of Law (2 ed.) 1081; 18 Cyc. 468; 24 C. J. 335.

¹² See § 884.

¹³ *Emerson v. Thompson*, 16 Mass. 429, 432; *Ames v. Jackson*, 115 Mass. 508; *Woerner, Am. Law of Adm.* (2 ed.) § 400.

¹⁴ *McDaniel v. Putnam*, 100 Kan. 550, 164 Pac. 1167.

¹⁵ *State v. Probate Court*, 145 Minn. 344, 177 N. W. 354. See 11 A. L. R. 240.

¹⁶ *McDaniel v. Putnam*, 100 Kan. 555, 164 Pac. 1167.

¹⁷ *State v. Probate Court*, 145 Minn. 344, 177 N. W. 354.

¹⁸ See § 1123.

¹⁹ *Granger v. Harriman*, 89 Minn. 303, 306, 94 N. W. 869.

not provable in the probate court.²⁰ An order allowing a claim barred by this statute is erroneous but not subject to collateral attack.²¹ Formerly there was no statutory limitation on the presentation and allowance of claims, but the equitable doctrine of laches was applied.²²

884. Right of representative to sue unaffected—Setoff—Statute—Nothing in this chapter shall prevent an administrator or executor from beginning any action, or from prosecuting to final judgment any action begun by the decedent, for the recovery of any debt or claim. The defendant in such action may set off any claim he has against the estate, instead of presenting the same to the probate court, and, if the final judgment be in his favor, the same shall be certified by the court rendering it to the probate court and shall be considered the true balance.²³

885. Jurisdiction of probate court exclusive—As to all claims against estates of decedents which the statutes contemplate shall be presented to and allowed by the probate court the original jurisdiction of that court is exclusive, excepting the jurisdiction of the federal courts. This jurisdiction cannot be interfered with by the other courts of the state.²⁴ As to claims secured by a lien the jurisdiction of the probate court is not exclusive.²⁵ Where an administrator brings an action in the district court, after the time for filing claims has expired, against the widow of the decedent for property of the estate converted by her and which she alleges she has expended in the payment of claims against the estate, the district court has jurisdiction to pass on the claim without referring it to the probate court.²⁶

886. Nature of proceeding—The presentation of a claim has been held an "action" within the meaning of the statute for the collection of assessments on stockholders.²⁷ It is not an action within the general statute of limitations.²⁸

887. Order limiting time to present claims—Statute—Upon granting letters testamentary or of administration the court shall make an order limiting the time for creditors to present claims against the estate, and fixing the time and place when and where proofs will be heard and such claims examined and adjusted. The time so limited shall not be

²⁰ *Berryhill v. Peabody*, 72 Minn. 232, 234, 75 N. W. 220.

²¹ *O'Brien v. Larson*, 71 Minn. 371, 74 N. W. 148.

²² *O'Mulcahey v. Gragg*, 45 Minn. 112, 47 N. W. 543.

²³ G. S. 1913, § 7330. See § 1130.

²⁴ *First Nat. Bank v. How*, 28 Minn. 150, 9 N. W. 626; *Boltz v. Schutz*, 61 Minn. 444, 64 N. W. 48; *Johanson v. Hoff*, 63 Minn. 296, 299, 65 N. W. 464;

O'Brien v. Larson, 71 Minn. 371, 74 N. W. 148; *State v. Bazille*, 89 Minn. 440, 95 N. W. 211.

²⁵ *Shevlin-Carpenter Lumber Co. v. Taylor*, 124 Minn. 132, 144 N. W. 472.

²⁶ *Merrill v. Comstock*, 154 Wis. 434, 143 N. W. 313.

²⁷ *Neff v. Lamm*, 99 Minn. 115, 108 N. W. 849.

²⁸ *O'Mulcahey v. Gragg*, 45 Minn. 112, 47 N. W. 543.

more than one year, nor less than six months, unless it shall appear by affidavit that there are no debts, in which case the limitation may be three months: Provided, that when it shall appear from the petition for letters that the decedent left no property except his homestead and such personal estate as is allowed by law to the surviving spouse or minor children, no order in respect to claims need be made.²⁹ The provision requiring the order to be made at the time of granting letters testamentary or of administration is mandatory. In the absence of evidence to the contrary it will be presumed that the court complied with the statutory requirement.³⁰ If it appears by affidavit that there are no debts the time may be limited to three months.³¹ It is provided that no order need be made where it appears that the decedent left no property except his homestead and such personal estate as is allowed by law to the surviving spouse or minor children.³² It is probably immaterial that a claim is filed before the order limiting the time to present claims.³³

888. Same—Publication—Statute—Three weeks' published notice of such order shall be given, and the last publication shall be made within six weeks after the order is filed.³⁴

889. Who may present claims—An assignee of a claim may present it in his own name.³⁵ The pledgee of a note and mortgage may present the claim against the estate of the maker.³⁶ One who is subrogated to the rights of a creditor may present his claim directly against the estate.³⁷ If a surety pays a claim after it has been filed he may prosecute it in the name of the creditor who filed it and to whose rights he is subrogated.³⁸ A representative of a deceased creditor of the estate may present a claim.³⁹ Where a creditor has presented his claim it is not necessary that the claim be again presented by one who subsequently acquires it. The claim may be prosecuted in the name of the creditor who filed it.⁴⁰ A representative should not act as agent for a claimant

²⁹ G. S. 1913, § 7320.

³⁰ Johanson v. Hoff, 70 Minn. 140, 142, 72 N. W. 965.

³¹ Hunt v. Burns, 90 Minn. 172, 175, 95 N. W. 1110.

³² Ramstadt v. Thunem, 136 Minn. 222, 161 N. W. 413.

³³ See Ricketson v. Richardson, 19 Cal. 330, 354; Janin v. Browne, 59 Cal. 37, 43.

³⁴ G. S. 1913, § 7321.

³⁵ Dixon v. Buell, 21 Ill. 203. See Fitzgerald v. English, 73 Minn. 266, 76 N. W. 27; 24 C. J. 341.

³⁶ Ponce v. McElvy, 47 Cal. 154.

³⁷ Campau v. Miller, 46 Mich. 148, 9 N. W. 140; Hayes v. Gill, 226 Mass. 388,

115 N. E. 492 (husband paying expenses of last illness of wife and her funeral expenses). See Merrill v. Comstock, 154 Wis. 434, 143 N. W. 313; State v. Probate Court, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234.

³⁸ Braught v. Griffith, 16 Iowa 26; Harman v. Harman, 62 Neb. 452, 87 N. W. 177.

³⁹ Feustmann v. Gott, 65 Mich. 592, 32 N. W. 869; Davis v. Browning, 91 Cal. 603, 27 Pac. 937.

⁴⁰ Ryan v. Flanagan, 38 N. J. L. 161; Fitzgerald's Estate v. Union Sav. Bank, 65 Neb. 97, 90 N. W. 994; 8 A. & E. Ency. of Law (2 ed.) 1073; 18 Cyc. 451.

in presenting a claim. A failure of a representative to comply with a request of a claimant to file a claim is no excuse for not filing.⁴¹ It has been held that a foreign representative cannot file a claim.⁴²

890. Mode of presenting—Itemized statement—Verification—The statute provides that claims shall be itemized and be verified by an affidavit of the claimant or his agent or attorney, showing the balance due, that no payments have been made thereon that are not credited, and that there are no offsets thereto known to the affiant.⁴³ Claims are not presented until placed in the custody of the court. Handing them to the representative or leaving them with him is insufficient.⁴⁴ The statute must be complied with in an application for leave to file a claim after the time limited for filing claims.⁴⁵ The claim need not be formally entitled. Any description that will identify the proceedings is sufficient.⁴⁶ The exact amount of the claim need not be stated where it is not yet ascertainable, as, for example, the amount of the liability of a surety on a bond.⁴⁷ A written claim is to be construed liberally. It is contemplated that a citizen of ordinary intelligence should be able to prepare a statement without relying on the technical knowledge of a lawyer.⁴⁸ The claim may be stated in general terms. It is not necessary to state all the particulars of the claim or the circumstances out of which the claim arose.⁴⁹ A claim on an account stated need not specify the items of the account.⁵⁰ A claim need not state the facts with the technical nicety and detail of a complaint and its sufficiency is not to be tested by the rules of pleading in an ordinary action in the district court.⁵¹ In a claim on a note it is proper practice to present the original note, but a copy is probably sufficient.⁵² In a claim on a note it is not

⁴¹ *In re Hobson's Estate*, 40 Colo. 332, 91 Pac. 929. See *In re Kidder's Estate*, 53 Minn. 529, 55 N. W. 738; 18 Cyc. 474.

⁴² *Winbigger v. Shattuck* (Cal.) 195 Pac. 707.

⁴³ See § 881; 18 Cyc. 479; 24 C. J. 347; 130 Am. St. Rep. 311.

⁴⁴ *State v. Probate Court*, 145 Minn. 344, 177 N. W. 354.

⁴⁵ *Gibson v. Brennan*, 46 Minn. 92, 48 N. W. 460.

⁴⁶ *In re Jefferson's Estate*, 35 Minn. 215, 28 N. W. 256.

⁴⁷ *Elizalde v. Murphy*, 163 Cal. 686, 126 Pac. 978. See *Gibson v. Brennan*, 46 Minn. 92, 48 N. W. 460; *St. Croix Boom Corporation v. Brown*, 47 Minn. 281, 50 N. W. 197.

⁴⁸ *Thompson v. Black*, 200 Ill. 465, 65 N. E. 1092.

⁴⁹ *Landis v. Woodman*, 126 Cal. 454,

58 Pac. 857; *Mauer v. King*, 127 Cal. 114, 116, 59 Pac. 290; *Thompson v. Orena*, 134 Cal. 26, 29, 66 Pac. 24; *Pollitz v. Wickersham*, 150 Cal. 238, 88 Pac. 911.

⁵⁰ *In re Swain's Estate*, 67 Cal. 637, 8 Pac. 497.

⁵¹ *Pollitz v. Wickersham*, 150 Cal. 238, 88 Pac. 911; *Doolittle v. McConnell* (Cal.) 174 Pac. 305; *Harrison v. Harrison*, 124 Iowa 528, 100 N. W. 344; *Rule v. Carey*, 178 Iowa 184, 159 N. W. 699; *In re Kirfel's Estate*, 37 S. D. 202, 157 N. W. 1057; *Parkes v. Burkhardt* (Wash.) 172 Pac. 908; *White v. Deering* (Cal.) 179 Pac. 401; 8 A. & E. Ency. of Law (2 ed.) 1077; 18 Cyc. 480; 24 C. J. 348.

⁵² *McFarland v. Fairlamb*, 18 Wash. 601, 52 Pac. 239; *Crocker-Woolworth Nat. Bank v. Carle*, 133 Cal. 409, 65 Pac. 951; *Hayner v. Trott*, 46 Kan. 70, 26 Pac. 415; 18 Cyc. 483; 24 C. J. 352. See, for a form of claim on checks, *Bax-*

necessary to state anything beyond what appears on its face.⁵³ Where a creditor has several claims growing out of separate transactions he need not present them together or at the same time.⁵⁴ The claimant is not strictly limited to the particular grounds stated in his written claim, even though no application to amend is made.⁵⁵ The requirement of a verification is imperative.⁵⁶ There must be a verification though the original instrument of indebtedness, such as a note, is presented.⁵⁷ The verification is a part of the claim. A claim of interest in a verification has been held sufficient.⁵⁸ The affidavit must state that there are no offsets known to the affiant.⁵⁹ The fact that the affidavit states that there are no offsets known to the "claimant" instead of to the "affiant" is immaterial, where they are the same person.⁶⁰ Surplusage does not vitiate a verification.⁶¹ It is sufficient if the verification substantially complies with the statute.⁶² Objection to the sufficiency of a verification cannot be made for the first time on appeal.⁶³ Objection that an attorney verifying a claim did not have actual knowledge of the facts is unavailing if not seasonably made.⁶⁴

891. Amendment—Filing corrected claim—It is discretionary with the court to allow a claim to be amended.⁶⁵ A claimant may file a second and corrected statement within the time limited. A claimant is not estopped by filing a claim.⁶⁶

892. Hearing on claims—Practice—The order limiting the time for the presentation of claims fixes the time and place when and where proofs will be heard and such claims examined and adjusted.⁶⁷ Proceedings in proof of claims need not be formally entitled. Any description which will identify them is sufficient.⁶⁸ No provision is made for pleadings

ter v. Brandenburg, 137 Minn. 259, 163 N. W. 516.

⁵³ Landis v. Woodman, 126 Cal. 454, 456, 58 Pac. 857.

⁵⁴ Olsen v. Hagan (Wash.) 172 Pac. 1173.

⁵⁵ See § 893.

⁵⁶ Perkins v. Onyett, 86 Cal. 348, 24 Pac. 1024; 8 A. & E. Ency. of Law (2 ed.) 1085; 18 Cyc. 485; 24 C. J. 355.

⁵⁷ Kennedy v. Lyle (Ala.) 76 So. 962.

⁵⁸ In re Hawgood's Estate, 37 S. D. 565, 159 N. W. 117.

⁵⁹ G. S. 1913, § 7323; Dakota Nat. Bank v. Kleinschmidt, 33 S. D. 132, 144 N. W. 934.

⁶⁰ Davis v. Browning, 91 Cal. 603, 27 Pac. 937; Gee Chong Pong v. Harris (Cal.) 175 Pac. 806; Dorais v. Doll, 33 Mont. 314, 83 Pac. 884.

⁶¹ Guerian v. Joyce, 133 Cal. 405, 65 Pac. 972.

⁶² Griffith v. Lewin, 129 Cal. 596, 598, 62 Pac. 172; In re Robert's Estate (S. D.) 170 N. W. 580.

⁶³ Dubbs v. Haworth, 102 Kan. 603, 171 Pac. 624.

⁶⁴ Doolittle v. McConnell (Cal.) 174 Pac. 305.

⁶⁵ See State v. Probate Court, 72 Minn. 434, 75 N. W. 700; Davis v. Superior Court (Cal.) 170 Pac. 437. As to amendment in the district court on appeal, see § 68.

⁶⁶ Warren v. McGill, 103 Cal. 153, 37 Pac. 144; Westbay v. Gray, 116 Cal. 660, 48 Pac. 800; F. A. Patrick & Co. v. Austin, 20 N. D. 261, 127 N. W. 109.

⁶⁷ See § 887.

⁶⁸ In re Jefferson's Estate, 35 Minn. 215, 28 N. W. 256.

and the practice is informal.⁶⁹ The proceeding is not strictly an adversary suit between litigant parties, the claimant on one side and the representative on the other, but is in the nature of a proceeding against the estate, the estate being, in theory, in the probate court for the purposes of administration.⁷⁰

893. Proof of claims—Admissions of representatives—Conversations with decedent—A representative cannot bind the estate by his admissions and his admissions are inadmissible to prove a claim.⁷¹ The rules applicable to a variance between pleading and proof in ordinary actions in the district court do not apply to proof of claims in the probate court. Claimants are not strictly limited to the particular grounds stated in their written claims even though no application to amend is made.⁷² The claimant cannot testify as to conversations with or admissions of the decedent relative to the claim.⁷³ But he may testify as to the contents of a lost writing executed by the decedent.⁷⁴ If upon cross-examination a claimant is required by the adverse party to testify as to a part of a conversation with the decedent he may testify as to the remainder of the conversation on his redirect examination.⁷⁵ Whether a representative may testify as to conversations of the decedent in relation to the claim, if the claimant objects, seems to be an open question.⁷⁶

894. Who may contest claims—Any one interested in the estate, including heirs, legatees, devisees, creditors and representatives may contest the allowance of claims.⁷⁷ The representative is an adversary party to all claimants in the allowance of claims and it is his duty to oppose the allowance of improper or illegal claims.⁷⁸ One not interested in the estate cannot contest the allowance of claims.⁷⁹ To vacate an allow-

⁶⁹ *Stuart v. Stuart*, 70 Minn. 46, 49, 72 N. W. 819.

⁷⁰ *State v. Probate Court*, 25 Minn. 22, 26. In a sense, however, the claimant and the representative are adversary parties. See § 893.

⁷¹ *First Nat. Bank v. How*, 28 Minn. 150, 155, 9 N. W. 626; *Johanson v. Hoff*, 63 Minn. 296, 65 N. W. 464; *Woerner*, *Am. Law of Adm.* (2 ed.) § 381; 16 Cyc. 1036, 1037.

⁷² *Thompson v. Black*, 200 Ill. 465, 65 N. E. 1092; *First Nat. Bank v. Sandmeyer*, 164 Ill. App. 98; *Craig v. Craig's Estate*, 187 Iowa 340, 149 N. W. 454.

⁷³ G. S. 1913, § 8378; *In re Hess' Estate*, 57 Minn. 282, 59 N. W. 193; *Wagner v. Seaberg*, 138 Minn. 37, 163 N. W. 975; *Woerner*, *Am. Law of Adm.* (2 ed.) § 398.

⁷⁴ *Anderson v. Oleson*, 143 Minn. 328, 173 N. W. 665.

⁷⁵ *In re Hess' Estate*, 57 Minn. 282, 59 N. W. 193.

⁷⁶ See *Pitzl v. Winter*, 96 Minn. 499, 105 N. W. 673; *Geraghty v. Kilroy*, 103 Minn. 286, 114 N. W. 838; *Burmeister v. Gust*, 117 Minn. 247, 135 N. W. 980; *Bowler v. Fahey*, 136 Minn. 408, 162 N. W. 515.

⁷⁷ *State v. Probate Court*, 25 Minn. 22, 26; *In re Douglas*, 140 Iowa 603, 117 N. W. 982; *In re Koch's Estate*, 148 Wis. 548, 134 N. W. 663. See *O'Brien v. Larson*, 71 Minn. 371, 74 N. W. 148; 18 Cyc. 514; 24 C. J. 388.

⁷⁸ *In re Gragg's Estate*, 32 Minn. 142, 19 N. W. 651; *In re Kidder's Estate*, 53 Minn. 529, 55 N. W. 738; *In re Koch's Estate*, 148 Wis. 548, 134 N. W. 663. See *O'Brien v. Larson*, 71 Minn. 371, 74 N. W. 148; 18 Cyc. 515, and §§ 882, 901, 902.

⁷⁹ *Semper v. Coates*, 93 Minn. 80, 100 N. W. 663.

ance of a claim against an estate on the application of one who knew of the time for hearing but failed to appear, his only excuse being that he felt confident that the administrator would administer the estate justly and honestly and not permit unjust claims to be allowed, is an abuse of discretion.⁸⁰

895. Who may object to failure to present claim—The representative, heirs, devisees, legatees or creditors may object to the failure of a claimant to present his claim.⁸¹

896. Order allowing or disallowing claims—Effect—Interest—Statute—Upon the adjudication of any claim, the court shall make its order allowing or disallowing the same, which order shall have the effect of a judgment for or against the estate, as the case may be. Such order shall contain the date of adjudication, the amount allowed, the amount disallowed, and shall be attached to the claim with the offsets, if any. The claim allowed shall bear interest at the legal rate.⁸² Under our probate practice a claim becomes a valid charge against an estate only by being allowed as such by the probate court as prescribed by statute and the representative has no authority to pay any others.⁸³ So far as the estate is concerned a claim allowed is merged in the judgment of allowance.⁸⁴ An order allowing or disallowing a claim has the effect of a judgment for or against the estate, as the case may be, and is conclusive on all persons interested in the estate, including the claimant, other creditors, next of kin, heirs, legatees and devisees, in the absence of an appeal. It is not subject to collateral attack for error or irregularity.⁸⁵ It is not even evidence of the debt against strangers.⁸⁶ An allowance of a claim which is not a claim against the estate within the meaning of the statutes is not always a nullity.⁸⁷ An order allowing a claim stops the running of the statute of limitations on the original claim.⁸⁸ There is only one order contemplated by the statute, and

⁸⁰ *In re Kidder's Estate*, 53 Minn. 529, 55 N. W. 738.

⁸¹ 8 A. & E. Ency. of Law (2 ed.) 1091; 24 C. J. 364.

⁸² G. S. 1913, § 7327. See 18 Cyc. 506; 24 C. J. 377, 409; 11 R. C. L. 199.

⁸³ *First Nat. Bank v. How*, 28 Minn. 150, 155, 9 N. W. 626. See *Johanson v. Hoff*, 63 Minn. 296, 299, 65 N. W. 464.

⁸⁴ *Bolles v. Boyer*, 141 Minn. 404, 170 N. W. 229.

⁸⁵ *First Nat. Bank v. How*, 28 Minn. 150, 152, 9 N. W. 626; *Barber v. Bowen*, 47 Minn. 118, 49 N. W. 684; *Lewis v. Welch*, 47 Minn. 193, 48 N. W. 608; *Johanson v. Hoff*, 70 Minn. 140, 72 N. W. 965; *O'Brien v. Larson*, 71 Minn. 371, 74 N. W. 148; *McCord v. Knowlton*, 79

Minn. 299, 82 N. W. 589; *Griffin v. Hovey*, 179 Mich. 104, 146 N. W. 210; *Johnson v. Rutherford*, 28 N. D. 87, 147 N. W. 398; 18 Cyc. 509; 24 C. J. 409; *Woerner*, Am. Law of Adm. (2 ed.) § 392. A like effect was given to an allowance or disallowance of a claim by commissioners under the former practice. *State v. Probate Court*, 25 Minn. 22; *Gage v. Stimson*, 26 Minn. 64; *Dawson v. Girard Life Ins. etc. Co.*, 27 Minn. 411, 8 N. W. 142; *State v. Probate Court*, 40 Minn. 296, 300, 41 N. W. 1033.

⁸⁶ *Johnson v. Powers*, 139 U. S. 156.

⁸⁷ See § 897.

⁸⁸ *McCord v. Knowlton*, 79 Minn. 299, 82 N. W. 589.

though a part of a claim is disallowed the order is nevertheless an order allowing a claim. An order must state the amount allowed or disallowed.⁸⁹ An order allowing a claim does not give the claimant a lien on the realty of the decedent.⁹⁰ A claim bears interest at the legal rate from the date of the order allowing it.⁹¹ If a claim is disallowed by the probate court but allowed by the district court on appeal it should bear interest from the time it was disallowed.⁹² Claims cannot be allowed until the expiration of the time previously fixed by the court for the presentation of claims.⁹³ The question has been raised, but not determined, whether an order allowing a claim is binding on the obligors of a bond given to secure the distribution of an estate.⁹⁴ The court is not restricted to common-law rules but may allow a claim where the claimant is equitably entitled to payment.⁹⁵ A representative is not personally affected by an order allowing or disallowing a claim.⁹⁶

897. Effect of allowing claim not properly presentable—If a claim not properly presentable as a claim against the estate is so presented and allowed it is an irregularity merely, if it might be allowed on the final accounting of the representative.⁹⁷

898. Balance against claimant—Collection—Statute—When a balance is allowed against a claimant and in favor of the estate, and no appeal is taken within the time provided therefor, the court may issue execution for such balance, which shall be collected in the same manner as an execution issued out of the district court.⁹⁸

899. Judgment on appeal to be certified to probate court—Statute—Upon the determination of an appeal from the allowance or disallowance of any claim or part thereof, the district court shall certify to the probate court the decision or judgment rendered therein.⁹⁹

900. Defences—Legal and equitable—Any defence, whether legal or equitable, may be interposed against a claim.¹ A contract made by the plaintiff with F. A. Samels, now deceased, and others, obligated the deceased to pay certain notes made by the plaintiff to a bank, provided

⁸⁹ *First Unitarian Society v. Houlston*, 96 Minn. 342, 105 N. W. 66.

⁹⁰ *Whitney v. Burd*, 29 Minn. 203, 12 N. W. 530; *Nelson v. Rogers*, 65 Minn. 246, 68 N. W. 18. See § 870.

⁹¹ *Johanson v. Hoff*, 70 Minn. 140, 143, 72 N. W. 965.

⁹² *Nelson v. Christensen (Wis.)* 172 N. W. 741.

⁹³ *Auerbach v. Gloyd*, 34 Minn. 500, 504, 27 N. W. 193.

⁹⁴ *Olson v. Fish*, 75 Minn. 228, 77 N. W. 818.

⁹⁵ *Thompson v. Black*, 200 Ill. 465, 65

N. E. 1092; *Hoblitt v. Sandmeyer*, 166 Ill. App. 431.

⁹⁶ *State v. Probate Court*, 145 Minn. 344, 177 N. W. 354.

⁹⁷ *C. W. Beggs, Sons & Co. v. Behrend's Estate*, 156 Wis. 34, 145 N. W. 207. See *First Nat. Bank v. Strait*, 65 Minn. 162, 167, 67 N. W. 987.

⁹⁸ G. S. 1913, § 7328.

⁹⁹ G. S. 1913, § 7332. See § 936.

¹ *Wilcox v. Powers*, 6 Mo. 145; *Foote v. Foote*, 61 Mich. 181, 192, 28 N. W. 90; *In re Roberts*, 214 N. Y. 369, 108 N. E. 562 (statute); 18 Cyc. 528; 24 C. J. 398; *Woerner*, *Am. Law of Adm.* (2 ed.) § 392.

certain of the parties to the contract indemnified and saved him harmless upon a liability to an investment company for which he was collaterally liable. They did not do so, and the liability was asserted against his estate. Held, that the contract did not impose an absolute and direct liability upon him to pay the notes at all events, and give him relief only by way of indemnity after payment; but that upon the failure of the parties to save the decedent harmless upon his obligation, as agreed in the contract, and the assertion of such obligation against the estate, the plaintiff could not recover for his failure to pay the notes.²

901. Claims barred by statute of limitations not allowable—Statute—

No claim or demand, or offset thereto, shall be allowed which was barred by the statute of limitations when filed.³ It is the duty of a representative to contest a claim on the ground that it is barred by the statute of limitations.⁴ A representative cannot by his promise or acknowledgment, oral or written, revive a debt against the estate barred by the statute of limitations.⁵ It is the duty of the court to ascertain the facts and to determine from them rather than from the face of the written claim whether the claim is barred.⁶ It is error for the probate court to allow a claim which on its face is barred by the statute of limitations and it is proper for it to set aside the allowance on the petition of an heir or other interested party.⁷ The objection that claims allowed were barred by the statute of limitations cannot be raised collaterally.⁸ The statute of limitations does not begin to run against a claim for services to the decedent, to be paid out of his estate, until his death.⁹ Where the original claim for services against a decedent's estate was filed in time to escape the bar of the statute of limitations, an amendment to such claim, germane to the original cause of action and amplifying the statements of the original claim, will be considered likewise as filed in time, though actually filed after the statute has run.¹⁰

² *Martin Market v. Samels' Estate* (Minn.) 186 N. W. 698.

³ G. S. 1913, § 7325; *Fallon v. Fallon*, 110 Minn. 213, 124 N. W. 994; *Wagner v. Seaberg*, 138 Minn. 37, 163 N. W. 975. See 24 C. J. 296.

⁴ *Schutz v. Morette*, 146 N. Y. 137, 40 N. E. 780. See *In re Gragg's Estate*, 32 Minn. 142, 19 N. W. 651; 18 Cyc. 424; 24 C. J. 297. In some states the representative need not interpose the statute of limitations against a claim which he deems just. *In re Baumhover's Estate*, 151 Iowa 146, 130 N. W. 817; 18 Cyc. 425; 24 C. J. 297; 11 R. C. L. 216.

⁵ *Schutz v. Morette*, 146 N. Y. 137, 40 N. E. 780. See 11 A. & E. Ency. of Law

(2 ed.) 921; 24 C. J. 299; 18 Cyc. 427; L. R. A. 1915B, 1016.

⁶ *In re Hawgood's Estate*, 37 S. D. 565, 159 N. W. 117.

⁷ *In re Brusha's Estate*, 87 Neb. 254, 126 N. W. 1079.

⁸ *Andrews v. Osborne*, 159 Mich. 77, 123 N. W. 599.

⁹ *In re Hess' Estate*, 57 Minn. 282, 59 N. W. 193; *Wagner v. Seaberg*, 138 Minn. 37, 163 N. W. 975; *Savage v. Minnesota Loan & Trust Co.*, 142 Minn. 187, 171 N. W. 778; *Welsh v. Welsh's Estate*, 148 Minn. 235, 181 N. W. 356.

¹⁰ *Hankins v. Young*, 174 Iowa 383, 156 N. W. 380.

902. Claims void under the statute of frauds—It is the duty of a representative to contest a claim on the ground that it is void under the statute of frauds and he is liable for devastavit if the estate suffers through his failure to do so.¹¹

903. Offset against claims—Statute—The executor or administrator, on or before the time set for hearing claims, shall file in the court a statement, in writing, of all offsets which he claims in favor of the estate against any of the claims filed, and the court, in its discretion, may allow the executor or administrator additional time for so filing an offset, and may set a day for hearing both the claim and offset.¹² It is the duty of representatives to assert by way of setoff claims of the estate against claims filed against the estate.¹³

904. Vacation of order allowing claims—The probate court may vacate an order allowing a claim for the purpose of permitting a contest thereon.¹⁴ The probate court erroneously allowed an outlawed claim. Held, that an action would not lie in the district court to restrain a sale of realty to pay the claim or to set aside the allowance of the claim on the ground of fraud under G. S. 1894, § 5434 (G. S. 1913, § 7910), if for no other reason, because the complaint did not show that the plaintiffs used due diligence to contest the allowance of the claim in the probate court.¹⁵

905. Extension of time to present claims—Statute—For cause shown, and upon notice to the executor or administrator, the court, in its discretion, may receive, hear, and allow a claim when presented before the final settlement of the administrator's or executor's account, and within one year and six months after the time when notice of the order was given.¹⁶ The court cannot allow a claim to be presented after one year and six months from the making and publication of the order limiting the time for creditors to present their claims.¹⁷ While the granting of an extension is discretionary with the probate court, it ought to be granted very freely where no injury can result to innocent parties and the administration will not be materially delayed, if the applicant has a meritorious claim, makes any reasonable excuse for his delay and proceeds with reasonable diligence after actual knowledge of the default. The mere fact that the claimant or his attorney was negligent is not conclusive against granting the relief. All meritorious claims should be allowed unless there are special and strong reasons against it. Grant-

¹¹ *Haskell v. Manson*, 200 Mass. 599, 86 N. E. 937. See *Welsh v. Welsh's Estate*, 148 Minn. 235, 181 N. W. 356.

¹² G. S. 1913, § 7324. See 18 Cyc. 507; 24 C. J. 378.

¹³ *People v. McCutcheon*, 40 Mich. 244, 246; *Stearns v. Stearns*, 30 Vt. 213, 217; *Woerner*, Am. Law of Adm. (2 ed.) § 398.

¹⁴ *In re Gragg's Estate*, 32 Minn. 142, 19 N. W. 651; *In re Kidder's Estate*, 53 Minn. 529, 55 N. W. 738.

¹⁵ *O'Brien v. Larson*, 71 Minn. 371, 74 N. W. 148.

¹⁶ G. S. 1913, § 7322.

¹⁷ *State v. Probate Court*, 145 Minn. 344, 177 N. W. 354.

ing an application made with reasonable diligence after actual knowledge of the default should be the general rule; refusing it the exception.¹⁸ When a contingent claim becomes absolute after the time limited for presenting claims but before the administration is closed an application to present the claim should ordinarily be granted as a matter of course.¹⁹ Relief may be more freely granted than in opening a default in an ordinary civil action in the district court.²⁰ Relief may be granted for excusable negligence of either a claimant or his attorney. Relief will not be granted as of course for the neglect of an attorney though the claimant is free from fault.²¹ The applicant must present a claim apparently good on the merits, duly prepared and verified as required by G. S. 1913, § 7323, excuse his neglect to file in time, and show good cause for the relief sought. If the neglect was that of the attorney of the applicant his affidavit together with that of the applicant should be presented.²² The claimant must proceed with reasonable diligence after discovering the default.²³ The fact that the claimant erroneously supposed that he could not present a claim until the contract on which it was based was fully performed is not a conclusive reason why relief should be granted.²⁴ The fact that the claimant did not know the ex-

¹⁸ *Massachusetts Mutual Life Ins. Co. v. Estate of Elliott*, 24 Minn. 134 (refusal to grant extension sustained); *In re Mills' Estate*, 34 Minn. 296, 25 N. W. 631 (grant of extension sustained); *State v. Probate Court*, 42 Minn. 54, 43 N. W. 692 (refusal to grant extension sustained on account of laches of applicant); *Gibson v. Brennan*, 46 Minn. 92, 48 N. W. 460 (refusal to grant extension sustained); *St. Croix Boom Corporation v. Brown*, 47 Minn. 281, 50 N. W. 197 (refusal to grant extension sustained—delay of claimant inexcusable—fact that claimant did not know exact amount of claim no excuse); *State v. Probate Court*, 67 Minn. 51, 69 N. W. 609, 908 (refusal to grant extension reversed—fact that claim has been allowed in another state not alone sufficient ground for denying application); *State v. Probate Court*, 79 Minn. 257, 82 N. W. 580 (refusal of probate court to grant extension held properly reversed by the district court—courts should be very liberal in relieving claimants); *Hunt v. Burns*, 90 Minn. 172, 176, 95 N. W. 1110 (when a contingent claim becomes absolute after the time limited for presenting claims but before the administration is closed the application should ordinarily be granted as a matter of

course); *State v. Williams*, 123 Minn. 57, 42 N. W. 945 (refusal to grant extension sustained—relief should be granted liberally); *State v. Ross*, 133 Minn. 172, 157 N. W. 1075 (refusal to grant extension sustained—inexcusable delay after knowledge of default). See *Schurmeler v. Connecticut Life Ins. Co.*, 171 Fed. 1.

¹⁹ *Hunt v. Burns*, 90 Minn. 172, 176, 95 N. W. 1110.

²⁰ *In re Mills' Estate*, 34 Minn. 296, 25 N. W. 631; *State v. Probate Court*, 67 Minn. 51, 69 N. W. 609, 908; *State v. Ross*, 133 Minn. 172, 157 N. W. 1075.

²¹ *State v. Probate Court*, 79 Minn. 257, 82 N. W. 580; *State v. Williams*, 123 Minn. 57, 142 N. W. 945; *State v. Ross*, 133 Minn. 172, 157 N. W. 1075.

²² *Gibson v. Brennan*, 46 Minn. 92, 48 N. W. 460; *State v. Williams*, 123 Minn. 57, 142 N. W. 945; *State v. Ross*, 133 Minn. 172, 157 N. W. 1075.

²³ *State v. Probate Court*, 42 Minn. 54, 43 N. W. 692; *Gibson v. Brennan*, 46 Minn. 92, 48 N. W. 460; *St. Croix Boom Corporation v. Brown*, 47 Minn. 281, 50 N. W. 197; *State v. Ross*, 133 Minn. 172, 157 N. W. 1075.

²⁴ *Gibson v. Brennan*, 46 Minn. 92, 48 N. W. 460.

act amount of his claim before the expiration of the time limited for presenting claims is not a conclusive reason why relief should be granted.²⁵ The application must be made "within one year and six months after the time when notice of the order was given."²⁶ The probate court may set aside a final decree to allow a creditor to file a claim after the time limited.²⁷ An order granting an application cannot be carried to the supreme or district court for review by certiorari. The remedy is an appeal to the district court from the order allowing the claim or directing its payment and a subsequent appeal from the district court to the supreme court.²⁸ In the absence of some special emergency the supreme court will not issue a writ of certiorari to review an order of the probate court denying an application for an extension of time for the presentation of claims, but will leave the applicant to his remedy in the district court, which has jurisdiction to issue the writ in such cases.²⁹ Certiorari will not lie to review an order of the probate court whereby, after a claim against the estate of a deceased person had been filed for allowance, and after the time fixed for presentation of claims had expired, it permitted such claim to be amended upon the petition of third parties having an interest in the same. The remedy is ample by an appeal from the order allowing the claim, if there be such an order made.³⁰ To secure a review on appeal to the supreme court the record must contain all the facts upon which the action of the lower court was based.³¹ The supreme court will not reverse the action of the lower court in granting or denying an application except for a clear abuse of discretion.³²

906. Claims for funeral expenses and last sickness—Claims for funeral expenses of the decedent need not be presented to the probate court for allowance in order to charge the representative. He is liable for them personally, if he has assets therefor, and if he pays them he is entitled to credit therefor in his final account as an expense of administration. There is no distinction between executors and administrators in this regard.³³ While claims for funeral expenses need not be presented

²⁵ *St. Croix Boom Corporation v. Brown*, 47 Minn. 281, 50 N. W. 197.

²⁶ G. S. 1913, § 7322; *Hantzch v. Massolt*, 61 Minn. 361, 366, 63 N. W. 1069; *Berryhill v. Peabody*, 77 Minn. 59, 61, 79 N. W. 651; *Connecticut Mutual Life Ins. Co. v. Schurmeier*, 117 Minn. 473, 136 N. W. 1. This limitation does not apply to a contingent claim which does not become absolute within that time if it becomes absolute before the administration is finally closed. *Hunt v. Burns*, 90 Minn. 172, 95 N. W. 1110.

²⁷ *State v. Bazille*, 89 Minn. 440, 95 N. W. 211.

²⁸ *State v. Probate Court*, 28 Minn. 381, 10 N. W. 209; *State v. Probate Court*, 142 Minn. 499, 172 N. W. 210.

²⁹ *State v. Probate Court*, 142 Minn. 499, 172 N. W. 210.

³⁰ *State v. Probate Court*, 72 Minn. 434, 75 N. W. 700.

³¹ *Gibson v. Brennan*, 46 Minn. 92, 48 N. W. 460.

³² *Gibson v. Brennan*, 46 Minn. 92, 48 N. W. 460; *State v. Ross*, 133 Minn. 172, 157 N. W. 1075.

³³ *Dampier v. St. Paul Trust Co.*, 46 Minn. 526, 49 N. W. 286; *Barrett v. Heim* (Minn.) 188 N. W. 207.

to the probate court for allowance in order to charge the representative therefor they may be presented to the probate court and allowed as a claim against the estate. They have a double aspect. By common law they are a charge against the representative and by G. S. 1913, § 7338, they are also a direct charge against the estate and may be presented and allowed as such. The creditor has alternative remedies.³⁴ Under G. S. 1913, § 7338, funeral expenses and expenses of last sickness are a direct charge on the estate of the decedent. The liability of either husband or wife therefor is secondary and if they pay them they may present a claim therefor to the probate court and have it allowed as a claim against the estate.³⁵ Funeral expenses incurred by a widow are a legitimate charge on the estate. If she pays for them and is reimbursed by the representative the latter is entitled to reimbursement out of the estate.³⁶ Funeral expenses are not a charge on the allowance to a widow under G. S. 1913, § 7243(1).³⁷ A claim for a "wake" over the remains of the decedent has been disallowed.³⁸

907. Secured claims—In general—It is proper to present secured claims in all cases, but it is not necessary to do so to preserve the lien and the right to resort to the specific property covered. It is necessary to do so in order to share in the general assets of the estate. Presenting a secured claim is not a waiver of the lien. The claim may be proved to the full amount thereof and not merely to the difference between the amount of the claim and the value of the security.³⁹ The security is not affected by the fact that the claimant presents the claim without mentioning the fact that it is secured.⁴⁰ The mere fact that a foreign creditor has collateral security for his claim is no reason why it should not be presented and allowed.⁴¹ A claim for a mechanic's lien need not

³⁴ Booth v. Radford, 57 Mich. 357, 24 N. W. 102; Schneider v. Breier's Estate, 129 Wis. 446, 109 N. W. 99. The case of Dampier v. St. Paul Trust Co., 46 Minn. 526, 49 N. W. 286, merely decides that such claims need not be presented to the probate court for allowance in order to charge the representative therefor. It does not decide that they cannot be so presented and allowed. Moreover, the case was decided under a statute narrower than the present one. See 18 Cyc. 437; 11 R. C. L. 223; 33 L. R. A. 660; 52 L. R. A. (N. S.) 1152; Ann. Cas. 1915D, 746.

³⁵ Constantinides v. Walsh, 146 Mass. 281, 15 N. E. 631; In re Skillman's Estate, 146 Iowa 601, 125 N. W. 343; Hayes v. Gill, 226 Mass. 388; 115 N. E. 492;

Woerner, Am. Law of Adm. (2 ed.) § 358; Ann. Cas. 1917B, 1166.

³⁶ McNally v. Weld, 30 Minn. 209, 14 N. W. 895.

³⁷ Barrett v. Helm (Minn.) 188 N. W. 207.

³⁸ Becker v. Bohmert, 63 Minn. 403, 65 N. W. 728.

³⁹ Fowler v. Mickley, 39 Minn. 28, 38 N. W. 634; Byrnes v. Sexton, 62 Minn. 135, 138, 64 N. W. 155; 8 A. & E. Ency. of Law (2 ed.) 1069; 18 Cyc. 464; 24 C. J. 333; 11 R. C. L. 207; Woerner, Am. Law of Adm. (2 ed.) § 408.

⁴⁰ Kendrick State Bank v. Barnum, 31 Idaho 562, 173 Pac. 1144. See 2 A. L. R. 1132.

⁴¹ State v. Probate Court, 67 Minn. 51, 69 N. W. 609, 908

be presented so far as the land affected is concerned.⁴² In an action by a lien claimant to foreclose his lien, perfected for material supplied the contractor, the personal representative of the contractor, who died before the commencement of the action, is a proper if not necessary party to the action, and the determination in that action of the amount due the lien claimant, an incidental issue, is conclusive upon the estate of the deceased contractor.⁴³ A pledgee need not present his claim unless he desires to come in and share as a general creditor.⁴⁴ Provision is made by statute for the payment of secured claims by leave of court, though they have not been presented for allowance.⁴⁵ If the estate is insolvent secured claims cannot be paid at all until the creditor has first exhausted his security or released or surrendered it.⁴⁶

908. Claims secured by mortgages—A claim secured by a real estate mortgage may be presented and proved to the full amount. It need not be presented in order to preserve the lien, but it must be presented in order to entitle the mortgagee to share in the general assets of the estate for any deficiency on the foreclosure of the mortgage.⁴⁷ The same rule applies to claims secured by chattel mortgages. It is sufficient to file the note without filing the mortgage.⁴⁸ The claim need not be presented in order to entitle a devisee to have the land exonerated out of the personal estate.⁴⁹ The lien of the mortgage is not lost merely because the mortgagee files the note without the mortgage and does not disclose the fact that the claim is secured.⁵⁰ Claims secured by mortgage may be paid with leave of court without being proved and allowed.⁵¹

909. Claims in judgment—Execution—Claims arising upon contract which have passed into judgment must be presented to the probate court to enable the judgment creditor to share with the general creditors.⁵² While such claims have to be presented to the probate court by

⁴² *Fish v. De Laray*, 8 S. D. 320, 66 N. W. 465. See *Shevlin-Carpenter Lumber Co. v. Taylor*, 124 Minn. 132, 144 N. W. 472; *F. T. Crowe & Co. v. Adkinson Const. Co.*, 67 Wash. 420, 121 Pac. 841. See Ann. Cas. 1913D, 275.

⁴³ *Shevlin-Carpenter Lumber Co. v. Taylor*, 124 Minn. 132, 144 N. W. 472.

⁴⁴ *In re Kibbe's Estate*, 57 Cal. 407; *In re Galland's Estate*, 92 Cal. 293, 294, 28 Pac. 287.

⁴⁵ See § 937.

⁴⁶ See § 940.

⁴⁷ *Hill v. Townley*, 45 Minn. 167, 47 N. W. 653; *Innis v. Flint*, 106 Minn. 343, 119 N. W. 48; *Pereles v. Lefser*, 119 Wis. 347, 96 N. W. 799; *Schmidt v. Grenzow*, 162 Wis. 301, 156 N. W. 143; *In re Ber-*

nal, 165 Cal. 223, 131 Pac. 375; *Kelsey v. Welch*, 8 S. D. 255, 66 N. W. 390 (statute); 8 A. & E. Ency. of Law (2 ed.) 1070; 18 Cyc. 464; 24 C. J. 334; Ann. Cas. 1917B, 156.

⁴⁸ *Massey v. Fralish*, 37 S. D. 91, 156 N. W. 791.

⁴⁹ *In re Brackey's Estate*, 166 Iowa 109, 147 N. W. 188; *Smith v. Kibbe* (Kan.) 178 Pac. 427.

⁵⁰ *Kendrick State Bank v. Barnum*, 31 Idaho 562, 173 Pac. 1144. See 2 A. L. R. 1132.

⁵¹ See § 937.

⁵² *Fowler v. Mickley*, 39 Minn. 28, 38 N. W. 634; *Byrnes v. Sexton*, 62 Minn. 135, 64 N. W. 155; *Scroggs v. Tutt*, 20 Kan. 271, 23 Kan. 181; *Sanders v. Rus-*

filing duly authenticated copies of the judgment, they do not have to be presented as ordinary claims for allowance by that court.⁵³ A judgment creditor who has acquired no lien prior to the death of the debtor must present his claim as a general creditor. The statute (G. S. 1913, § 7926) authorizing the issue of execution on money judgments after the death of the judgment debtor is limited to cases where a lien was acquired prior to his death.⁵⁴ This rule applies to a judgment recovered in another state, including a judgment allowing a claim against the estate of a decedent in the course of administration proceedings.⁵⁵ If a judgment has become a lien on the property of the decedent before his death it need not be presented to the probate court in order to preserve the lien, and if it is presented, its allowance by the probate court does not affect its force as a lien. Execution may issue thereon after the expiration of a year from the death of the decedent.⁵⁶ A judgment may be used as a setoff against a judgment in favor of a representative without having been presented to the probate court.⁵⁷

910. Contingent claims—A contingent claim is one where the liability depends on some future event which may or may not happen and it is therefore uncertain whether there ever will be a liability or not.⁵⁸ A claim is not contingent merely because of the uncertainty that always attends a lawsuit.⁵⁹ A contingent claim which does not become absolute and capable of liquidation during administration need not be pre-

sell, 86 Cal. 119, 24 Pac. 852; *Fields v. Munday*, 106 Wis. 383, 82 N. W. 343; *Mc-Faul v. Haley*, 166 Mo. 56, 65 S. W. 995; 8 A. & E. Ency. of Law (2 ed.) 1063; 18 Cyc. 463; 24 C. J. 332; 11 R. C. L. 207.

⁵³ See § 936.

⁵⁴ *Byrnes v. Sexton*, 62 Minn. 135, 64 N. W. 155. See § 1140; *Woerner*, Am. Law of Adm. (2 ed.) § 410.

⁵⁵ *Fields v. Munday*, 106 Wis. 383, 42 N. W. 343.

⁵⁶ *Fowler v. Mickley*, 39 Minn. 28, 38 N. W. 634; *Byrnes v. Sexton*, 62 Minn. 135, 64 N. W. 155; *Morton v. Adams*, 124 Cal. 229, 56 Pac. 1038; *Boyd v. Collins*, 70 Iowa 296, 30 N. W. 574. See G. S. 1913, § 7926; 24 C. J. 332.

⁵⁷ *Martin County Nat. Bank v. Bird*, 92 Minn. 110, 99 N. W. 780.

⁵⁸ *Palmer v. Pollock*, 26 Minn. 433, 4 N. W. 1113 (claim on bond of administrator); *Hantzsch v. Massolt*, 61 Minn. 361, 364, 63 N. W. 1060 (claim against estates of deceased sureties on a guardian's bond held contingent); *State v. Probate Court*, 66 Minn. 246, 68 N. W.

1063 (claim on subscription for stock held not contingent); *Lake Phalen Land and Improvement Co. v. Lindeke*, 66 Minn. 209, 68 N. W. 974 (claim against distributees of estate of deceased subscriber for stock held contingent); *Fitzhugh v. Harrison*, 75 Minn. 481, 489, 78 N. W. 95 (liability to reimburse others out of the sale of property held contingent but becoming absolute at or before the death of the decedent); *Berryhill v. Peabody*, 77 Minn. 59, 79 N. W. 651 (liability of sureties on bond of assignee in insolvency held contingent); *Jorgenson v. Larson*, 85 Minn. 134, 88 N. W. 439 (claim of purchaser against vendor of land for damages from refusal of vendor's wife to sign deed held absolute upon such refusal); *Dallas Compress Co. v. Leopold* (Ala.) 88 So. 681 (claim on covenant of warranty); 8 A. & E. Ency. of Law (2 ed.) 1065; 18 Cyc. 456; 24 C. J. 325; *Woerner*, Am. Law of Adm. (2 ed.) § 394; 58 L. R. A. 82; 32 Harv. L. Rev. 330.

⁵⁹ *Jorgenson v. Larson*, 85 Minn. 134, 88 N. W. 439.

sented to the probate court and is not allowable therein.⁶⁰ If a contingent claim becomes absolute and capable of liquidation before the expiration of the time limited for the presentation of claims in the probate court it will be forever barred if not so presented.⁶¹ If a contingent claim becomes absolute and capable of liquidation after the time limited for the presentation of claims to the probate court, but before final settlement, application must be made for leave to file it or it will be barred.⁶² A claim secured by a real estate mortgage is not contingent merely because it is uncertain whether there will be a deficiency after foreclosure.⁶³ A claim payable on the death of another person is not contingent, for death is inevitable.⁶⁴

911. Claims not yet due—Claims not due but which run to a certain maturity must be presented though they will not mature within the time limited for presenting claims.⁶⁵ Where the maker of a promissory note dies, the note, even though not due, is provable as a claim against his estate payable presently, the same as if past due. Such is also the case where one of two or more makers of a joint and several note not yet due dies. If the holder of such a note files it as a claim against the estate of a deceased maker, and it is allowed by the court and paid by the representative, a suit for contribution against the comakers accrues at once.⁶⁶

912. Claims for an amount not known—It is no excuse for not presenting a claim that the exact amount thereof is not known.⁶⁷

913. Claims on contracts not fully performed—A claim arising out of contract must be presented though the contract has not been fully performed.⁶⁸

⁶⁰ *In re Martin's Estate*, 56 Minn. 420, 57 N. W. 1065; *Hantzch v. Massolt*, 61 Minn. 361, 63 N. W. 1069; *Oswald v. Pillsbury*, 61 Minn. 520, 63 N. W. 1072; *Lake Phalen Land & Imp. Co. v. Lindeke*, 66 Minn. 209, 68 N. W. 974; *Berryhill v. Peabody*, 72 Minn. 232, 75 N. W. 220; *Dent v. Matteson*, 70 Minn. 519, 73 N. W. 416; *Id.*, 73 Minn. 170, 75 N. W. 1041. See, under former statute, *McKeen v. Waldron*, 25 Minn. 466; *Palmer v. Pollock*, 26 Minn. 433, 4 N. W. 1113; *Hospes v. Northwestern Mfg. & Car Co.*, 48 Minn. 174, 50 N. W. 1117.

⁶¹ *Fitzhugh v. Harrison*, 75 Minn. 481, 489, 78 N. W. 95.

⁶² *Jorgenson v. Larson*, 85 Minn. 134, 88 N. W. 439; *Hunt v. Burns*, 90 Minn. 172, 95 N. W. 1110; *Schurmeier v. Connecticut Life Ins. Co.*, 137 Fed. 42.

⁶³ *Schmidt v. Grenzow*, 162 Wis. 301, 156 N. W. 143.

⁶⁴ *McDaniel v. Putnam*, 100 Kan. 550, 164 Pac. 1167.

⁶⁵ *Bolles v. Boyer*, 141 Minn. 404, 170 N. W. 229; *Morgan v. Hamlet*, 113 U. S. 449; *Pratt v. Lamson*, 128 Mass. 528; *Schmidt v. Grenzow*, 162 Wis. 301, 156 N. W. 143. See *Oswald v. Pillsbury*, 61 Minn. 520, 63 N. W. 1072; *Johanson v. Hoff*, 63 Minn. 296, 65 N. W. 464; 8 A. & E. Ency. of Law (2 ed.) 1069; 18 Cyc. 418, 461; 24 C. J. 329; *Woerner*, Am. Law of Adm. (2 ed.) § 393; L. R. A. 1906A, 1185 (remedy where estate has been distributed before claim accrued).

⁶⁶ *Bolles v. Boyer*, 141 Minn. 404, 170 N. W. 229.

⁶⁷ *St. Croix Boom Corporation v. Brown*, 47 Minn. 281, 50 N. W. 197.

⁶⁸ *Gibson v. Brennan*, 46 Minn. 92, 48 N. W. 460.

914. Equitable claims—Contribution—Subrogation—Equitable claims arising out of contract, as for example, claims for contribution between cosureties, may be presented and are to be determined by equitable rules.⁶⁹ Claims calling for equitable relief beyond the jurisdiction of the probate court need not be presented.⁷⁰ A claim based on the equitable doctrine of subrogation may be presented.⁷¹

915. Claim of beneficiary to a trust fund—A claim of a beneficiary to a trust fund of which the decedent was trustee need not be presented if the fund can be traced. In such a case the beneficiary is seeking his own property only and is not seeking to enforce a claim against the estate of the decedent. If the beneficiary seeks to come in and share as a general creditor of the estate he must present his claim.⁷²

916. Claims of legatees—The mere fact that a claimant is a legatee under the will of the decedent does not prevent him from enforcing his claim against the estate.⁷³

917. Claims for necessities furnished minor decedent—An estate of a minor is liable for necessities furnished him and if his parents do not support him those who care for him are entitled to compensation out of his estate.⁷⁴

918. Claim of state for support of insane decedent—Statute—Whenever any patient in a state institution for the insane dies and does not leave surviving him spouse, children, grandchildren or parents, then and in such case the state shall have a claim for maintenance, treatment and support against the estate of such deceased person, which claim shall be computed at the rate of one hundred twenty dollars per year for the time such person was in such institution and be verified by the superintendent of the institution wherein such deceased person was confined. Provided, however, that the estate of such deceased insane person shall be entitled to a credit upon such claim of any sum or sums of money that may have been paid to the state for his or her maintenance, treatment or support in such institution.⁷⁵ This statute is not retroactive. It does not entitle the state to a distributive share of the estate but only to reimbursement for expenses incurred for the pur-

⁶⁹ *Tiego v. Cunningham's Estate*, 267 Ill. 367, 108 N. E. 350.

⁷⁰ *Toulouse v. Burkett*, 2 Idaho 184, 10 Pac. 26 (reformation of contract—cancellation of deed—enforcement of vendor's lien); *Tyler v. Mayre*, 95 Cal. 160, 168, 27 Pac. 160. 30 Pac. 196 (enforcement of trust); *Kline v. Gingery*, 25 S. D. 320, 124 N. W. 958 (rescission of contract).

⁷¹ See §§ 876, 889, 914, 921, 927, 936.

⁷² *Lathrop v. Rampton*, 31 Cal. 24;

McGrath v. Carroll, 110 Cal. 79, 42 Pac. 466; *Bemmerly v. Woodward*, 124 Cal. 568, 57 Pac. 561; *Meade County v. Welch*, 34 S. D. 348, 148 N. W. 601; 8 A. & E. Ency. of Law (2 ed.) 1064; 18 Cyc. 467; 24 C. J. 334.

⁷³ *McNaughton v. McClure* (Wis.) 171 N. W. 936. See §§ 921, 927.

⁷⁴ *In re Pauly's Estate*, 174 Iowa 122, 156 N. W. 355.

⁷⁵ Laws 1917, c. 409.

poses specified. The rights of the state under the statute are only those of a creditor.⁷⁶

919. Claims of county—A claim of a county for the care of an insane person in the state hospital against his estate, is in the nature of quasi contract and must be presented.⁷⁷

920. Claims of representative against the estate—Retainer—Claims of the representative against the estate must be presented under the same conditions as the claims of other persons.⁷⁸ The common-law right of retainer has undoubtedly been abolished in this state by our statutes providing for the presentation of claims to the probate court.⁷⁹

921. Claims of widow for money advanced—If a widow advances her own money for the payment of preferred claims against her husband's estate she may file a claim for reimbursement. She is not a mere volunteer or officious intermeddler in the payment of such claims.⁸⁰

922. Claims for taxes—The statute does not apply to taxes. They are not claims "arising upon contract." Formerly the statute expressly included taxes.⁸¹

923. Claim for specific personal property—A claim for specific personal property need not be presented.⁸²

924. Claims for specific real property—A claim for specific real property need not be presented.⁸³

925. Claims against deceased partners—A creditor of a partnership must file his claim against the estate of a deceased partner in order to share in the assets of the estate.⁸⁴ Presentation of a claim against the estate of a deceased partner is not necessary to enforce it against surviving partners.⁸⁵ A surviving partner is not required to present a claim against the partnership, arising out of partnership transactions, to enable him to assert it in the settlement of partnership affairs, but he must present it against the estate of a deceased partner if he wishes to share in the assets of such estate.⁸⁶

⁷⁶ *State v. Probate Court*, 142 Minn. 283, 171 N. W. 928.

⁷⁷ *Meade County v. Welch*, 34 S. D. 348, 148 N. W. 601; *In re Jacob's Estate*, 119 Iowa 176, 93 N. W. 94.

⁷⁸ *In re Hodges' Estate*, 157 Mich. 198, 121 N. W. 748; *In re Ring's Estate*, 132 Iowa, 216, 109 N. W. 710; *In re Hildebrandt's Estate*, 92 Cal. 433, 28 Pac. 486; 8 A. & E. Ency. of Law (2 ed.) 1072; 18 Cyc. 462; 24 C. J. 331; 11 R. C. L. 203; Woerner, Am. Law of Adm. (2 ed.) § 395.

⁷⁹ See Woerner, Am. Law of Adm. (2 ed.) § 395; 24 C. J. 440.

⁸⁰ *Merrill v. Comstock*, 154 Wis. 434, 143 N. W. 313. See § 906.

⁸¹ *McAlpine v. Kratka*, 92 Minn. 411, 414, 100 N. W. 233. See *In re Jefferson's Estate*, 35 Minn. 215, 28 N. W. 256.

⁸² *Truman v. Dakota Trust Co.*, 29 N. D. 456, 151 N. W. 219; *Sprague v. Walton*, 145 Cal. 228, 78 Pac. 645 (claim for money which may be identified in specie need not be presented).

⁸³ *Brown v. Sebastopol*, 153 Cal. 704, 96 Pac. 363.

⁸⁴ *Hawkins v. Mahoney*, 71 Minn. 155, 164, 73 N. W. 720; 8 A. & E. Ency. of Law (2 ed.) 1065.

⁸⁵ *Corson v. Berson*, 86 Cal. 433, 25 Pac. 7.

⁸⁶ *In re Kahn*, 18 Mo. App. 426.

926. Claims on implied or quasi contracts—Claims for services to decedent—Claims founded on contracts or promises implied by law, that is, quasi contracts, must be presented, if the obligation is not grounded in tort.⁸⁷ Claims for money had and received through fraudulent representations in a sale need not be presented.⁸⁸ Claims upon implied contract for the reasonable value of services rendered the decedent by members of his family or others are presentable.⁸⁹

927. Claims of surviving spouse—A claim of a wife under a contract with her deceased husband may be presented.⁹⁰ The statute making both husband and wife liable to third parties for necessities furnished the family does not change the rule that, as between husband and wife, the duty to furnish such necessities rests upon the husband. Where the wife pays for such necessities out of her own funds as a contribution toward the family expenses and without expecting reimbursement therefor, she is not entitled to recover the amount so paid from the estate of her husband; but where she makes such payments without an understanding that they are a contribution by her toward such expenses for which no reimbursement is expected, she may recover the amount thereof from his estate.⁹¹ A claim of a widow of the decedent for money advanced by her to pay his debts may be presented and allowed as a claim against his estate.⁹² A claim of a surviving spouse for an allowance pending administration is not presentable.⁹³

928. Claims arising out of promises to make a devise or bequest—A claim to a portion or the whole of an estate under a promise of the decedent to make a devise or bequest to the claimant is not presentable to the probate court.⁹⁴ Where the decedent promised a claimant to make a will in his favor in return for services and neglects to do so the claim-

⁸⁷ *Berryhill v. Gasquoine*, 88 Minn. 281, 92 N. W. 1121; *Meade County v. Welch*, 34 S. D. 348, 148 N. W. 601.

⁸⁸ *Selkregg v. Thomas*, 27 Colo. App. 259, 149 Pac. 273.

⁸⁹ *Schwab v. Pierro*, 43 Minn. 520, 46 N. W. 71; *Donahue v. Donahue*, 53 Minn. 460, 55 N. W. 602; *Becker v. Bohmert*, 63 Minn. 403, 65 N. W. 728; *Fitzgerald v. English*, 73 Minn. 266, 76 N. W. 27; *Meehan v. Meehan*, 119 Minn. 35, 137 N. W. 163; *Beneke v. Estate of Beneke*, 119 Minn. 441, 138 N. W. 689; *Maycroft v. Maycroft*, 120 Minn. 529, 139 N. W. 1134; *Knight v. Martin*, 124 Minn. 191, 144 N. W. 941; *Lansing v. Gregory*, 128 Minn. 496, 151 N. W. 277; *Lovell v. Beedle*, 138 Minn. 12, 163 N. W. 778; *Wagner v. Seaberg*, 138 Minn. 37, 163 N. W. 975; *Sav-*

age v. Minnesota Loan & Trust Co., 142 Minn. 187, 171 N. W. 778; *Welsh v. Welsh's Estate*, 148 Minn. 235, 181 N. W. 356. See *Dunnell*, Minn. Digest and Supplements, §§ 7307, 10375; 11 L. R. A. (N. S.) 873; 133 Am. St. Rep. 250; *Woerner*, Am. Law of Adm. (2 ed.) § 396; 18 Cyc. 409; 24 C. J. 277.

⁹⁰ *Rule v. Carey*, 178 Iowa 184, 159 N. W. 699.

⁹¹ *Kosanke v. Kosanke*, 137 Minn. 115, 162 N. W. 1060.

⁹² *Johnston v. Frank*, 97 Neb. 190, 149 N. W. 409.

⁹³ *In re McCausland's Estate*, 52 Cal. 568, 577.

⁹⁴ *Odenbreit v. Utheim*, 131 Minn. 56, 60, 154 N. W. 741; *Oles v. Wilson*, 57 Colo. 246, 141 Pac. 489. See § 152.

ant may present a claim to the probate court for the reasonable value of the services as upon implied contract.⁹⁵

929. Claims of non-residents—Claims of non-residents stand on the same footing as those of residents and must be presented and allowed under like conditions. It is immaterial that there are no more assets than will pay the domestic creditors alone.⁹⁶ The fact that a claim has been presented and allowed in another state is no objection to its being presented and allowed in this state.⁹⁷

930. Claims arising out of state—Claims arising out of contracts entered into out of the state must be presented under the same conditions as claims arising out of domestic contracts.⁹⁸

931. Claims arising out of contracts of representative—Claims arising out of contracts of the representative are not presentable.⁹⁹

932. Claims for services to wife of decedent—A guardian of an insane person, clothed with the management and control of the ward's property and affairs is authorized, without first obtaining the approval of the probate court, to employ an attendant to care for and render assistance to the invalid wife of the ward. When such employment is necessary, and the employment is in good faith, without purpose to unnecessarily burden the estate with expense, the reasonable value of the services rendered thereunder is a valid claim against the estate of the ward. If the ward dies before payment, the claim may be presented for allowance in the proceedings for the administration of his estate.¹

933. Claims for services attaching to homestead—Whether claims for services, attaching to a homestead by virtue of the exception to the homestead exemption provided for in section twelve of article one of the constitution, must be enforced in the probate court if an order is made limiting the time for the presentation of claims, is an open question.²

934. Claims held provable in probate court—A claim of a judgment creditor of a corporation against a stockholder for unpaid stock;³ a claim for a deficiency on the foreclosure of a real estate mortgage;⁴ a claim for damages for a breach of warranty in the sale of personal prop-

⁹⁵ Schwab v. Pierro, 43 Minn. 520, 46 N. W. 71. See Meehan v. Meehan, 119 Minn. 35, 137 N. W. 163; 18 Cyc. 415.

⁹⁶ Findley v. Gidney, 75 N. C. 395; Fields v. Mundy's Estate, 106 Wis. 383, 82 N. W. 343.

⁹⁷ State v. Probate Court, 67 Minn. 51, 69 N. W. 609, 908. See § 1202.

⁹⁸ Jones v. Drewry, 72 Ala. 311.

⁹⁹ C. W. Beggs, Sons & Co. v. Behrend's Estate, 156 Wis. 34, 145 N. W. 207; 8 A. & F. Ency. of Law (2 ed.) 1064;

Woerner, Am. Law of Adm. (2 ed.) § 356. See § 733.

¹ Matthews v. Mires, 135 Minn. 94, 160 N. W. 187.

² Ramstadt v. Thunem, 136 Minn. 222, 161 N. W. 413. See §§ 821, 887.

³ Nolan v. Hazen, 44 Minn. 478, 47 N. W. 155. See State v. Probate Court, 66 Minn. 246, 68 N. W. 1063.

⁴ Hill v. Townley, 45 Minn. 167, 47 N. W. 653.

erty; ⁵ a claim of a receiver of an insolvent corporation against a stockholder on an assessment levied on his stock under G. S. 1913, § 6646; ⁶ a claim of a receiver of an insolvent corporation against stockholders on an assessment levied on their stock, the claim being contingent during the time limited for presenting claims to the probate court but becoming absolute before the estate was closed; ⁷ a claim on a promise implied by law to restore property or its value which had been received under an erroneous judgment which was afterwards vacated; ⁸ a claim by a purchaser of land against the vendor for damages from the failure or refusal of the wife of the vendor to join in the deed; ⁹ a claim on a liability to reimburse others in connection with a land contract contingent on the performance by the obligor of his agreement to sell within a reasonable time certain reserved property for an amount sufficient to reimburse them, his liability becoming absolute at or before his death by his failing to perform his agreement; ¹⁰ a claim of a receiver of an insolvent corporation against a stockholder of the corporation for an unpaid subscription for stock; ¹¹ a claim on a note of the decedent given for a charity; ¹² a claim of an attorney for services in foreclosing a mortgage; ¹³ a claim for services in caring for decedent during his last sickness; ¹⁴ a claim ex contractu passed into judgment; ¹⁵ a claim for personal property taxes; ¹⁶ a claim of a nephew of the decedent, and a member of his family, for services rendered to the decedent under an implied agreement for compensation; ¹⁷ a claim for breach of a covenant against incumbrances; ¹⁸ a claim for rent under a lease to the decedent accruing after his death; ¹⁹ a claim for services rendered the invalid wife of decedent; ²⁰ a claim of a wife for reimbursement for money paid by her for household necessities; ²¹ a claim arising under the terms of a loan of money to the decedent for his life upon condition that at his

⁵ *Clark v. Gates*, 84 Minn. 381, 87 N. W. 941.

⁶ *Neff v. Lamm*, 99 Minn. 115, 108 N. W. 849.

⁷ *Hunt v. Burns*, 90 Minn. 172, 95 N. W. 1110.

⁸ *Berryhill v. Gasquoine*, 88 Minn. 281, 92 N. W. 1121.

⁹ *Jorgenson v. Larson*, 85 Minn. 134, 88 N. W. 439.

¹⁰ *Fitzhugh v. Harrison*, 75 Minn. 481, 78 N. W. 95.

¹¹ *State v. Probate Court*, 66 Minn. 246, 68 N. W. 1063.

¹² *Albert Lea College v. Brown*, 88 Minn. 524, 93 N. W. 672.

¹³ *Merrick v. Putnam*, 73 Minn. 240, 75 N. W. 1047.

¹⁴ *Fitzgerald v. English*, 73 Minn. 266, 76 N. W. 27.

¹⁵ *Fowler v. Mickley*, 39 Minn. 28, 38 N. W. 634; *Byrnes v. Sexton*, 62 Minn. 135, 64 N. W. 155. See *Martin County Nat. Bank v. Bird*, 92 Minn. 110, 99 N. W. 781; and § 909.

¹⁶ *In re Jefferson's Estate*, 35 Minn. 215, 28 N. W. 256. See § 922.

¹⁷ *Schwab v. Pierro*, 43 Minn. 520, 46 N. W. 71. See *Meehan v. Meehan*, 119 Minn. 35, 137 N. W. 163.

¹⁸ See *Stuart v. Stuart*, 70 Minn. 46, 72 N. W. 819.

¹⁹ See *Johanson v. Hoff*, 63 Minn. 296, 65 N. W. 464.

²⁰ *Matthews v. Mires*, 135 Minn. 94, 160 N. W. 187.

²¹ *Kosanke v. Kosanke*, 137 Minn. 115, 162 N. W. 1060.

death the money should go to the claimants;²² a claim on an account stated;²³ a claim for unpaid purchase money on a sale of real property in the nature of a vendor's lien.²⁴

935. Claims held not provable in probate court—A claim for trespass to land;²⁵ a claim against an insane person under guardianship;²⁶ a contingent claim against sureties on a guardian's bond;²⁷ a contingent claim for taxes and insurance payable by a lessee;²⁸ a contingent claim against a stockholder on a stock subscription before a call;²⁹ a contingent claim against stockholders of an insolvent national bank, the bank not becoming insolvent until after the time limited for filing claims;³⁰ a contingent claim against a surety on the bond of an assignee in insolvency;³¹ a contingent liability of a stockholder for corporate debts under the constitution;³² a contingent claim against a stockholder on bonus stock;³³ a contingent claim against a surety on an administrator's bond;³⁴ a claim for attorney's fees for services rendered in connection with controversies over the construction of a will and the allowance of a claim against the estate;³⁵ a claim for money paid at the request of an executor to relieve an estate of an incumbrance;³⁶ a claim for a whole or a part of the estate;³⁷ a claim against a surety on the bond of an administrator, there being no breach of the bond until after the close of the administration;³⁸ a claim of a third party that he was the owner of property in the hands of an administrator.³⁹

PAYMENT

936. Time—Duty of representative—Judgments—It is ordinarily the duty of a representative to pay a claim as soon as it is allowed if he has

²² *Hayford v. Dougherty*, 144 Minn. 89, 174 N. W. 442.

²³ *In re Swain's Estate*, 67 Cal. 637, 8 Pac. 497.

²⁴ *Selna v. Selna*, 125 Cal. 357, 58 Pac. 16.

²⁵ *Comstock v. Matthews*, 55 Minn. 111, 56 N. W. 583. See §§ 29, 881.

²⁶ *Pflaum v. Babb*, 86 Minn. 395, 90 N. W. 1051.

²⁷ *Hantzsch v. Massolt*, 61 Minn. 361, 63 N. W. 1069.

²⁸ *Oswald v. Pillsbury*, 61 Minn. 520, 63 N. W. 1072.

²⁹ *Lake Phalen Land & Imp. Co. v. Lindeke*, 66 Minn. 209, 68 N. W. 974.

³⁰ *Dent v. Matteson*, 70 Minn. 519, 73 N. W. 416.

³¹ *Berryhill v. Peabody*, 72 Minn. 232, 75 N. W. 220; *Id.*, 77 Minn. 59, 79 N. W. 651.

³² *In re Martin's Estate*, 56 Minn. 420, 57 N. W. 1065; *Willoughby v. St. Paul German Ins. Co.*, 80 Minn. 432, 436, 83 N. W. 377. See *Hunt v. Burns*, 90 Minn. 172, 95 N. W. 1110; *Neff v. Lamm*, 99 Minn. 115, 108 N. W. 849.

³³ *Hospes v. Northwestern Mfg. & Car Co.*, 48 Minn. 174, 200, 50 N. W. 1117.

³⁴ *McKeen v. Waldron*, 25 Minn. 466.

³⁵ *Smith v. Pence*, 62 Minn. 321, 64 N. W. 822.

³⁶ *Winston v. Young*, 52 Minn. 1, 53 N. W. 1015.

³⁷ *Knutsen v. Krook*, 111 Minn. 352, 127 N. W. 11.

³⁸ *Martz v. McMahon*, 114 Minn. 34, 129 N. W. 1049.

³⁹ *Order of St. Benedict v. Steinhauser*, 179 Fed. 137.

the necessary funds. One reason for prompt payment is the saving of interest. No order of court is necessary for the payment of allowed claims. All claims must be paid before final settlement.⁴⁰ A representative is not authorized to pay a claim not allowed by the probate court, if it is a claim which the statute requires to be presented to that court for allowance.⁴¹ Where a claim is allowed and adjudged to be paid by the district court on appeal from the probate court, it is the duty of the representative to pay it, if he has sufficient funds, as if originally allowed by the probate court.⁴² When a duly authenticated copy of a judgment of another court, state or federal, conclusive upon the estate, is filed in the probate court in which administration is pending, it is the duty of the representative to pay it in the due course of administration, and no order of the probate court allowing the claim or directing its payment is necessary.⁴³ In the payment of claims a representative is subject to the orders of the probate court. The court may order him to pay a surety of a creditor of the estate who is entitled to be subrogated to the rights of the creditor against the estate.⁴⁴ Special provision is made for the payment of secured claims with leave of court without formal proof and allowance.⁴⁵ At common law, except when suit was brought against him, the administrator or executor himself, and not the court, allowed or adjusted the debts of the decedent with the creditors. He paid these debts without any order of the court out of the assets of the estate, or paid them out of his own funds and reimbursed himself out of the assets. He had the right, among creditors of equal degree, to pay one in preference to another. He might thus prefer and pay a creditor by giving his own obligation for the debt.⁴⁶

937. Same—Payment of secured claims—Statute—Whenever a creditor of the deceased has a mortgage, pledge, or other security for his debt, the executor or administrator may, without proof thereof being

⁴⁰ *Johanson v. Hoff*, 70 Minn. 140, 72 N. W. 965; *Connecticut Mutual Life Ins. Co. v. Schurmeler*, 117 Minn. 473, 136 N. W. 1; *Bolles v. Boyer*, 141 Minn. 404, 170 N. W. 229. Under a former statute an order of court for payment was necessary. *Wood v. Myrick*, 16 Minn. 494 (447); *Waterman v. Millard*, 22 Minn. 261; *Bunnell v. Post*, 25 Minn. 376; *Balch v. Hooper*, 32 Minn. 158, 161, 20 N. W. 124; *Huntsman v. Hooper*, 32 Minn. 163, 20 N. W. 127.

⁴¹ *First Nat. Bank v. How*, 28 Minn. 150, 155, 9 N. W. 626. See § 937 as to claims which may be paid without a prior allowance by the probate court. It seems that if a representative pays a claim without its being allowed he is

not entitled to credit therefor on his accounting. See § 1048.

⁴² *Berkey v. Judd*, 31 Minn. 271, 17 N. W. 618. See *Berkey v. St. Paul Nat. Bank*, 54 Minn. 448, 56 N. W. 53.

⁴³ *Berkey v. Judd*, 27 Minn. 475, 8 N. W. 383; *Oswald v. Pillsbury*, 61 Minn. 520, 63 N. W. 1072; *Connecticut Mutual Life Ins. Co. v. Schurmeler*, 117 Minn. 473, 136 N. W. 1. See *Berkey v. St. Paul Nat. Bank*, 54 Minn. 448, 56 N. W. 53; and § 879.

⁴⁴ *State v. Probate Court*, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234.

⁴⁵ See § 937.

⁴⁶ *Germania Bank v. Michaud*, 62 Minn. 459, 466, 65 N. W. 70.

made to the court, pay such debt or the interest thereon, as the same shall mature; but no such payment shall be made unless the same shall appear to be for the best interests of the estate, and the probate court, after hearing application therefor, shall so order. Such order may be made with or without notice, as the court may deem best.⁴⁷ This statute has no application to equitable or disputed liens. The meaning of the statute is that where there is no dispute, and nothing to litigate, the probate court may, as an incident to the distribution of the estate, direct the executor or administrator to pay off a mortgage, pledge, or other security in favor of a claimant.⁴⁸ A representative may no doubt pay a judgment which is a lien on the realty of the decedent without an order of court.⁴⁹

938. Payment in case of an appeal—Statute—Whenever an appeal is taken from the decision of the probate court allowing or disallowing any claim, in whole or in part, the executor or administrator shall not pay the same until it has finally been determined on such appeal, but he shall retain in his hands sufficient assets to pay the same in like proportion as other claims of the same class.⁵⁰

939. Retaining assets to pay contingent claims—There was formerly a statute in this state to the effect that "if any person is liable as security for the deceased, or has any other contingent claim against his estate which cannot be proved as a debt before the commissioners or allowed by them, the same may be presented with the proper proof to the commissioners, who shall set forth the claim and proof in their report; and said court may order the executor or administrator to retain in his hands sufficient to pay such contingent claim when the same becomes absolute; or, if the estate is insolvent, sufficient to pay a proportion equal to the dividends of other creditors."⁵¹ At the present time there is no statute in this state authorizing the retention of funds of an estate to pay contingent claims not accruing within the time limited for the settlement of the estate. The only remedy on such claims is an action in the district court against the distributees.⁵²

940. Order of paying claims when estate insolvent—Statute—If the assets which the executor or administrator has received and which can be used for the payment of debts are not sufficient therefor, he shall, after paying the expenses of administration, pay the debts against the decedent in the following order:

⁴⁷ G. S. 1913, § 7342. See 18 Cyc. 309; 11 R. C. L. 160.

⁴⁸ *State v. Probate Court*, 103 Minn. 325, 330, 103 N. W. 325.

⁴⁹ See *Fowler v. Mickley*, 39 Minn. 28, 38 N. W. 634: § 909.

⁵⁰ G. S. 1913, § 7340.

⁵¹ *McKeen v. Waldron*, 25 Minn. 466, 469. See 18 Cyc. 669; 24 C. J. 455; *Woerner*, Am. Law of Adm. (2 ed.) § 394; 32 Harv. L. Rev. 330.

⁵² *Hantzsch v. Massolt*, 61 Minn. 361, 367, 63 N. W. 1069. See § 1210.

1. Funeral expenses.
2. Expenses of last sickness.
3. Debts having preference by laws of the United States.
4. Taxes.

5. Debts duly proven to be due to other creditors: Provided, that no debt or claim for which the creditor holds a mortgage, pledge, or other security shall be so paid until the creditor shall have first exhausted his security or shall have released or surrendered the same.⁵³ The statute applies to the estates of married women.⁵⁴ Funeral expenses and expenses of last sickness are preferred claims.⁵⁵ Taxes are preferred claims.⁵⁶ The cost of a monument over the grave of the decedent, when reasonable in amount, is properly allowed as an expense of administration, but it is not strictly a funeral expense and as such a preferred claim on the estate.⁵⁷ The priority of such claims is only in the distribution of assets of the estate, of which insurance money payable to the wife of the decedent is not a part.⁵⁸ After preferred claims are paid other claims are to be paid pro rata.⁵⁹ Secured claims are not payable until the creditor has first exhausted his security, or released or surrendered it.⁶⁰ If a representative through negligence or mistake pays a claimant in full and it is subsequently discovered that the estate is insolvent he may recover of the claimant the excess of his pro rata share.⁶¹

941. No preferences in payment of claims of same class—Statute—No preference shall be given in the payment of any debt over any other debts of the same class, nor shall a debt due and payable be entitled to preference over debts not due.⁶² Except as expressly provided otherwise all unsecured creditors whose claims have been allowed are equal and no preferences are allowable. No creditor can assert a right, either

⁵³ G. S. 1913, § 7338. See 18 Cyc. 546, 868; 24 C. J. 420; 11 R. C. L. 254.

⁵⁴ *Schneider v. Bereler's Estate*, 129 Wis. 446, 109 N. W. 99; *In re Skillman's Estate*, 146 Iowa 601, 125 N. W. 343; *Constantinides v. Walsh*, 146 Mass. 281, 15 N. E. 631.

⁵⁵ *McNally v. Weld*, 30 Minn. 209, 213, 14 N. W. 895; *Dampier v. St. Paul Trust Co.*, 46 Minn. 526, 49 N. W. 286; *Elton v. Lamb*, 33 N. D. 388, 157 N. W. 288; *In re Skillman's Estate*, 146 Iowa 601, 125 N. W. 343; *Herning v. Holt Lumber Co.*, 153 Wis. 107, 140 N. W. 1102; *Merrill v. Comstock*, 154 Wis. 434, 143 N. W. 313; 8 A. & E. Ency. of Law (2 ed.) 1035, 1037; 18 Cyc. 549, 552; 24 C. J. 423; *Woerner, Am. Law of Adm.* (2 ed.) § 365; 9 A. L. R. 462.

⁵⁶ *In re Jefferson's Estate*, 35 Minn. 215, 28 N. W. 256; 8 A. & E. Ency. of

Law (2 ed.) 1048; 18 Cyc. 551; 24 C. J. 425; *Woerner, Am. Law of Adm.* (2 ed.) 367.

⁵⁷ *In re Lester's Estate*, 169 Iowa 15, 150 N. W. 1033.

⁵⁸ *Rose v. Marchessault*, 146 Minn. 6, 177 N. W. 658.

⁵⁹ *Oswald v. Pillsbury*, 61 Minn. 520, 525, 63 N. W. 1072; *Byrnes v. Sexton*, 62 Minn. 135, 140, 64 N. W. 155; 18 Cyc. 547; *Woerner, Am. Law of Adm.* (2 ed.) § 374.

⁶⁰ *Rice v. London etc. Co.*, 70 Minn. 77, 72 N. W. 826; 8 A. & E. Ency. of Law (2 ed.) 1052; 18 Cyc. 868.

⁶¹ *Woodruff v. Clafin Co.*, 198 N. Y. 470, 91 N. E. 1103. See 23 Harv. L. Rev. 403; 32 Id. 339; 28 L. R. A. (N. S.) 440; *Woodward, Quasi Contracts*, § 185.

⁶² G. S. 1913, § 7339. See 24 C. J. 420.

in law or equity, to have any specific property, real or personal, applied in payment of his claim to the exclusion of any other creditor, nor can he, by any diligence or act of his own, secure any advantage over other creditors of the same class whose claims have been allowed. His only right is that common to all such creditors, to have the estate administered as provided by law through the probate court.⁶³ Judgment creditors stand on the same footing as creditors whose claims have been allowed by the probate court, except when they have secured a lien on realty of the decedent prior to his death.⁶⁴ Claims not yet due stand on the same footing as claims payable presently.⁶⁵ At common law the representative might give a preference among creditors of equal degree.⁶⁶

MARSHALING ASSETS

942. In general—All the property of a decedent, legal or equitable, real or personal, contingent or absolute, in possession or in remainder, belonging to him at the time of his death or subsequently accruing to his estate, with certain exceptions noted under sections 821-824, is liable for the payment of his debts and the expenses of administration, regardless of whether he died testate or intestate.⁶⁷

943. Order of liability in absence of testamentary directions—The order in which the property of an estate should be resorted to for the payment of debts and the expenses of administration, where there is no contrary direction in a will, is as follows:

1. Personal property:
 - a. Property not bequeathed.
 - b. Property bequeathed generally.
 - c. Property bequeathed specifically.
2. Real property:
 - a. Property descended to heirs, that is, not devised.
 - b. Property devised generally.
 - c. Property devised specifically.⁶⁸

This order of liability is radically different from that worked out by courts of equity in marshaling assets of estates. To what extent, if any,

⁶³ *Whitney v. Burd*, 29 Minn. 203, 12 N. W. 530; *Oswald v. Pillsbury*, 61 Minn. 520, 525, 63 N. W. 1072; 8 A. & E. Ency. of Law (2 ed.) 1057; 18 Cyc. 546; 24 C. J. 420.

⁶⁴ See §§ 909, 936, 1140.

⁶⁵ *Bolles v. Boyer*, 141 Minn. 404, 170 N. W. 229.

⁶⁶ *Germania Bank v. Michaud*, 62 Minn. 459, 466, 65 N. W. 70; 8 A. & E. Ency. of Law (2 ed.) 1056; 18 Cyc. 544;

24 C. J. 419; *Woerner*, Am. Law of Adm. (2 ed.) § 376.

⁶⁷ See §§ 809-851, 943; 11 A. & E. Ency. of Law (2 ed.) 828-854; 18 Cyc. 591; 40 Id. 2065, 2068; 18 C. J. 940; 24 C. J. 458; 11 R. C. L. 107; *Woerner*, Am. Law of Adm. (2 ed.) § 304.

⁶⁸ *In re Woodworth's Estate*, 31 Cal. 595; *Duck v. McGrath*, 145 N. Y. S. 1033; 19 A. & E. Ency. of Law (2 ed.) 1300-1317; 18 Cyc. 590; 40 Id. 2067; 24 C. J. 459; 28 R. C. L. 300.

the rules of equity are applicable in this state has never been determined. It would seem that they should be regarded as valuable aids in arriving at a correct construction of our statutory system rather than rules of law in force here except as modified by statute.⁶⁹ The personal property of a decedent, whether bequeathed or not, constitutes the primary fund for the payment of his debts and the expenses of administration, and his real property a secondary fund to be resorted to only in case the personal property is insufficient, unless the decedent left a will clearly directing otherwise.⁷⁰ There is no substantial reason for this distinction between the liability of real and personal property for the payment of a decedent's debts. It is due to the manner in which the law upon the subject developed in England. It is a mere accident of history.⁷¹ If legatees lose their legacies, in whole or in part, by a sale to pay debts and expenses of administration, it is an open question in this state whether they can enforce contribution from devisees. In many states there are statutes authorizing such contribution. These statutes generally authorize contribution between specific legatees and specific devisees. In the absence of statute the cases in other jurisdictions are conflicting.⁷² There was formerly in this state a statute making legatees and devisees equally liable in proportion to the amount of their legacies or devises and providing for contribution. Unfortunately this was not incorporated in the probate code.⁷³ Land specifically devised, and not charged in such devise with the payment of debts, cannot be sold for the payment of debts and the expenses of administration until other land is exhausted.⁷⁴ Land descended, that is not devised, should be

⁶⁹ *Titterington v. Hooker*, 58 Mo. 593; *Pearce v. Calhoun*, 59 Mo. 271; *Woerner*, *Am. Law of Adm.* (2 ed.) § 495; 19 A. & E. Ency. of Law (2 ed.) 1382. For the equity rules see *Hays v. Jackson*, 6 Mass. 149; *Wilts v. Wilts*, 151 Iowa 149, 130 N. W. 906; 19 A. & E. Ency. of Law (2 ed.) 1288; 18 Cyc. 594; *Woerner*, *Am. Law of Adm.* (2 ed.) §§ 489-497; 3 *Williams*, *Executors*, (7 Am. Ed.) 214; 11 R. C. L. 127; *Pomeroy*, *Equity*, § 1135.

⁷⁰ G. S. 1913, §§ 7336, 7344, 8182, 8193; *Bryant v. Livermore*, 20 Minn. 313 (271); *State v. Probate Court*, 25 Minn. 22; *Greenwood v. Murray*, 26 Minn. 259, 261, 2 N. W. 945; *Brown v. Strom*, 113 Minn. 1, 9, 129 N. W. 136; 8 A. & E. Ency. of Law (2 ed.) 1097; 19 Id. 1300; 18 Cyc. 591; 40 Id. 2068; 24 C. J. 460; 11 R. C. L. 126; 28 R. C. L. 300; *Woerner*, *Am. Law of Adm.* (2 ed.) § 489. See cases under §§ 735, 956.

⁷¹ See § 77.

⁷² See 1 A. & E. Ency. of Law (2 ed.) 57; 19 Id. 1313; 40 Cyc. 1909n, 2068, 2076; 28 R. C. L. 336; *Woerner*, *Am. Law of Adm.* (2 ed.) §§ 452, 497; 1 L. R. A. (N. S.) 461; *Warren*, *Cases on Wills*, 731.

⁷³ See G. S. 1878, c. 47 §§ 29-33. G. S. 1913, § 8186, apparently applies only where an heir, devisee, or legatee has paid more than his just share through an action against him in the district court, and not where he has paid more than his just share through proceedings in the probate court. It embodies a rule, however, that would probably be applied in an action for contribution, independent of statute, where an heir, devisee, or legatee has paid more than his just share through proceedings in the probate court.

⁷⁴ G. S. 1913, § 7353. See §§ 953, 970, 1226; 40 Cyc. 2068; 28 R. C. L. 301.

sold before land devised, whether the devise is specific or general.⁷⁵ Land devised generally should be sold before land devised specifically. A residuary devise may be general within this rule.⁷⁶ The personal property of a decedent is liable for debts secured by real estate mortgages.⁷⁷ Since all the unexempt property of a decedent is liable for his debts and expenses of administration the order of liability is of little concern to creditors. If a representative violates the proper order in applying the assets of the estate to the payment of claims the creditors are not prejudiced and they are not bound to see that the proper order is observed.⁷⁸ It is the right and duty of the probate court to enforce the proper order in the due course of administration. This can be done on applications for the sale of assets and in the final decree of distribution.⁷⁹

944. Provisions of will as to payment of claims controlling—Statute— When the testator makes provision by his will, or designates the estate to be appropriated for the payment of debts, expenses of administration, or family expenses, they shall be paid according to the provisions of the will, and out of the estate thus appropriated. If the provisions made by the will, or the estate appropriated, is not sufficient to pay such debts and expenses, so much of the estate, real and personal, as is not disposed of by the will, if any, shall be appropriated according to the provisions of the law for that purpose.⁸⁰ The customary formal clause in wills providing for the payment of debts is superfluous. It adds nothing to the liability of the land devised to be sold for the payment of the debts of testator.⁸¹ A testator may make his realty the primary fund for the payment of debts, but only by language clearly showing an intention to exonerate the personalty. While such intention need not be expressed directly, but may be inferred from the general scheme and tenor of the will, it must appear unequivocally. A general direction for the sale of realty for the payment of debts, or a general direction for the payment of debts, or a devise after the payment of debts does not

⁷⁵ G. S. 1913, §§ 7343, 7353, 8193; *Wilts v. Wilts*, 151 Iowa 149, 130 N. W. 906; 19 A. & E. Ency. of Law (2 ed.) 1307; 40 Cyc. 2067; 24 C. J. 568; 28 R. C. L. 301; *Woerner*, Am. Law of Adm. (2 ed.) § 489; *Pomeroy*, Equity, § 1135.

⁷⁶ *Johnson v. Home for Aged Women*, 152 Mass. 89, 93, 25 N. E. 44; *In re Sutton's Estate* (Del.) 97 Atl. 624. See 40 Cyc. 2068.

⁷⁷ *In re Fox's Estate*, 159 Mich. 420, 124 N. W. 60. See §§ 908, 937, 940, 945.

⁷⁸ See *Woerner*, Am. Law of Adm. (2 ed.) § 489; *Pomeroy*, Equity, § 1135.

⁷⁹ *Greenwood v. Murray*, 26 Minn. 259, 261, 2 N. W. 945; *Baldwin v. Zien*, 117 Minn. 178, 134 N. W. 498; *Hays v. Jackson*, 6 Mass. 149; *Atwood v. Frost*, 59 Mich. 409; 19 A. & E. Ency. of Law (2 ed.) 1382; *Woerner*, Am. Law of Adm. (2 ed.) § 495; 24 C. J. 568.

⁸⁰ G. S. 1913, § 7343. See *Baldwin v. Zien*, 117 Minn. 178, 134 N. W. 498; 19 A. & E. Ency. of Law (2 ed.) 1336-1369; 40 Cyc. 2065-2074; 28 R. C. L. 301; *Woerner*, Am. Law of Adm. (2 ed.) §§ 490, 491.

⁸¹ *Gates v. Shugrue*, 35 Minn. 392, 29 N. W. 57; *Larson v. Curran*, 121 Minn. 104, 140 N. W. 337.

have that effect. Merely charging the realty with the payment of debts is insufficient unless an intention to exonerate the personalty is also apparent. The intention of the testator controls and evidence of the surrounding circumstances is admissible as in other cases. While it is the general policy of our law to make the personalty of a decedent the primary fund for the payment of his debts, in the absence of a testamentary direction to the contrary, it is to be remembered that this policy does not rest on any solid foundation, but is a mere survival from early English law. While the courts of this state should not be quick to infer an intention on the part of a testator to exonerate personalty there is no reason why they should be loath to do so. Purchasers from a devisee take subject to the charge.⁸² A bare charge of debts on the realty does not give the representative implied power to sell the realty for the payment of debts. He must apply to the probate court for a license.⁸³

945. Devise or descent of mortgaged realty—Exoneration—Unless the will expresses a contrary intention a devisee of a specific devise of real property incumbered by a mortgage created or assumed by the testator is entitled to have the property exonerated from the mortgage out of the personal estate, on the ground that the personal estate is the primary fund for the payment of debts of the decedent. If the personal estate is insufficient for the purpose resort may be had to the real estate upon which there are no superior claims. The order of liability for the exoneration is as follows: (1) the general personal estate, not including specific legacies or general legacies; (2) intestate real estate; (3) real or personal estate charged in the will with the payment of debts. It is generally held that the exoneration cannot be made out of general legacies but some cases hold otherwise. All the cases hold that it cannot be made out of specific legacies, or out of other specific devises, or out of residuary devises.⁸⁴ According to the better view there is no right to exoneration where the devise is made expressly subject to the mortgage.⁸⁵ Where land incumbered by a mortgage is included in a

⁸² *Gates v. Shugrue*, 35 Minn. 392, 29 N. W. 57; *Larson v. Curran*, 121 Minn. 104, 140 N. W. 337; *Hale v. St. Paul*, 54 Minn. 421, 56 N. W. 63; *Hamilton v. Smith*, 110 N. Y. 159, 17 N. E. 740; *In re Shaffer's Estate* (Pa.) 104 Atl. 853; 19 A. & E. Ency. of Law (2 ed.) 1339; 40 Cyc. 2069; 28 R. C. L. 301; *Woerner*, Am. Law of Adm. (2 ed.) §§ 490, 493; Ann. Cas. 1915B, 53.

⁸³ See § 468.

⁸⁴ *Hale v. St. Paul*, 54 Minn. 421, 56 N. W. 63; *Brown v. Brown*, 162 Mass. 56, 37 N. E. 772; *Wilts v. Wilts*, 151 Iowa 149, 130 N. W. 906; *In re Brack-*

ey's Estate, 166 Iowa 109, 147 N. W. 188; *Jackson v. Bevins*, 74 Conn. 96, 49 Atl. 899; *In re Woodworth's Estate*, 31 Cal. 595; *Atkinson v. Staigg*, 13 R. I. 725; *Higbie v. Morris*, 53 N. J. Eq. 173; *In re Sutton's Estate* (Del.) 97 Atl. 624; *Smith v. Kibbe* (Kan.) 178 Pac. 427; 11 A. & E. Ency. of Law (2 ed.) 1062; 19 Id. 1316; 40 Cyc. 2063; 28 R. C. L. 304; *Woerner*, Am. Law of Adm. (2 ed.) § 494; 18 Harv. L. Rev. 221; 11 Probate Reports Ann. 435; 8 Ann. Cas. 592; 3 L. R. A. (N. S.) 898; 5 A. L. R. 488.

⁸⁵ *Jackson v. Bevins*, 74 Conn. 96, 49 Atl. 899; 40 Cyc. 2065; 11 Probate Re-

general devise the devisee is entitled to have the mortgage paid out of descended land, there being no personal assets for the purpose.⁸⁶ The statutory interest of a surviving spouse is subject to contribution.⁸⁷ Where mortgaged land descends to an heir he is entitled to have the mortgage paid out of the personal estate, as in the case of devised land, if the mortgage was created or assumed by the ancestor.⁸¹ The right to exoneration may be lost by a sale under G. S. 1913, § 7363 (959, *infra*), and an application of the proceeds to the payment of the mortgage.⁹² The right to exoneration has been materially modified by statute in England and some states of this country. It is somewhat modified in this state by G. S. 1913, §§ 7342, 7363. The rule rests upon no satisfactory foundation and ought to be abolished or materially modified by statute.⁸⁸

SALES OF REALTY UNDER LICENSE

946. **Jurisdiction**—The probate court has exclusive original jurisdiction to grant a license to sell realty of a decedent and to determine the necessity or expediency thereof.⁸⁹ A sale is void if the appointment of the representative was without jurisdiction.⁹⁰ In granting a license the court passes on its jurisdiction to make it and on all matters necessary to justify it, including the due appointment of the representative applying for it, and its order is not subject to collateral attack for want of jurisdiction unless the want of jurisdiction affirmatively appears from the record.⁹¹ The court granting the probate of a will or letters of administration or appointing a guardian is the proper court to grant a license to sell regardless of the county in which the land lies.⁹² A probate court in this state cannot authorize a sale of land situated in another state.⁹³

ports Ann. 438. See *contra*, *In re Riegelman's Estate*, 174 Pa. St. 476, 34 Atl. 120; *In re Brackey's Estate*, 166 Iowa 109, 147 N. W. 188.

⁸⁶ *Wilts v. Wilts*, 151 Iowa 149, 130 N. W. 906.

⁸⁷ *Stalgg v. Atkinson*, 144 Mass. 564, 12 N. E. 354 (construing Minnesota statute).

⁸¹ 19 A. & E. Ency. of Law (2 ed.) 1322; 18 C. J. 947.

⁹² See *In re Reynolds' Estate* (Vt.) 109 Atl. 60.

⁸⁸ See 11 Probate Reports Ann. 440; *Woerner*, Am. Law of Adm. (2 ed.) § 497.

⁸⁹ *Paine v. First Div. St. Paul etc. R. Co.*, 14 Minn. 65 (49); *Luse v. Reed*, 63 Minn. 5, 11, 65 N. W. 91; 11 A. & E. Ency. of Law (2 ed.) 1070; 18 Cyc. 700; 24 C. J. 578.

⁹⁰ *Culver v. Hardenbergh*, 37 Minn. 225, 33 N. W. 792; *Chase v. Ross*, 36 Wis. 267.

⁹¹ *Culver v. Hardenbergh*, 37 Minn. 225, 33 N. W. 792; *Curran v. Kuby*, 37 Minn. 330, 33 N. W. 907.

⁹² *Montour v. Purdy*, 11 Minn. 384 (278); *Rumrill v. First Nat. Bank*, 23 Minn. 202, 9 N. W. 731; *Smith v. Swenson*, 37 Minn. 1, 32 N. W. 784; *Culver v. Hardenbergh*, 37 Minn. 225, 33 N. W. 792; *Menage v. Jones*, 40 Minn. 254, 41 N. W. 972; *West Duluth Land Co. v. Kurtz*, 45 Minn. 380, 47 N. W. 1134; *Smith v. Barr*, 83 Minn. 354, 86 N. W. 342; *Stack v. Royce*, 34 Neb. 833, 52 N. W. 675; 11 A. & E. Ency. of Law (2 ed.) 1071; 18 Cyc. 703; 24 C. J. 578.

⁹³ *People v. Parker*, 54 Colo. 604, 132 Pac. 56; *Allen v. Shanks*, 90 Tenn. 359, 372, 16 S. W. 715; 11 A. & E. Ency. of

947. Necessity of obtaining license—As a general rule a representative is not authorized to sell real property of an estate except under a license from the probate court.⁹⁴ No license is necessary to sell under a power in a will.⁹⁵ No license is necessary to sell real property purchased by a representative on behalf of the estate at a foreclosure or execution sale. Such property is regarded as personalty.⁹⁶

948. Effect of power of sale in will—If there is a power of sale in the will to the representative he need not apply to the probate court for a license to sell.⁹⁷ A sale is frequently made under a license from the probate court though it might have been made without such license under a power in a will. The practice seems unobjectionable.⁹⁸ If the representative has a power of sale from the will the probate court may deny his application for a license.⁹⁹

949. Nature of proceeding—The proceeding is in rem. There are no adversary parties.¹ It is not an action but a special statutory proceeding in rem.² It is not an equitable proceeding but a special statutory proceeding.³ The jurisdiction is irrespective of the parties in interest except as the statutes provide otherwise.⁴

950. Only representative may sell—No one but an executor, administrator or guardian can be authorized by the probate court to sell land.⁵

951. Representative need not take possession—It is not necessary that the representative take possession of the property in order to obtain a license to sell.⁶

952. Authority to order sale statutory—The authority of the probate court to order sales of realty is purely statutory and exists only in the

Law (2 ed.) 1071; 24 C. J. 579; L. R. A. 1915D, 755.

⁹⁴ See § 744.

⁹⁵ See § 948.

⁹⁶ See § 742; Williams v. Towl, 65 Mich. 204; 11 A. & E. Ency. of Law (2 ed.) 1068.

⁹⁷ Townshend v. Goodfellow, 40 Minn. 312, 317, 41 N. W. 1056; Lovejoy v. McDonald, 59 Minn. 393, 401, 61 N. W. 320; Justice v. Soderlund, 225 Mass. 320, 114 N. E. 623; 18 Cyc. 685; 24 C. J. 555; 11 R. C. L. 401; 80 Am. St. Rep. 96; 32 L. R. A. (N. S.) 676; Woerner, Am. Law of Adm. (2 ed.) § 464.

⁹⁸ See Baldwin v. Zlen, 117 Minn. 178, 134 N. W. 498 (implied power); Greenman v. McVey, 126 Minn. 21, 147 N. W. 812 (Id.); In re Acklin's Estate, 237 Pac. 528, 85 Atl. 862; Personeni v. Goodale, 199 N. Y. 323, 92 N. E. 754.

⁹⁹ Justice v. Soderlund, 225 Mass. 320, 114 N. E. 623.

¹ Spencer v. Sheehan, 19 Minn. 338 (292); Brusha v. Phipps, 86 Neb. 822, 126 N. W. 856; Miller v. Hanna, 89 Neb. 224, 131 N. W. 226; Shane v. Peoples, 25 S. D. 188, 141 N. W. 737; 18 Cyc. 700; 24 C. J. 572; 11 R. C. L. 318.

² McClay v. Foxworthy, 18 Neb. 295, 25 N. W. 86; Brusha v. Phipps, 86 Neb. 822, 126 N. W. 856.

³ Bixby v. Jewell, 72 Neb. 755, 101 N. W. 1026; Poessnecker v. Entenmann, 64 Neb. 409, 89 N. W. 1033.

⁴ Spencer v. Sheehan, 19 Minn. 338 (292).

⁵ Culver v. Hardenbergh, 37 Minn. 225, 230, 33 N. W. 792; Burrell v. Chicago etc. Ry. Co., 43 Minn. 363, 45 N. W. 849. See 24 C. J. 557.

⁶ Jones v. Billstein, 28 Wis. 221; In re Bazzuro's Estate, 161 Cal. 71, 118 Pac. 434.

cases contemplated by the statute. It cannot be changed or enlarged by the probate court.⁷

953. What may be sold—All real property left by the decedent may be sold except his homestead and land exempted under federal statutes. Even the homestead may perhaps be sold to pay certain claims.⁸ The interest to be sold is the interest or title of which the decedent died seized.⁹ Prior to Laws 1889, c. 46, the fee of a homestead was subject to sale for the payment of debts.¹⁰ The probate court is not required to hold an inquiry to determine whether the land which the representative seeks to sell is not a homestead.¹¹ On the issue of a patent to heirs of an entryman of government land, where final proof is not made by him before his death, the land cannot be sold as part of his estate and is not subject to the charges of administration.¹² After final proof the interest of an entryman in government land may be sold though he has not yet received a patent.¹³ An estate in remainder may be sold.¹⁴ A reversion may be sold.¹⁵ A disputed title may be sold.¹⁶ Land may be sold though the title is in litigation.¹⁷ Land specifically devised, and not charged in such devise with the payment of debts, can only be sold after the other land of the decedent is exhausted.¹⁸ Land subject to a lease may be sold.¹⁹ Land subject to a mortgage or other lien may be sold.²⁰ Land transferred by heirs or devisees may be sold but only after the other land of the decedent is exhausted.²¹ The equity of re-

⁷ *Eberstein v. Oswalt*, 47 Mich. 254, 10 N. W. 360; *Hewitt v. Durant*, 78 Mich. 186, 44 N. W. 318; 11 A. & E. Ency. of Law (2 ed.) 1069; 18 Cyc. 674; 24 C. J. 544; *Woerner*, Am. Law of Adm. (2 ed.) § 463.

⁸ See §§ 815, 821, 942-945; 11 A. & E. Ency. of Law (2 ed.) 1090; 18 Cyc. 690; 24 C. J. 560; *Woerner*, Am. Law of Adm. (2 ed.) § 471; *Church*, Probate Law, 890.

⁹ *Everstein v. Oswalt*, 47 Mich. 254, 10 N. W. 360.

¹⁰ *McCarthy v. Van Der Mey*, 42 Minn. 189, 44 N. W. 53. See Laws 1919, c. 436 (short statute of limitations and validating act in relation to sales of homesteads).

¹¹ *Randel v. Randel*, 64 Kan. 254, 67 Pac. 837.

¹² *Byerly v. Eadie*, 95 Kan. 400, 148 Pac. 757; 11 A. & E. Ency. of Law (2 ed.) 1094.

¹³ *Doran v. Kennedy*, 122 Minn. 1, 141 N. W. 851; *Id.*, 237 U. S. 362.

¹⁴ *McGowan v. Baldwin*, 46 Minn. 477, 49 N. W. 251; *Baldwin v. Zlen*, 117

Minn. 178, 134 N. W. 498; *Hiner v. Root's Heirs*, 81 Wis. 263, 51 N. W. 435. See 24 C. J. 561.

¹⁵ *Hiner v. Root's Heirs*, 81 Wis. 263, 51 N. W. 435; *Kamerer v. Kamerer*, 281 Ill. 587, 117 N. E. 1027. See 24 C. J. 561.

¹⁶ See § 969.

¹⁷ *Martin v. Bond's Estate*, 64 Neb. 868, 90 N. W. 910.

¹⁸ See § 970; *In re Bryant's Estate*, 38 Wash. 337, 80 Pac. 555; *Howe v. Kern*, 63 Or. 487, 125 Pac. 834, 128 Pac. 818; 11 A. & E. Ency. of Law (2 ed.) 1090; 24 C. J. 563.

¹⁹ *In re Brannan's Estate*, 5 Cal. Unrep. Cas. 882, 51 Pac. 320. See *Fritz v. McGill*, 31 Minn. 536, 18 N. W. 753.

²⁰ See § 963.

²¹ See § 970; *State v. Probate Court*, 25 Minn. 22; *Drinkwater v. Drinkwater*, 4 Mass. 354; *Davis v. Vansande*, 45 Conn. 600; *Hyde v. Tanner*, 1 Barb. (N. Y.) 75; *Ireland v. Miller*, 71 Mich. 119, 39 N. W. 16; *Flood v. Strong*, 108 Mich. 561, 66 N. W. 473; 11 A. & E. Ency. of Law (2 ed.) 1096; 18 Cyc. 693; 24 C.

demption of a deceased mortgagor may be sold.²² The interest of a vendee in an executory contract of sale may be sold.²³ The interest of a vendor in an executory contract of sale may be sold.²⁴ Land descending to a surviving husband or wife under the statute of descent may be sold.²⁵ The "interest" of a husband includes the statutory interest of the wife.²⁶ Land fraudulently conveyed by the decedent may be sold without having the sale set aside.²⁷ The entire interest or estate of the decedent in a particular tract must be sold. An undivided portion of such interest or estate cannot be sold.²⁸ A sale cannot be made subject to estates or interests created by the will.²⁹ A sale should not be ordered when it is certain that the proceeds would be insufficient to pay the expenses of the sale.³⁰ Leasehold interests are personalty and cannot be sold under a license to sell realty.³¹

954. Grounds for selling—Statutes—The real estate of a decedent or ward may be sold under license of the probate court in the following cases:

1. When the personal estate of a decedent is insufficient to pay his debts, the legacies, if any, and the expenses of administration, or the court shall deem it for the best interests of the estate and of all persons interested therein.

2. When the personal property in the hands of a guardian is insufficient to pay all the debts of the ward, with the charges of managing his estate, or the court deems it for the best interests of the ward.

3. When the income of the estate of a ward is insufficient to maintain him and his family, or to educate the ward when a minor; or when it appears that it would be for the benefit of the ward that his real estate or any part thereof should be sold, and the proceeds thereof put at interest or invested in other real estate, in first mortgages on real estate, or bonds of the United States or of this state, or municipal or school district bonds of this state, or in the improvement or protection of any other real estate of the ward.³²

J. 563; Woerner, *Am. Law of Adm.* (2 ed.) § 471.

²² Woerner, *Am. Law of Adm.* (2 ed.) § 471. See §§ 838, 963.

²³ § 961; *Smith v. Barr*, 83 Minn. 354, 86 N. W. 342; *Baxter v. Robinson*, 11 Mich. 520; *Hovarka v. Havlik*, 68 Neb. 14, 93 N. W. 990; *Cutler v. Meeker*, 71 Neb. 732, 99 N. W. 514; 11 A. & E. *Ency. of Law* (2 ed.) 1091; 24 C. J. 561.

²⁴ See § 832.

²⁵ See § 104.

²⁶ *Scott v. Wells*, 55 Minn. 274, 56 N. W. 828.

²⁷ *Drinkwater v. Drinkwater*, 4 Mass. 354; *Tyndale v. Stanwood*, 182 Mass. 534, 66 N. E. 23; *Dunbar v. Kelly*, 189 Mass. 390, 75 N. E. 740; 11 A. & E. *Ency. of Law* (2 ed.) 1095; 18 Cyc. 692. See § 866.

²⁸ *Eberstein v. Oswalt*, 47 Mich. 254, 10 N. W. 360. See *Scott v. Wells*, 55 Minn. 274, 56 N. W. 828.

²⁹ *Hewitt v. Durant*, 78 Mich. 186, 44 N. W. 318.

³⁰ *Valle v. Bryan*, 19 Mo. 423.

³¹ *Mulloy v. Kyle*, 26 Neb. 313, 41 N. W. 117. See *Baldwin v. Zien*, 117 Minn. 178, 134 N. W. 498.

³² G. S. 1913, § 7344.

When there is not sufficient personal estate in the hands of the executor or administrator to pay all the debts and legacies and the allowance to the widow and minor children, the probate court may, on petition of the executor or administrator, order the sale of the real estate, or so much thereof as may be necessary, to pay the same.³³ Real estate devised or passing by descent may be sold for the payment of inheritance taxes thereon.³⁴

955. Mortgaging or leasing instead of selling—Statute—Whenever it shall appear that the interests of all persons concerned will be better protected by mortgaging or leasing such real estate than by selling the same, the court may, by license, authorize the mortgaging or leasing thereof, and may authorize the representative to agree to the extension or renewal of an existing mortgage or lease.³⁵

956. To pay debts and expenses of administration—The statute authorizes the sale of the realty of a decedent to pay his debts and the expenses of administration in case the personal assets of his estate are insufficient for that purpose.³⁶ Ordinarily there can be no sale of the realty if there is sufficient personalty to pay the debts of the decedent. The personalty is the primary fund for the payment of such debts, the realty a secondary fund.³⁷ Realty may be sold to pay funeral expenses and a monument, at least if the latter is secured on an order of court.³⁸ Taxes accruing after the death of the owner will not justify a sale.³⁹ If there is a deficiency of personal assets in this state the fact that there are sufficient personal assets in another state will not bar a sale here.⁴⁰ It is an open question in this state whether a sale may be had if the deficiency of personal assets is due to the fault of the representative, and if so, whether the remedy on the bond of the representative must be first exhausted. It is the better view that a sale may be had regardless of the fault of the representative and without first resorting to his bond.⁴¹ A sale may be had to pay a debt which is a charge on realty.

³³ G. S. 1913, § 7336.

³⁴ See G. S. 1913, § 2278.

³⁵ G. S. 1913, § 7345. See G. S. 1913, §§ 7346, 7347 (validating acts); Laws 1921, c. 453 (authorizing execution of mining leases).

³⁶ § 954; *Deppe v. Ford*, 89 Minn. 253, 94 N. W. 679 (expenses of administration); 11 A. & E. Ency. of Law (2 ed.) 1080; 18 Cyc. 676; 24 C. J. 546; *Woerner*, Am. Law of Adm. (2 ed.) § 469.

³⁷ *State v. Probate Court*, 25 Minn. 22; *Greenwood v. Murray*, 26 Minn. 259, 261, 2 N. W. 945; *In re Ackerman's Estate*, 33 Minn. 54, 21 N. W. 852; *Gates v. Shugrue*, 35 Minn. 392, 29 N. W. 57; *Fowler v. Mickley*, 39 Minn. 28, 38 N. W.

634; 11 A. & E. Ency. of Law (2 ed.) 1085; 18 Cyc. 681; 24 C. J. 551.

³⁸ *Mullinnix v. Brown*, 151 Iowa 468, 131 N. W. 671; *Johnson's Petition*, 15 R. I. 438; *Van Emon v. Superior Court*, 76 Cal. 589, 18 Pac. 877; *In re Estate of Koppikus*, 1 Cal. App. 84, 81 Pac. 732; 11 A. & E. Ency. of Law (2 ed.) 1080; 24 C. J. 550.

³⁹ *Luse v. Webster*, 74 Or. 489, 145 Pac. 1063.

⁴⁰ *State v. Probate Court*, 25 Minn. 22, 28; *Lawrence's Appeal*, 49 Conn. 411.

⁴¹ See *Conger v. Cook*, 56 Iowa 117, 8 N. W. 782; *Kingsland v. Murray*, 133 N. Y. 170, 30 N. E. 845; *Globe Mercantile Co. v. Perkeypile (Ind.)* 125 N. E.

The creditor is not bound to look to the devisee whose devise is charged with the debt.⁴² A sale of realty may be ordered to meet prospective charges or expenses though there are no debts or expenses unpaid.⁴³ Realty cannot be sold to pay claims barred by the statute of limitations.⁴⁴ A sale may be had to pay debts of the decedent though the executor, as residuary legatee, has given a bond under the statute to pay all debts.⁴⁵ Realty may be sold though there is an affidavit of no claims.⁴⁶ Where the representative has paid allowed claims out of his own funds in excess of the personal assets he is entitled to be subrogated to the rights of creditors whose debts he has paid and realty may be sold to reimburse him.⁴⁷ An executor or administrator, in the discharge of his duty and power as a trustee to preserve the estate, may pay off liens thereon. He may redeem land from the lien of a mortgage made by the decedent, though not presented as a claim against the estate, and charge the expense to the estate. A sale may be made to redeem mortgaged premises and to pay debts, expenses and charges of administration.⁴⁸

957. To pay legacies—The statutes authorize the sale of realty of a decedent to pay legacies if the personal assets of his estate are insufficient therefor.⁴⁹ While the statute provides for the sale of realty to pay legacies only in case the personalty is insufficient, if a will clearly makes the realty the primary fund for the payment of legacies a sale may of course be ordered accordingly.⁵⁰ While the statute in general terms authorizes the sale of realty to pay legacies, realty specifically devised and not made subject to the payment of legacies by the will probably cannot be sold for that purpose.⁵¹ Possibly under our statute realty not devised or passing under a residuary clause may be sold to pay legacies even though they are not charged on the realty by the will,

29; 11 A. & E. Ency. of Law (2 ed.) 1086; 18 Cyc. 683; 24 C. J. 552; Woerner, Am. Law of Adm. (2 ed.) § 470.

⁴² Bennett v. Gaddis, 79 Ind. 347; Wilson v. Bynum, 92 N. C. 717, 724; Clement v. Cozurt, 109 N. C. 173.

⁴³ In re Freund's Estate, 131 Cal. 667, 63 Pac. 1080.

⁴⁴ G. S. 1913, § 7325; Hoffman v. Beard, 32 Mich. 218. See O'Brien v. Larson, 71 Minn. 371, 74 N. W. 148; 11 A. & E. Ency. of Law (2 ed.) 1081; 18 Cyc. 680; 24 C. J. 548.

⁴⁵ Lafferty v. People's Sav. Bank, 76 Mich. 35, 43 N. W. 34. Contra, Thayer v. Winchester, 133 Mass. 447.

⁴⁶ State v. Probate Court, 25 Minn. 22, 27.

⁴⁷ Woerner, Am. Law of Adm. (2 ed.) § 469.

⁴⁸ In re Freund's Estate, 131 Cal. 667, 63 Pac. 1080. See § 937.

⁴⁹ G. S. 1913, §§ 7336, 7344. See Kelly v. Slack, 93 Minn. 489, 101 N. W. 797; Baldwin v. Zien, 117 Minn. 178, 134 N. W. 498; Larson v. Curran, 121 Minn. 104, 109, 140 N. W. 337; Greenman v. McVey, 128 Minn. 21, 147 N. W. 812; 24 C. J. 554.

⁵⁰ See § 944.

⁵¹ See Humes v. Wood, 8 Pick. (Mass.) 478; Hubbell v. Hubbell, 9 Pick. (Mass.) 561; White v. Ditson, 140 Mass. 359, 4 N. E. 606; Morisey v. Brown, 144 N. C. 154; Bigelow, Wills, 316; 19 A. & E. Ency. of Law (2 ed.) 1349; 40 Cyc. 2028.

but this is very doubtful.⁵² Realty cannot be sold to pay a residuary bequest.⁵³ Where legacies are charged on realty by the terms of a will the representative is probably under no affirmative duty to sell the realty to pay the legacies unless the will directs him to do so. In other words it is probably discretionary with him to sell or not. The question has never been determined in this state. It has been the usual practice not to sell but to have the realty assigned subject to the charge, remitting the legatees to their remedies in the district court.⁵⁴ The provisions of a will may be such that it is the affirmative duty of the executor to sell the realty for the purpose of paying a legacy, so that he and his sureties cannot be discharged until he has done so.⁵⁵ A power to sell realty to pay legacies is often given expressly by will.⁵⁶ A power to sell realty to pay legacies may be implied from the provisions of the will.⁵⁷ The probate court may license a sale of realty to pay legacies though the representative has implied power to sell under the terms of the will.⁵⁸ A vested remainder may be sold to pay legacies which are a charge thereon before the expiration of the precedent estate.⁵⁹

958. To pay family allowance pending administration—The statute authorizes a sale of the realty of a decedent to pay the statutory allowance to a widow and minor children pending administration, in case the personal assets of his estate are insufficient for that purpose.⁶⁰ The allowance may be paid out of the rents and profits of the realty of the decedent if the personal assets of his estate are insufficient.⁶¹

959. Sale when for best interests of estate and interested parties—Provision is made by statute for a sale when the court shall deem it for the best interests of the estate and of all persons interested therein. Under this provision land may be sold to pay specific legacies. The sale need not be for the best interest of all to the same degree. The estate should be administered with reference to the interests of all, taken as a

⁵² See § 1089; 19 A. & E. Ency. of Law (2 ed.) 1349; 24 C. J. 555; 40 Cyc. 2018.

⁵³ *White v. Ditson*, 140 Mass. 351, 359, 4 N. E. 606.

⁵⁴ See *Eddy v. Kelly*, 72 Minn. 32, 74 N. W. 1020; *Wherley v. Rowe*, 106 Minn. 494, 119 N. W. 222; *Hause v. O'Leary*, 136 Minn. 126, 161 N. W. 392; *American Cannel Coal Co. v. Clemens*, 132 Ind. 163; *Hartzell's Estate*, 178 Pa. St. 286; *Nolan v. First Nat. Bank*, 161 Wis. 22, 152 N. W. 468.

⁵⁵ *In re More's Estate*, 179 Mich. 237, 146 N. W. 319.

⁵⁶ *Townshend v. Goodfellow*, 40 Minn. 312, 41 N. W. 1056; *Merriam v. Wagner*, 74 Minn. 215, 77 N. W. 44.

⁵⁷ *Greenman v. McVey*, 126 Minn. 21, 147 N. W. 812. See § 468.

⁵⁸ See *Greenman v. McVey*, 126 Minn. 21, 147 N. W. 812.

⁵⁹ *In re Root's Will*, 81 Wis. 263, 51 N. W. 435.

⁶⁰ § 782; *Blakeman v. Blakeman*, 64 Minn. 315, 67 N. W. 69; *Pinnacle Gold Mining Co. v. Popst*, 54 Colo. 451, 131 Pac. 413; *Ackerson v. Orchard*, 7 Wash. 377; *Miller v. Defoor*, 50 Ga. 566; 11 A. & E. Ency. of Law (2 ed.) 1080; 18 Cyc. 676.

⁶¹ *Blakeman v. Blakeman*, 64 Minn. 315, 67 N. W. 69; *Baldwin v. Zien*, 117 Minn. 178, 186, 134 N. W. 498.

whole, so as to cause the least injury and best serve the interests of all. To this extent each person who becomes a beneficiary under a will or under the law is subject to such necessary changes in the character of his interest as are required by the administration of the estate.⁶²

960. Sale of whole estate when division inexpedient—Statute—When ever it appears to the court that it is necessary to sell a part of the real estate of a decedent or ward, and that by a sale of such part the residue, or some specified part or piece thereof, would be greatly injured, the court may license a sale of the whole estate, or such part thereof as may be judged necessary, and most for the interest of all concerned.⁶³ An unmarried woman executed a will by which she devised legacies to her relatives, and a certain legacy to appellant, who thereafter became her husband. Having died without issue, and there being no lawful issue of any deceased child, appellant, upon renouncing the will and electing to take under the statute, was entitled to an equal, undivided one-third of all lands other than the homestead of which she died seized. It appearing that the undivided one-third interest of the surviving husband and the other undivided two-thirds interest of the real estate could not be equitably divided, the probate court had jurisdiction, incidental to the administration and distribution of the estate, to cause the entire estate to be sold to pay specific legacies, if for the best interests of the estate and all parties concerned.⁶⁴

961. Sale of interest of vendee under land contract—Statute—When ever a decedent dies entitled under contract of purchase to any interest in land, such interest may be sold in the same cases, and in like manner, as lands of which he died seized. And in case there are any payments thereafter to become due upon such contract, such sale shall be made subject thereto, and shall not be confirmed until the purchaser shall execute a satisfactory bond to the administrator, for the benefit and indemnity of all persons entitled to the interest of decedent in such lands, conditioned for the payment of all sums unpaid on the contract. Upon the confirmation of such sale, the administrator shall assign the contract, which shall vest in the purchaser, his heirs and assigns, all the right, title, and interest of all persons entitled to the interest of the decedent in such land, and all the right and interest of all such persons in such contract, and the purchaser shall, by such sale, acquire all rights and remedies against the vendor of such land as decedent would have, if living. The proceeds of such sale shall be disposed of, in all respects in the same manner as the proceeds of sales of lands of which the dece-

⁶² G. S. 1913, §§ 7344, 7351; *Deppe v. Ford*, 89 Minn. 253, 94 N. W. 679; *Kelly v. Slack*, 93 Minn. 489, 101 N. W. 797. See *In re Porter's Estate*, 129 Cal. 86,

61 Pac. 659; *In re Steward's Estate*, 1 Cal. App. 57, 81 Pac. 728.

⁶³ G. S. 1913, § 7351.

⁶⁴ *Kelly v. Slack*, 93 Minn. 489, 101 N. W. 797.

dent died seized.⁶⁵ A representative can dispose of the interest of a vendee under a land contract only as provided by this statute under a license from the probate court.⁶⁶

962. Sale of land of married ward—Deed—Necessity of spouse joining—Statute—The homestead of a ward having a spouse shall not be sold or mortgaged by his guardian unless such spouse shall join in the deed or mortgage, nor shall the sale or mortgage of any land of a ward by his guardian in any manner affect the interests or estate of such spouse therein, unless he or she shall join in the conveyance; provided, that if the spouse of such ward has been adjudged insane or incompetent to transact his or her business, or manage his or her estate, it shall not be necessary for such insane or incompetent spouse to join in such conveyance, but a guardian of such insane or incompetent spouse shall first be appointed by the probate court of the proper county, and such guardian shall join in such conveyance after first being authorized so to do by order of such probate court.⁶⁷

963. Sale subject to or free from liens or charges—Mortgages—Statute—When the estate of a decedent or ward is in any way liable for any charge upon the lands thereof, by mortgage or otherwise, such lands may be sold by the representative, subject to such charges, but the sale shall not be confirmed by the court until the purchaser executes a bond to the representative, approved by the court, conditioned to save said estate and such representative harmless, or unless such charge shall be first satisfied and released by the owner or holder thereof. The representative may sell the whole or any part of the interest of the decedent or ward in any tract of land charged with any incumbrance, and upon release of the tract so sold may apply the proceeds of such sale or sales to the payment of the incumbrance until the same is fully paid, and he shall account only for the balance remaining as proceeds of the estate.⁶⁸ The statute allows a representative to sell the land free of the incumbrance, if the sum bid is sufficient to pay it off, and to agree with the purchaser to apply, and to apply, the proceeds of the sale, or so much thereof as may be necessary, to free the land from the incumbrance. Where the purchaser paid the holder of the incumbrance directly, rather than through the representative, it was held that this was a substantial compliance with the statute and sufficient.⁶⁹ Where less than the whole

⁶⁵ G. S. 1913, §§ 7361, 7362; *Smith v. Barr*, 83 Minn. 354, 86 N. W. 342; *Hovarka v. Havlik*, 68 Neb. 14, 93 N. W. 990; *Cutler v. Meeker*, 71 Neb. 732, 99 N. W. 514; 11 A. & E. Ency. of Law (2 ed.) 1091.

⁶⁶ *Hunt v. Thorn*, 2 Mich. 213; *Baxter v. Robinson*, 11 Mich. 520; *Hovarka v. Havlik*, 68 Neb. 14, 93 N. W. 990.

⁶⁷ G. S. 1913, § 7358, as amended by Laws 1915, c. 258.

⁶⁸ G. S. 1913, § 7363. See 11 A. & E. Ency. of Law (2 ed.) 1135; 18 Cyc. 768; 24 C. J. 567; *Woerner*, Am. Law of Adm. (2 ed.) 482.

⁶⁹ *Culver v. Hardenbergh*, 37 Minn. 225, 33 N. W. 792.

estate is sold the indemnity bond need only be for the amount or proportion of the incumbrance properly chargeable to the estate or interest sold, or such interest may be released on payment of such proportion, to be adjusted by the court after hearing the parties.⁷⁰ It will be presumed that a sale of land incumbered with a mortgage was made subject to the mortgage if the mortgage is not mentioned in the record.⁷¹ If a sale is made subject to a mortgage and the mortgagee is the purchaser he need not give bond to discharge it since the effect of the transaction is to cancel the mortgage in his hands.⁷² A purchaser may agree with the representative that the amount of an incumbrance shall be deducted from the face of a nominal bid.⁷³ The rights of lienholders must be protected either by selling subject to their liens or by directing payment thereof to be made out of the proceeds of the sale.⁷⁴ An administrator, who, in selling mortgaged land for the payment of debts, pays prior liens in good faith out of the proceeds of the sale, and complies with an order of court to take a first mortgage for a portion of the unpaid purchase price, is entitled in his final account to credit for the amount thus paid, where the land sold for its full value, and the sale was approved and confirmed by the court, though the statute requires such sales to be made subject to existing liens.⁷⁵ A conveyance by executors under a power of sale held not subject to mechanics' liens upon the interest of one of the devisees.⁷⁶ The probate court cannot order a sale subject to incumbrances created after the death of the decedent.⁷⁷

964. Amount to be sold—As a general rule only so much of the realty of the decedent should be ordered sold as may be necessary to satisfy the purposes of the sale. The court is authorized by statute to order a sale of the whole or a part.⁷⁸

965. When petition may be made—The petition may be made, and ought to be made, as soon as the representative ascertains that the personal assets will be insufficient to pay the debts.⁷⁹ The exact amount of the deficiency of personal assets need not be ascertained. The petition may be made in the early stages of the administration.⁸⁰ It may be made before claims are presented and allowed or the expiration of the

⁷⁰ McGowan v. Baldwin, 46 Minn. 477, 49 N. W. 251.

⁷¹ Edgerton v. Schnelder, 26 Wis. 385.

⁷² Lynch v. Kirby, 36 Mich. 238.

⁷³ Stebbins v. Field, 43 Mich. 333, 5 N. W. 394.

⁷⁴ Shahan v. Shahan, 48 W. Va. 477, 37 S. E. 552; Hood v. Hammond, 128 Ala. 569, 30 So. 540.

⁷⁵ In re Vasek's Estate, 97 Neb. 617, 150 N. W. 1004.

⁷⁶ Ness v. Davidson, 45 Minn. 424, 48 N. W. 10.

⁷⁷ Hewitt v. Durant, 78 Mich. 186, 44 N. W. 318.

⁷⁸ §§ 960, 969; Litchfield v. Cudworth, 15 Pick. (Mass.) 23; Fralich v. Moore, 123 Ind. 75, 24 N. E. 232; 11 A. & E. Ency. of Law (2 ed.) 1097; 18 Cyc. 697; 24 C. J. 569.

⁷⁹ Stout v. Stout, 82 Ohio St. 358, 92 N. E. 465; Nation v. Green (Ind.) 114 N. E. 895; 24 C. J. 572.

⁸⁰ Abila v. Burnett, 33 Cal. 658.

time for presenting them.⁸¹ It may be made before the filing of an inventory and appraisal.⁸² It is not necessary that all the personal property should be exhausted before petitioning for a sale of realty. This is recognized by the statute providing that the petition shall state "how much, if any, remains undisposed of."⁸³ It is not necessary to await the settlement of the accounts of the representative.⁸⁴ There is no statutory limitation of time within which an application to sell realty for the payment of debts in the course of administration must be made. It must be made within a reasonable time after the allowance of the claims of creditors, not exceeding in any event ten years. Promptness is required for the security of titles and the protection of bona fide purchasers. Each case depends upon its own facts. The terms of a will or the condition of an estate may contemplate or require considerable delay. No hard and fast rule can be laid down. An order granting a petition any time before the settlement of the estate is not void or subject to collateral attack for delay in making the application, but it may be reviewed on appeal and reversed for an abuse of discretion. In any event, the supreme court will not interfere with the action of the probate court in refusing a license after an unreasonable delay, though less than ten years have elapsed.⁸⁵ A former statute prescribed a limitation of three years. This was repealed by Laws 1885, c. 19.⁸⁶ There can be no sale after the representative is discharged and the administration closed.⁸⁷

⁸¹ Cahill v. Bassett, 66 Mich. 407, 33 N. W. 722; Randel v. Randel, 64 Kan. 254, 67 Pac. 387; Nation v. Green (Ind.) 114 N. E. 895. This is inferentially recognized by our statute which provides that the petition shall set forth the debts outstanding "so far as can be ascertained." G. S. 1913, § 7348. See 11 A. & E. Ency. of Law (2 ed.) 1083; 18 Cyc. 704; 24 C. J. 572.

⁸² Nichols v. Lee, 16 Colo. 147, 26 Pac. 157.

⁸³ Stuart v. Allen, 16 Cal. 473, 503; Richardson v. Musser, 54 Cal. 196; Wood v. Hammond, 16 R. I. 98; Read v. Gardner, 30 R. I. 485, 76 Atl. 177. Contra, Marvin v. Bowlby, 142 Mich. 245, 105 N. W. 751. See 11 A. & E. Ency. of Law (2 ed.) 1089; 18 Cyc. 682; 24 C. J. 553.

⁸⁴ Read v. Gardner, 30 R. I. 485, 76 Atl. 177; Palmer v. Palmer, 13 Gray (Mass.) 326; 11 A. & E. Ency. of Law (2 ed.) 1088; 18 Cyc. 684.

⁸⁵ State v. Probate Court, 40 Minn.

296, 41 N. W. 1033. See O'Mulcahey v. Gragg, 45 Minn. 112, 47 N. W. 543; Davis v. Townsend, 45 Minn. 523, 48 N. W. 405; Hill v. Nichols, 47 Minn. 382, 50 N. W. 367; Berkey v. St. Paul Nat. Bank, 54 Minn. 448, 454, 56 N. W. 53; Mowry v. McQueen, 80 Minn. 385, 83 N. W. 348; In re Jones' Estate, 80 Kan. 632, 103 Pac. 772; Plummer v. Kennington, 149 Iowa 419, 128 N. W. 552; Flora v. Brown, 159 Iowa 253, 140 N. W. 364; 11 A. & E. Ency. of Law (2 ed.) 1074; 18 Cyc. 707; 24 C. J. 575; Woerner, Am. Law of Adm. (2 ed.) § 465; Ann. Cas. 1917C, 600.

⁸⁶ State v. Probate Court, 25 Minn. 22; In re Ackerman's Estate, 33 Minn. 54, 21 N. W. 852; Gates v. Shugrue, 35 Minn. 392, 29 N. W. 57; Culver v. Hardenbergh, 37 Minn. 225, 33 N. W. 792; Boltz v. Schultz, 61 Minn. 444, 64 N. W. 48; Harrison v. Harrison, 67 Minn. 520, 70 N. W. 802.

⁸⁷ State v. Probate Court, 40 Minn. 296, 41 N. W. 1033.

966. Who may petition for a sale—In this state no one but a personal representative or guardian is authorized to petition for a sale.⁸⁸ A foreign representative or guardian may petition for a sale under certain conditions.⁸⁹ A special administrator cannot petition for a sale.⁹⁰ The probate court may compel a representative to petition for a sale upon the application of creditors.⁹¹ An executor who is a sole or residuary legatee and has given a bond under G. S. 1913, § 7417, to pay debts and legacies, may petition for a sale.⁹²

967. Petition—Statute—To obtain a license to sell, mortgage, or lease for more than one year, the representative shall present a verified petition to the court appointing him, setting forth what personal estate has come into his hands; the disposition thereof; how much, if any, remains undisposed of; the debts outstanding against the decedent or ward, so far as can be ascertained, and, if it be the estate of a decedent, the legacies unpaid, if any; a description of all the real estate other than the homestead of a decedent, and the condition and value of the several tracts; the names and residences, so far as known, of all persons interested therein, and, if unknown, a statement of that fact; and facts showing grounds for such sale, mortgage, or lease.⁹³ If a representative is licensed to sell by a court with jurisdiction the absence of a petition, or a defect in a petition, is not fatal to the sale and does not render it subject to collateral attack.⁹⁴ When it is sought to sell land fraudulently conveyed it is not necessary to allege that it was fraudulently conveyed.⁹⁵ It is sufficient for the representative to allege that he is such without stating the particulars of his appointment.⁹⁶ When it is sought to sell land specifically devised the petition need not set out the will. The court will take judicial notice of the will.⁹⁷ The fact that the petition prays for the sale of more land than is necessary is immaterial.⁹⁸ It is not necessary to set out the precise nature of the decedent's interest

⁸⁸ G. S. 1913, § 7348; *Levy v. Riley*, 4 Or. 392. See 11 A. & E. Ency. of Law (2 ed.) 1072; 18 Cyc. 686; 24 C. J. 557; *Woerner*, Am. Law of Adm. (2 ed.) § 464.

⁸⁹ See §§ 1179, 1347.

⁹⁰ *Long v. Burnett*, 13 Iowa 28.

⁹¹ *Stratton v. McCandliss*, 32 Kan. 512, 4 Pac. 1018. See 11 A. & E. Ency. of Law (2 ed.) 1073; 18 Cyc. 687; 24 C. J. 558.

⁹² See §§ 716, 956.

⁹³ G. S. 1913, § 7348. See 18 Cyc. 713; 24 C. J. 582; 11 R. C. L. 326-329; *Woerner*, Am. Law of Adm. (2 ed.) § 468; *Church*, Probate Law, 898.

⁹⁴ G. S. 1913, § 7360; *Montour v. Pur-*

dy, 11 Minn. 384 (278); *Rumrill v. First Nat. Bank*, 28 Minn. 202, 9 N. W. 731; *Davis v. Hudson*, 29 Minn. 27, 11 N. W. 136; *Curran v. Kuby*, 37 Minn. 330, 33 N. W. 907; *Smith v. Barr*, 83 Minn. 354, 86 N. W. 342; *Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458; *Dane v. Layne*, 10 Cal. App. 366, 101 Pac. 1067; *Plains Land & Imp. Co. v. Lynch*, 38 Mont. 271, 99 Pac. 847.

⁹⁵ *Tyndale v. Stanwood*, 182 Mass. 534, 66 N. E. 23.

⁹⁶ *Moffitt v. Moffitt*, 69 Ill. 641.

⁹⁷ *Howe v. Kern*, 63 Or. 487, 125 Pac. 834, 128 Pac. 818.

⁹⁸ *Howe v. Kern*, 63 Or. 487, 125 Pac. 834, 128 Pac. 818.

or title or to mention incumbrances.⁹⁹ The statute requires that the petition show the "condition" of the land. It is not necessary that the petition show that there are no incumbrances, or that it is not cultivated, improved or built upon, or that it has no water power or other natural advantages.¹ An allegation that the land is "improved" is a sufficient description of its condition.² The debts outstanding may be stated in gross.³ The fact that the petition does not state the debts outstanding is not fatal.⁴ If a petition is not sufficiently definite or specific the court may require an amended petition.⁵ A general petition to sell the interest of the decedent in a specified tract of land covers the statutory interest of his wife therein. It is not necessary to proceed against the interest of the wife separately.⁶ If there are more than one representative all should join in the petition, but this is not jurisdictional.⁷

968. Notice of hearing on petition—Publication—Statute—If it appears from such petition that license ought to be granted for any of the reasons set forth therein, the court shall make an order directing all persons interested in such estate to appear at a time and place therein named, and show cause, if any there be, why license should not be granted as prayed. Such order shall be served upon all persons interested in such estate by three weeks' published notice.⁸ The notice is not jurisdictional.⁹ It need not name the interested parties nor be personally served.¹⁰ It may be published in a daily paper on regular publication days once a week at intervals of a week. An objection to the sufficiency of a publication is cured by a confirmation of the sale without appeal.¹¹

969. Hearing on petition—Proof—Statute—At the time and place fixed in such order, upon proof of the due publication thereof, the court shall hear all proper evidence for or against the prayer of such petition. When satisfied that a sale of the whole or some portion of the real estate is necessary or for the best interests of the estate or ward,

⁹⁹ Tyndale v. Stanwood, 182 Mass. 534, 66 N. E. 23.

¹ Spencer v. Sheehan, 19 Minn. 338 (292).

² Richardson v. Butler, 82 Cal. 174, 23 Pac. 9.

³ State v. Probate Court, 19 Minn. 117 (85).

⁴ Spencer v. Sheehan, 19 Minn. 338 (292).

⁵ State v. Probate Court, 19 Minn. 117 (85); Spencer v. Sheehan, 19 Minn. 338 (292).

⁶ Scott v. Wells, 55 Minn. 274, 56 N. W. 828.

⁷ Melms v. Pfister, 50 Wis. 186, 18 N. W. 255.

⁸ G. S. 1913, § 7349. See 18 Cyc. 724; 24 C. J. 591; Woerner, Am. Law of Adm. (2 ed.) § 466.

⁹ G. S. 1913, § 7369; Hunter v. Buchanan, 87 Neb. 277, 127 N. W. 166. See § 40.

¹⁰ Spencer v. Sheehan, 19 Minn. 338 (292); Stack v. Royce, 34 Neb. 833, 52 N. W. 675 (names of interested parties need not be given though known).

¹¹ Dayton v. Mintzer, 22 Minn. 393.

the court may order the sale of the whole or so much and such part of the real estate described in the petition as it deems necessary or beneficial, and if satisfied that the interests of the estate will be better subserved by mortgaging or leasing such real estate it may authorize such mortgage or lease.¹² The statute does not prescribe the kind or amount of evidence that shall be submitted by the petitioner on the application for a license. In the absence of a contest the averments of the verified petition ought to be deemed sufficient to make out a *prima facie* case for the petitioner, the court taking judicial notice of all prior proceedings in the administration, including the inventory and appraisal and the presentation and allowance of claims. If the court desires additional proof of the existence and amount of claims and the deficiency of personal assets it may require the representative to submit it.¹³ It has been held that the allegations of the petition or the admissions of the representative are not sufficient proof of claims, at least in case of a contest.¹⁴ The prior allowance of claims cannot be questioned on the hearing.¹⁵ If claims against the estate have not been proved and allowed by the court they may doubtless be proved by the testimony of the creditors.¹⁶ If persons interested in the estate contest claims the burden is on the representative to prove their validity. Possibly the representative may relieve himself of this burden by notifying the claimant of the contest and giving him an opportunity to come in and prove his claim.¹⁷ The validity of the appointment of the representative cannot be questioned on the application except for jurisdictional defects.¹⁸ The want of a statement of the claims filed or a showing as to the disposition of the personal assets, if irregular, does not invalidate the sale.¹⁹ The exact amount of the deficiency of personal assets need not be shown.²⁰ The title of the decedent to the land sought to be sold cannot be adjudicated, but it may be considered so far as necessary to determine the advisability of ordering it sold, or whether the decedent has a substantial claim to the land.²¹ If it appears that the title is disputed it is discretionary with the court to defer granting a license until the title can be settled in a court of competent jurisdiction.²² Collateral

¹² G. S. 1913, § 7350. See 18 Cyc. 737; 24 C. J. 601; Woerner, *Am. Law of Adm.* (2 ed.) §§ 437-470.

¹³ See *In re Brannan's Estate* (Cal.) 51 Pac. 320; *Plains Land & Imp. Co. v. Lynch*, 28 Mont. 271, 99 Pac. 847; 24 C. J. 601.

¹⁴ *Chamberlin v. Chamberlin*, 4 Allen (Mass.) 184.

¹⁵ *State v. Probate Court*, 25 Minn. 22.

¹⁶ *Chamberlin v. Chamberlin*, 4 Allen (Mass.) 184; *Cahill v. Bassett*, 66 Mich. 407, 33 N. W. 722.

¹⁷ *Nation v. Green* (Ind.) 114 N. E. 895.

¹⁸ *Waldow v. Beemer*, 45 Neb. 626, 63 N. W. 918. See *Culver v. Hardenbergh*, 37 Minn. 225, 33 N. W. 792; Woerner, *Am. Law of Adm.* (2 ed.) § 467.

¹⁹ *Cheney v. McColloch*, 104 Iowa 249, 73 N. W. 580.

²⁰ *Abila v. Burnett*, 33 Cal. 658.

²¹ *Shields v. Ashley*, 16 Mo. 471, 473; *Swachkamer v. Kline*, 25 N. J. Eq. 503; *Robison v. Furman*, 47 N. J. Eq. 307, 20 Atl. 898; 11 A. & E. Ency. of Law (2 ed.) 1094; 18 Cyc. 745; Woerner, *Am. Law of Adm.* (2 ed.) § 467.

²² *Valle v. Bryan*, 19 Mo. 423; *Trent*

questions of trespass, boundary and the like cannot be considered.²³ Questions of heirship cannot be considered. Persons claiming to be heirs should be allowed to offer any pertinent objections to the granting of the license, without determining their heirship.²⁴ A foreign executor and trustee having a vested property interest in the estate as such trustee may oppose a petition without taking out local letters as executor.²⁵

970. License—Statute—The license shall describe the land to be sold, mortgaged, or leased. It may specify the order in which several tracts shall be sold, and shall direct whether the land shall be sold at private sale or public auction. If any part of such real estate has been devised, and not charged in such devise with the payment of debts, it shall direct that part not so devised to be sold first, and, if any lands have been sold by heirs or devisees, it shall direct the remainder to be sold first. When the petition is to mortgage lands, the license shall fix the maximum amount and rate of interest for which the mortgage may be given, and specify for what purpose the proceeds shall be used.²⁶ Granting or refusing a license is largely a matter of discretion with the probate court.²⁷ Where there are debts against an estate duly allowed and there is no personal property in the hands of the representative to pay them, it is the duty of the court, on a proper application of the representative, to grant a license.²⁸ It is discretionary with the court to defer granting a license for the sale of land, the title to which is defective, until the defect is cured.²⁹ It is discretionary with the court to defer granting a license if it is probable that a much larger price can be realized within a reasonable time.³⁰ A license is to be liberally construed and mere technical defects therein disregarded.³¹ A license to sell the "interest of the estate" in specified land has been held to include the statutory interest of the decedent's wife.³² The license must describe the land with reasonable certainty.³³ An informal license for the sale of the interest of decedent in an executory contract for the sale

v. Trent, 24 Mo. 307; Marshall v. Blass, 82 Mich. 518, 529, 46 N. W. 947, 47 N. W. 516; Woerner, Am. Law of Adm. (2 ed.) § 467; 24 C. J. 565.

²³ Clement v. Foster, 71 N. C. 36.

²⁴ In re Houck's Estate, 23 Or. 10, 17 Pac. 461.

²⁵ Rawitzer v. First Trust Co., 175 Cal. 585, 166 Pac. 581.

²⁶ G. S. 1913, § 7353. See 18 Cyc. 746; 24 C. J. 609; Woerner, Am. Law of Adm. (2 ed.) § 473.

²⁷ In re Parker's Estate, 72 Neb. 601, 101 N. W. 233; Livermore v. Haven, 23 Pick. (Mass.) 116.

²⁸ State v. Probate Court, 25 Minn. 22.

²⁹ See § 969.

³⁰ See Smith v. Barr, 83 Minn. 354, 86 N. W. 342.

³¹ Buntin v. Root, 66 Minn. 454, 69 N. W. 330; Smith v. Barr, 83 Minn. 354, 86 N. W. 342.

³² Scott v. Wells, 55 Minn. 274, 56 N. W. 828.

³³ Middleton v. Wharton, 41 Minn. 266, 43 N. W. 4; In re Winona Bridge Ry. Co., 51 Minn. 97, 52 N. W. 1079; Buntin v. Root, 66 Minn. 454, 69 N. W. 330 (indefinite description cured by confirmation of sale).

of land to him held sufficient.³⁴ Land sought to be sold was in range six and was so described in the petition. The license described the land as in range five. Held, that the sale was void and that an order of the probate court, made twenty-seven years after the sale, correcting the error, was also void.³⁵ In appropriate cases the court has the power and duty to marshal various tracts in the order in which they are liable for the debts or legacies of the decedent.³⁶ If any lands of the decedent have been sold by heirs or devisees the license must direct the remainder to be sold first.³⁷ If any part of the land to be sold has been devised and not charged in such devise with the payment of debts, the license must direct that the part not so devised shall be sold first.³⁸ Pursuant to G. S. 1894, § 4598, a license to sell the real estate of a deceased person for the payment of debts was granted by the probate court, and subsequently extended for two years after the year therein named as the time in which the real estate should be sold, but said real estate was not sold under said license. Held, that said license having expired at the end of said three years, the probate court had power to grant a new or second license.³⁹ Possibly an order of sale is a determination of the jurisdiction and authority of the court to make it, including the due appointment of the representative and all other prerequisites of the order. It does not have that effect if the record affirmatively shows lack of jurisdiction.⁴⁰ The sale must be pursuant to the license.⁴¹

971. Sale public in part and private in part—Statute—On the hearing of a petition for sale of lands, the court may license the sale of a part of the land at public auction, and of another part at private sale. In either case the license shall describe the land to be sold thereunder.⁴²

972. Bond and oath before sale or mortgage—Statute—Every representative licensed to sell or mortgage real estate shall give bond before sale, as provided hereafter in the subdivision on probate bonds. Before fixing the time and place of sale, if at public auction, and before making sale, if at private sale, he shall take and subscribe an oath that in disposing of the estate which he is licensed to sell he will use his best judgment in fixing on the time and place of sale, and will exert his utmost endeavors to dispose of the same advantageously to all persons interested therein, which oath shall be filed in the probate court before con-

³⁴ *Smith v. Barr*, 83 Minn. 354, 86 N. W. 342.

³⁵ *Hanson v. Ingwaldson*, 77 Minn. 533, 80 N. W. 702.

³⁶ *Baldwin v. Zlen*, 117 Minn. 178, 134 N. W. 498; *Hays v. Jackson*, 6 Mass. 149. See §§ 943-945.

³⁷ G. S. 1913, § 7353. See § 943.

³⁸ G. S. 1913, § 7353. See § 943.

³⁹ *Harrison v. Harrison*, 67 Minn. 520, 70 N. W. 802.

⁴⁰ *Culver v. Hardenbergh*, 37 Minn. 225, 229, 33 N. W. 792.

⁴¹ *Williams v. Schembri*, 44 Minn. 250, 46 N. W. 403.

⁴² G. S. 1913, § 7357.

firmation of sale.⁴³ Before any representative shall proceed under a license to sell or mortgage real estate, he shall give a bond in such amount and with such sureties as the judge shall require and approve, conditioned for the faithful discharge of his duties under said license, and to account for and pay over according to law all moneys received on account thereof.⁴⁴ A bond, duly approved, is essential to a valid sale.⁴⁵ The fact that a bond was not formally approved has been held not fatal on collateral attack.⁴⁶ A testator cannot relieve his executor of the statutory duty to give the bond.⁴⁷ The bond is in the nature of additional security. The sureties on the general bond of the representative are liable on a sale of realty though a special sale bond is given.⁴⁸ An action on the general bond of the representative is not a prerequisite to an action on the special sale bond.⁴⁹ The bond is for the protection of those entitled to the proceeds of the sale and not of purchasers of the land.⁵⁰ It is sufficient if the bond is in substantial compliance with the statute. A bond reciting that it was sealed, but without any seal or scroll, has been held sufficient.⁵¹ If a bond is duly approved and deposited with the judge of probate the failure of the judge to record it is not fatal to the validity of the sale and does not render it subject to collateral attack.⁵² A license required the representatives to execute a sale bond in a specified amount. After the appraisal and before the sale the court approved a satisfactory bond in a less amount. Held, that the variance was not fatal to the validity of the sale.⁵³ It is not necessary for the license to fix the amount of the statutory sale bond.⁵⁴ The sureties are not liable for the failure of the representative to return to purchasers the proceeds of a void sale.⁵⁵ They are not liable for a breach of trust by the representative not connected with the sale or mortgage.⁵⁶

⁴³ G. S. 1913, § 7354.

⁴⁴ G. S. 1913, § 7419.

⁴⁵ G. S. 1913, § 7369 (2); *Babcock v. Cobb*, 11 Minn. 347 (247) (statute requiring a bond held applicable though license to sell was made prior to its enactment); *In re Winona Bridge Ry. Co.*, 51 Minn. 97, 102, 52 N. W. 1079; *Hubachek v. Maxbass Security Bank*, 117 Minn. 163, 134 N. W. 640 (failure of guardian to give sale bond under statute of North Dakota held to render title unmarketable). See 11 A. & E. Ency. of Law (2 ed.) 1098; 18 Cyc. 759; *Woerner*, Am. Law of Adm. (2 ed.) § 472; 24 C. J. 622; 33 L. R. A. 761 (necessity of bond by guardian).

⁴⁶ *Hunter v. Buchanan*, 87 Neb. 277, 127 N. W. 166.

⁴⁷ *Sharpley v. Plant*, 79 Miss. 175, 28 So. 799.

⁴⁸ *Frederickson v. American Surety Co.*, 135 Minn. 346, 160 N. W. 859; *Durfee v. Joslyn*, 101 Mich. 551, 60 N. W. 39. See 43 L. R. A. (N. S.) 308.

⁴⁹ *White v. Schaberg*, 131 Mich. 319, 91 N. W. 168.

⁵⁰ *People v. Parker*, 54 Colo. 604, 132 Pac. 56.

⁵¹ *Buntin v. Root*, 66 Minn. 454, 69 N. W. 330. Since the enactment of G. S. 1913, § 5704, no seal is required.

⁵² *In re Winona Bridge Ry. Co.*, 51 Minn. 97, 52 N. W. 1079.

⁵³ *In re Winona Bridge Ry. Co.*, 51 Minn. 97, 52 N. W. 1079.

⁵⁴ *In re Winona Bridge Ry. Co.*, 51 Minn. 97, 102, 52 N. W. 1079.

⁵⁵ *People v. Parker*, 54 Colo. 604, 132 Pac. 56.

⁵⁶ *National Surety Co. v. Washington* (Okl.) 170 Pac. 1142.

They are liable not only for the proceeds of the sale, but also for interest thereon from the time the same came into the hands of the representative.⁵⁷ The bond does not cover counsel fees incurred in proceedings to compel the representative to account.⁵⁸ In an action involving the validity of a sale the failure to give a bond may be proved by showing that the record is silent as to such bond and by the testimony of the representative.⁵⁹ Whether any bond was filed has been held a question for the trial court and not open for consideration in the supreme court.⁶⁰ T., a minor, owned 80 acres of land in section II, and 80 in section 14. S., his guardian, obtained license to sell two eighties in section II,—one owned by T. and the other not. S., as principal, and W., as surety, executed a sale-bond, conditioned that S. would sell the two eighties in section II, and dispose of the proceeds according to law. S. then proceeded, and, as guardian, sold the two eighties in fact owned by T., as an entirety, for a gross sum, and commingled the money with his own funds. Subsequently, S. paid out and expended various sums for the use of his ward. T. having attained his majority, and S. having failed to account for or pay over the balance due his ex-ward, T. sued on the sale-bond to recover the proceeds of the 160 acres sold, less the amounts paid out by S. for his use. No fraud or mistake in the terms of the bond is alleged. Held, that T. could elect to allow the void sale of the 80 in section 14 to stand, and claim the purchase-money in the hands of S. Also, that W., the surety, is not liable for the proceeds of the 80 in section 14, but is for the proceeds of the 80 in section II. Also, that, in order to ascertain the amount for which W. is liable, the amount due T. must be apportioned between the two tracts sold, in proportion to their respective values at the time of sale. Also, that, as to S., the whole being one debt, and his disbursements having been made generally with reference to it as an entirety, the credits must be applied in reduction of the entire claim, and the balance apportioned between the two eighties; that W. has no right to have the credits exclusively applied to extinguish the part for which he was liable, nor has T. any equity entitling him to have them first applied to extinguish the part for which W. was not liable.⁶¹

973. Oath—An oath made and filed as prescribed by statute is essential to a valid sale.⁶² An oath in substantial compliance with the statute is sufficient.⁶³ The fact of the filing of an oath is sufficiently proved

⁵⁷ *Durfee v. Joslyn*, 101 Mich. 551, 60 N. W. 39.

⁵⁸ *Mann v. Everts*, 64 Wis. 372, 25 N. W. 209.

⁵⁹ *Babcock v. Cobb*, 11 Minn. 347 (247).

⁶⁰ *Jordan v. Secombe*, 33 Minn. 220, 22 N. W. 383.

⁶¹ *Tomlinson v. Simpson*, 33 Minn. 443, 23 N. W. 864.

⁶² G. S. 1913, §§ 7354, 7369 (3); *Montour v. Purdy*, 11 Minn. 384 (278); 11 A. & E. Ency. of Law (2 ed.) 1098; 18 Cyc. 758; 24 C. J. 622; *Woerner*, Am. Law of Adm. (2 ed.) § 472.

⁶³ *Montour v. Purdy*, 11 Minn. 384

by the oath, dated before the sale, found in the regular files of the probate court, though the fact or date of filing is not indorsed upon it by the probate judge.⁶⁴

974. Bond to prevent sale—Statute—License shall not be granted if any of the persons interested in the estate shall give bond to the judge of probate in such sum and with such sureties as he directs and approves, conditioned to pay all the debts, legacies, and expenses of administration, so far as personal property of the estate is insufficient therefor, within such time as the court may direct. But this section shall not apply to cases wherein it appears to the court that it would be for the best interests of the estate of the decedent, and of all the persons interested therein, that the said real estate or any part thereof, not specifically disposed of by the will of the deceased, be sold.⁶⁵ A bond is not invalid merely because it is given after the order of license instead of before. The obligor on the bond must be interested in the estate. The approval of the bond by the court is an adjudication of that fact which cannot be collaterally attacked for error.⁶⁶ The statute is inapplicable to a sale made to carry out provisions of a will or to make a partition.⁶⁷

975. Private sale—Appraisal—Notice—Statute—If, on hearing, the court is satisfied that it will be for the best interests of the estate to sell the whole or some part of the land at private sale, it shall so order. But before any land shall be sold at private sale it shall be reappraised by two or more competent persons to be appointed by the court, who, before entering upon their duties, shall take and subscribe an oath to faithfully appraise such land at its full cash value. Such oath and the order of their appointment shall be filed with the court. The court may in such case also order such notice as it deems advisable to be given by the representative before sale is made. No such land shall be sold at private sale for less than its appraised value.⁶⁸ No notice of sale is required in a private sale unless expressly required by the license.⁶⁹ A failure to give a notice as required by a license for a private sale is fatal to the validity of the sale.⁷⁰ Where a license was granted to a guardian for a private sale, but no sale was made thereunder, a deed executed by the guardian was held not to make a marketable title.⁷¹

(278); *Hugo v. Miller*, 50 Minn. 105, 52 N. W. 381.

⁶⁴ *West Duluth Land Co. v. Kurtz*, 45 Minn. 380, 47 N. W. 1134.

⁶⁵ G. S. 1913, § 7352. See 11 A. & E. Ency. of Law (2 ed.) 1076; 18 Cyc. 698; 24 C. J. 570.

⁶⁶ *Bond v. Fidelity & Casualty Co.* (Kan.) 173 Pac. 294.

⁶⁷ *Clarity v. Sheridan*, 91 Iowa 304, 59 N. W. 52; *Butts v. McLeod*, 89 Kan.

785, 132 Pac. 1174. See *Dexter v. Gordon*, 136 Mich. 235, 98 N. W. 1016.

⁶⁸ G. S. 1913, § 7356. See *Woerner*, Am. Law of Adm. (2 ed.) § 476 (appraisal); 24 C. J. 617.

⁶⁹ *Curran v. Kuby*, 37 Minn. 330, 33 N. W. 907; *Culver v. Hardenbergh*, 37 Minn. 225, 33 N. W. 792.

⁷⁰ *Cater v. Steeves*, 95 Minn. 225, 103 N. W. 885.

⁷¹ *Williams v. Schembri*, 44 Minn. 250, 46 N. W. 403.

976. Notice of sale at public auction—Statute—When the license directs a sale at public auction, three weeks' published notice of the time and place of sale shall be given, and the court may order further notice whenever deemed advisable. The notice shall describe the land with reasonable certainty. Such sale shall be in the county where the lands are situated, between 9 o'clock a. m. and the setting of the sun on the same day. When the lands are contiguous, and lie in two or more counties, the notice may be given and sale made in either.⁷² A notice in substantial compliance with the statute is a prerequisite to a valid sale. The want of such a notice renders the sale subject to collateral attack.⁷³ A notice which states neither the time nor place of sale is insufficient.⁷⁴ An error in the name of an attorney of a non-resident guardian has been held immaterial.⁷⁵ The notice must describe the land with reasonable certainty.⁷⁶ It must state the particular place in a city where the sale will be had.⁷⁷ It must be published three weeks.⁷⁸ A publication in a daily paper once each week for three successive weeks and on the same day of each week is sufficient.⁷⁹ No notice is required in the case of a private sale unless expressly directed. If a notice is expressly directed and it is not given the sale is void and subject to collateral attack.⁸⁰

977. Adjournment of sale—Statute—The executor, administrator, or guardian may adjourn the sale from time to time, as he may deem for the best interests of all persons concerned, but not exceeding three months in all. Each adjournment shall be publicly announced at the time and place fixed for the sale, and, if for more than one day, further notice thereof shall be given by posting or publication, or both, as the circumstances will admit.⁸¹ A statement in a report of sale that the sale was "legally made" covers adjournments as authorized by the

⁷² G. S. 1913, § 7355.

⁷³ G. S. 1913, §§ 7355, 7369(4); *Montour v. Purdy*, 11 Minn. 384 (278); *Hartley v. Croze*, 38 Minn. 325, 37 N. W. 449. See *Cater v. Steeves*, 95 Minn. 225, 103 N. W. 885 (private sale); 18 Cyc. 760; 24 C. J. 625; *Woerner*, Am. Law of Adm. (2 ed.) § 475.

⁷⁴ *Houlihan v. Fogarty*, 162 Mich. 492, 127 N. W. 793.

⁷⁵ *Richardson v. Farwell*, 49 Minn. 210, 51 N. W. 915.

⁷⁶ *Rice v. Dickerman*, 47 Minn. 527, 50 N. W. 698; *Richardson v. Farwell*, 49 Minn. 210, 51 N. W. 915; *In re Winona Bridge Ry. Co.*, 51 Minn. 97, 52 N. W. 1079.

⁷⁷ *Hartley v. Croze*, 38 Minn. 325, 37 N. W. 449.

⁷⁸ See, as to the sufficiency of publication under former statutes, *Montour v. Purdy*, 11 Minn. 384 (278); *Spencer v. Sheehan*, 19 Minn. 338 (292); *Dayton v. Mintzer*, 22 Minn. 393; *Wilson v. Thompson*, 26 Minn. 299, 3 N. W. 699; *Greenwood v. Murray*, 28 Minn. 120, 123, 9 N. W. 629; *Hartley v. Croze*, 38 Minn. 325, 37 N. W. 449; *Richardson v. Farwell*, 49 Minn. 210, 51 N. W. 915; *Hugo v. Miller*, 50 Minn. 105, 52 N. W. 381 (affidavits of publishing and posting notices held sufficient).

⁷⁹ *Dayton v. Mintzer*, 22 Minn. 393.

⁸⁰ *Curran v. Kuby*, 37 Minn. 330, 33 N. W. 907; *Cater v. Steeves*, 95 Minn. 225, 103 N. W. 885.

⁸¹ G. S. 1913, § 7360. See 11 A. & E. Ency. of Law (2 ed.) 1103; 18 Cyc. 766; 24 C. J. 631.

statute.⁸² Adjournments from day to day may be made without a new notice.⁸³ An adjournment is proper if there is a combination of bidders to affect the sale.⁸⁴ If the weather is bad and the bidders few an adjournment is proper.⁸⁵ If the bids are unsatisfactory an adjournment is proper.⁸⁶ An adjournment may be made by a representative through his agent or attorney.⁸⁷ If a sale is confirmed an irregularity in adjournments does not render the sale subject to collateral attack.⁸⁸

978. Confirmation of sale by probate court—Statute—The representative making a sale shall immediately report in writing his proceedings under the license to the court, with due proof that notice of sale has been given. Thereupon the court shall inquire into the regularity and fairness of the sale, and may examine any person under oath touching the same. If it appears that there has been any irregularity or unfairness, or that the sum bid is less than the value, or that a sum sufficiently in excess of such bid to warrant a new sale may be obtained, it shall vacate such sale and order another, notice of which shall be given, and the sale conducted in all respects as if no previous sale had taken place. But if it appears that the first sale was regularly and fairly conducted, and that the sum bid was not disproportionate to the value of the property, or not sufficiently so to warrant the expense of a new sale, the court may confirm such sale and order a conveyance under it.⁸⁹ A confirmation is essential to the validity of a sale. If none is made the sale is subject to collateral attack on that ground.⁹⁰ Whatever sale is made the representative must report to the court for confirmation. He cannot declare a sale off and proceed to a resale.⁹¹ An administrator licensed to sell at private sale cannot make a binding contract of sale. He can only report a proposed sale to the probate court, and the proposed purchaser acquires no interest in the land until the sale has been confirmed by the court and the purchaser has complied with the conditions prescribed by the court.⁹² The confirmation does not normally or necessarily extend to matters anterior to the sale. It is ordinarily confined to the legality and fairness of the sale and the sufficiency of the price.⁹³

⁸² *Dayton v. Mintzer*, 22 Minn. 393, 396.

⁸³ *Sitzman v. Pacquette*, 13 Wis. 291.

⁸⁴ *In re Lawrence*, 1 Redf. (N. Y.) 310.

⁸⁵ *Beaublen v. Poupard*, Harr Ct. (Mich.) 206; *Norris v. Howe*, 15 Mass. 175.

⁸⁶ *Rogers v. Dickry*, 117 Ga. 819, 45 S. E. 71. See *Smith v. Barr*, 83 Minn. 354, 86 N. W. 342.

⁸⁷ *Hicks v. Willis*, 41 N. J. Eq. 515, 7 Atl. 567.

⁸⁸ *Thompson v. Burge*, 60 Kan. 549,

57 Pac. 110; *Noland v. Barrett*, 122 Mo. 181, 26 S. W. 692.

⁸⁹ G. S. 1913, § 7368. See 11 A. & E. Ency. of Law (2 ed.) 1111; 18 Cyc. 787; 24 C. J. 651; *Woerner*, Am. Law of Adm. (2 ed.) § 473; 11 R. C. L. 366-369; *Church*, Probate Law, 942.

⁹⁰ G. S. 1913, § 7369 (5); *Peirson v. Fisk*, 99 Mich. 43, 57 N. W. 1080.

⁹¹ *Peirson v. Fisk*, 99 Mich. 43, 57 N. W. 1080. See *Amundson v. Hanson* (Minn.) 185 N. W. 252.

⁹² *Amundson v. Hanson* (Minn.) 185 N. W. 252.

⁹³ *Dawson v. Helmes*, 30 Minn. 107,

But if the order authorizing the sale is not in compliance with the statute or is void for any reason the court should refuse to confirm the sale.⁹⁴ It is the duty of the court to pass on the sufficiency of the notice of sale.⁹⁵ As the jurisdiction of the court to grant the license and the necessity for the sale have already been determined on the hearing of the application for the license they will be presumed on the hearing for confirmation.⁹⁶ Regularly the confirmation should precede the execution of the deed but a subsequent confirmation is effectual.⁹⁷ An order of confirmation need not include a description of the land sold.⁹⁸ A sale may be confirmed as to a part of the lands sold and vacated as to the remainder.⁹⁹ Where an order of confirmation is entered and a deed given in pursuance thereof it will be presumed that the facts authorizing the order were duly ascertained.¹ A confirmation does not render the sale immune from collateral attack on the grounds specified in G. S. 1913, § 7369. In other words it does not validate a void sale. Recitals in the order of confirmation as to compliance with the statutory requirements may be contradicted.² A confirmation of a sale not made pursuant to a prior license has been held not to make a marketable title.³ The confirmation may be made *ex parte* without notice to heirs or others.⁴ A grantee of an heir may resist confirmation.⁵ Upon confirmation of the sale the purchaser becomes the equitable owner and entitled to a deed on payment or tender of payment of the purchase price.⁶ In a sense the title passes at the time of the sale subject to confirmation by the court. The confirmation relates back to the time of sale and validates it as of that time.⁷ Upon confirmation the subject-matter passes out of the jurisdiction of the probate court.⁸ A confirmation may be

14 N. W. 462; *Culver v. Hardenbergh*, 37 Minn. 225, 229, 33 N. W. 792; *Burrell v. Chicago etc. Ry. Co.*, 43 Minn. 363, 45 N. W. 849. See *Dayton v. Mintzer*, 22 Minn. 393, 395; *Hugo v. Miller*, 50 Minn. 105, 113, 52 N. W. 381; *Carter v. Steeves*, 95 Minn. 225, 226, 103 N. W. 885.

⁹⁴ *Miller v. Hanna*, 89 Neb. 224, 131 N. W. 226.

⁹⁵ *Hugo v. Miller*, 50 Minn. 105, 113, 52 N. W. 381.

⁹⁶ *Saxon v. Cain*, 19 Neb. 488, 26 N. W. 385.

⁹⁷ *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462.

⁹⁸ *Buntin v. Root*, 66 Minn. 454, 458, 69 N. W. 330.

⁹⁹ *Delaplaine v. Lawrence*, 3 N. Y. 301; *Bacon v. Morrison*, 57 Mo. 68.

¹ *Wheelock v. Lake*, 117 Mich. 11, 75 N. W. 140.

² *Cater v. Steeves*, 95 Minn. 225, 103 N. W. 885.

³ *Williams v. Schembri*, 44 Minn. 250, 46 N. W. 403.

⁴ *Brusha v. Phipps*, 86 Neb. 822, 126 N. W. 856.

⁵ *In re Bazzuro's Estate*, 161 Cal. 71, 118 Pac. 434.

⁶ *Pearson v. Gillenwaters*, 99 Tenn. 446, 42 S. W. 9; *Moller v. Niagara Fire Ins. Co.*, 54 Wash. 439, 103 Pac. 449; *Lake v. Hathaway*, 75 Kan. 391, 89 Pac. 666.

⁷ *Cunningham v. Richardson*, 68 Wash. 24, 122 Pac. 369. See §§ 979, 980.

⁸ *State v. Probate Court*, 19 Minn. 117 (85); *State v. Probate Court*, 33 Minn. 94, 22 N. W. 10. See *Amundson v. Hanson* (Minn.) 185 N. W. 252.

set aside by the court if erroneously or unadvisedly made.⁹ Where the court confirms a sale and directs the execution of a deed on compliance with the specified terms, but the purchaser fails to comply therewith, the court has power to revoke its order, or to amend it so as to authorize a sale to another; and where this is done, and the sale made to the other, the wife of the first purchaser acquires no marital interest in the land. Where the court has power to make such amendment, irregularities in the procedure cannot be taken advantage of in a collateral proceeding.¹⁰ An order of confirmation made by a court with jurisdiction, if not set aside on motion or reversed on appeal, is conclusive on all parties interested in the estate and is not subject to collateral attack for error or irregularity.¹¹

979. Payment of purchase price—Confirmation is essential to the validity of the sale. Until the sale is confirmed the purchaser is under no obligation to pay the purchase price.¹² If the purchaser accepts the deed he may be sued in the district court for the purchase price.¹³ After confirmation the court may set aside the sale and order another sale if the purchaser neglects or refuses to pay the purchase price.¹⁴

980. Deed—Form and sufficiency—Where a deed is made by "A. B. Executor," and signed by him in the same form, it sufficiently appears that it was made by him in his representative capacity.¹⁵ A deed is necessary to pass the legal title.¹⁶ Though a deed by a representative does not refer to the proceedings in the probate court, if it appears by the records of that court and the deed that the sale and deed were made pursuant to a license it is sufficient. Such a deed in the name of the representative, in his official capacity, as grantor, is sufficient.¹⁷ If a representative dies or removes from the state before executing a deed an administrator de bonis non may execute it.¹⁸ The deed should not contain any warranty of title but should merely convey the interest or estate of the decedent.¹⁹ Covenants of warranty or seizin in the deed do not bind the estate.²⁰

⁹ Taylor v. Hosick, 13 Kan. 518.

¹⁰ Amundson v. Hanson (Minn.) 185 N. W. 253.

¹¹ Lake v. Hathaway, 75 Kan. 391, 89 Pac. 666.

¹² Peirson v. Fisk, 99 Mich. 43, 57 N. W. 1080; 11 A. & E. Ency. of Law (2 ed.) 1112; 18 Cyc. 788; 24 C. J. 651; Woerner, Am. Law of Adm. (2 ed.) § 478.

¹³ Stebbins v. Field, 43 Mich. 333, 5 N. W. 394.

¹⁴ Taylor v. Hosick, 13 Kan. 518.

¹⁵ Babcock v. Collins, 60 Minn. 73, 61 N. W. 1020.

¹⁶ Scarf v. Aldrich, 97 Cal. 360, 32

Pac. 324; 11 A. & E. Ency. of Law (2 ed.) 1153; 18 Cyc. 832; 24 C. J. 696; Woerner, Am. Law of Adm. (2 ed.) § 480.

¹⁷ Menage v. Jones, 40 Minn. 254, 41 N. W. 972. See Sterling v. Sterling, 77 Minn. 12, 79 N. W. 525 (deed reciting proceedings in probate court and attempting to create a trust); 11 A. & E. Ency. of Law (2 ed.) 1156; 18 Cyc. 835; 24 C. J. 699; Woerner, Am. Law of Adm. (2 ed.) § 480.

¹⁸ Gridley v. Phillips, 5 Kan. 349.

¹⁹ Payne v. People (Colo.) 173 Pac. 397.

²⁰ Hale v. Marquette, 69 Iowa 376, 28

981. Disposition of surplus at sale—When land is sold in proceedings in the probate court for the payment of debts and expenses of administration, the surplus proceeds, if any, go to the heir who would have taken the land. The conversion of the real estate into money is complete only to the extent and for the purposes for which the sale was authorized. So far as these purposes do not extend, the property retains its former character in respect of the rights of the owner. Therefore any surplus must be applied to the payment of a judgment obtained against the heir, and duly docketed after the death of the ancestor and before the sale.²¹

982. Caveat emptor—It seems to be an open question in this state whether the rule of caveat emptor applies to sales by representatives. There are many cases in other jurisdictions holding that it does, but there are discordant notes and limitations on the general rule.²² The rule of caveat emptor has been held not applicable to a title which a representative agreed to convey which was defective because of defects in the proceedings authorizing the sale of the land for the payment of debts, such defects going to the right of the representative to convey title.²³ In Iowa it is held that the doctrine of caveat emptor does not apply to sales by guardians under order of the court, and where a guardian selling a lot as an entirety under order of court and the purchaser did not know that it was subject to an easement not disclosed in the records as shown by an abstract, the purchaser was entitled to an abatement in the price because of the incumbrance by the easement.²⁴

983. No lien to purchaser at void sale—The statutes do not now give a lien to a purchaser at a void sale. Formerly there was such a statute.²⁵

984. Effect of sale on liens—A sale cuts out a judgment lien against heirs or devisees.²⁶

985. Sale cuts out statutory interest of other spouse—A sale for the payment of debts cuts out the statutory interest of the other spouse in the land sold. No reference need be made to such interest in the proceedings.²⁷

N. W. 647; 11 A. & E. Ency. of Law (2 ed.) 1159; 18 Cyc. 837; 24 C. J. 690; Woerner, Am. Law of Adm. (2 ed.) § 480.

²¹ Kolars v. Brown, 108 Minn. 60, 121 N. W. 229. See § 984.

²² See Stephens v. Boyd, 157 Iowa 570, 138 N. W. 389; Stonerook v. Wisner, 171 Iowa 109, 153 N. W. 351; Shutz v. Tidrick, 26 S. D. 505, 128 N. W. 811; 11 A. & E. Ency. of Law (2 ed.) 1137; 15 Id. 64; 18 Cyc. 826; 21 Cyc. 145; 24 C. J. 689; 11 R. C. L. 350; Woerner,

Am. Law of Adm. (2 ed.) § 484; Ann. Cas. 1917E, 252.

²³ Hrdlicka v. Evans, 165 Iowa 207, 145 N. W. 84.

²⁴ Stonerook v. Wisner, 171 Iowa 109, 153 N. W. 351. See Ann. Cas. 1917E, 252.

²⁵ Montour v. Purdy, 11 Minn. 384 (278).

²⁶ Yoder v. Kalona Sav. Bank, 142 Iowa 219, 119 N. W. 147; Yeaton v. Barnhart, 78 Or. 249, 150 Pac. 742. See § 981.

²⁷ Scott v. Wells, 55 Minn. 274, 56 N.

986. Proof of sale—In proving a sale as a source of title it is necessary to show authority therefor.²⁸

987. Records as evidence—The proceedings and judgments of a probate court relating to a sale of land affect the title to the land; they are a link in the chain of title,—as much so as a voluntary conveyance would be; and they are competent and admissible in evidence against the whole world.²⁹

988. Findings as to sales—A finding that a guardian of certain minors, having been licensed to sell certain lands by a probate court, "did sell" the same to the plaintiff, is not a finding of any title in the plaintiff.³⁰

989. Estoppel of representative to attack sale—A representative may be estopped by his conduct from attacking the sale as against the purchaser by asserting an adverse claim.³¹

990. Estoppel of heirs and wards to attack sale—Heirs or wards who accept and retain the proceeds of a sale with full knowledge of defects therein are estopped from attacking the validity of the sale.³² One entitled to a homestead exemption under the federal law may waive it by his voluntary act, or by acquiescing in a sale of the land to pay debts from which it is in fact exempt.³³

991. Fraud—The record showed that a sale, at the time it was made, was ill advised, and that if it had been deferred for a reasonable time a much larger sum would have been realized by the estate. Held, however, that the finding that there was no fraud in making the sale was justified by the evidence.³⁴

992. Sale to representative voidable—Statute—No representative making the sale shall directly or indirectly purchase or be interested in the purchase of any part of the real estate so sold, and all sales made contrary to the provisions of this section shall be void.³⁵ The statute is

W. 828. See *Luse v. Reed*, 63 Minn. 5, 11, 65 N. W. 91; *Lake Phalen Land & Imp. Co. v. Lindeke*, 66 Minn. 209, 68 N. W. 974.

²⁸ *Dawson v. Helmes*, 30 Minn. 107, 112, 14 N. W. 462.

²⁹ *Kurtz v. St. Paul & Duluth R. Co.*, 61 Minn. 18, 63 N. W. 1.

³⁰ *Myrick v. Coursalle*, 32 Minn. 153, 19 N. W. 736.

³¹ *Hunt v. Stevens*, 174 Mich. 501, 140 N. W. 992.

³² *Pursley v. Hays*, 17 Iowa 310; *Du-ford v. Mercer*, 24 Iowa 118; *Mote v. Kleen*, 83 Neb. 585, 119 N. W. 1125; *Brown v. Coleman*, 62 Or. 454, 125 Pac. 278; *Cunningham v. Richardson*, 68

Wash. 24, 122 Pac. 369; *Borcher v. McGuire*, 85 Neb. 646, 124 N. W. 111; *Howe v. Blumenkamp*, 88 Neb. 389, 129 N. W. 539; *Kulp v. Helmann*, 90 Neb. 167, 133 N. W. 206; *Wisconsin Trust Co. v. Chapman*, 121 Wis. 479, 99 N. W. 341; *Gilbert v. Hopkins*, 204 Fed. 196. See *Lovejoy v. McDonald*, 59 Minn. 393, 61 N. W. 320; *Babcock v. Collins*, 60 Minn. 73, 61 N. W. 1020; 18 Cyc. 798.

³³ *Doran v. Kennedy*, 122 Minn. 1, 141 N. W. 851.

³⁴ *Smith v. Barr*, 83 Minn. 354, 86 N. W. 342. See *O'Brien v. Larson*, 71 Minn. 371, 74 N. W. 148.

³⁵ G. S. 1913, § 7359. See 11 A. & E. Ency. of Law (2 ed.) 1149; 18 Cyc. 769;

affirmative of common law.³⁶ It must be read in connection with the registry statutes.³⁷ A sale to a representative, either directly or indirectly, is forbidden by the statute, but it is not void. It is only voidable by the parties interested in the estate and cannot be avoided by them as against a bona fide purchaser.³⁸ If the representative has any interest in the purchase, direct or indirect, the sale is voidable by those interested in the estate.³⁹ A sale to a member of the family of the representative and a reconveyance to the representative is not void, but it is presumptively fraudulent and may be set aside unless the presumption is overcome by evidence that it was made in good faith.⁴⁰ The law will not infer fraud from the mere fact that the purchaser is a son of the representative.⁴¹ A representative may in good faith purchase the land from a bona fide purchaser at the sale by the representative.⁴² A representative who has the land purchased for him by a third party and afterwards conveyed to him by such party may give a good title to a bona fide purchaser.⁴³ The rule which disables a trustee from purchasing for his own benefit at a sale made by him in the discharge of a fiduciary duty is not applicable to the guardian of minor heirs, when a sale of real property belonging to the estate of one deceased is sold by an administrator under the order of the probate court for the purpose of satisfying a claim against the estate which has been duly presented and allowed.⁴⁴ If an administrator with the will annexed sells to himself a beneficiary under the will may disaffirm the sale and recover the land or he may affirm the sale and compel the administrator to account for the profits of the transaction. An administrator with will annexed, who in good faith and for full value purchases real estate to pay debts and expenses of administration, and who makes improvements increasing the value of the land, and who pays taxes thereon, is, when sued by a ben-

24 C. J. 633; Woerner, *Am. Law of Adm.* (2 ed.) § 487; 11 R. C. L. 358; L. R. A. 1918B, 7.

³⁶ *White v. Iselin*, 26 Minn. 487, 5 N. W. 359; *Ketchum v. Ketchum*, 177 Mich. 100, 143 N. W. 25.

³⁷ *Ketchum v. Ketchum*, 177 Mich. 100, 143 N. W. 25.

³⁸ *White v. Iselin*, 26 Minn. 487, 5 N. W. 359; *Davis v. Hudson*, 29 Minn. 27, 39, 11 N. W. 136; *Brown v. Fischer*, 77 Minn. 1, 79 N. W. 494 (sale to husband of guardian). See *Baldwin v. Allison*, 4 Minn. 25 (11); *Barber v. Bowen*, 47 Minn. 118, 49 N. W. 684; *Fleming v. McCutcheon*, 85 Minn. 152, 88 N. W. 433; *Turner v. Fryberger*, 94 Minn. 433, 103 N. W. 217; *Dunnell*, *Minn. Digest*, § 9934; 136 *Am. St. Rep.* 789; 11 A. & E. *Ency. of Law* (2 ed.) 1149; 18 *Cyc.* 771;

24 C. J. 636; Woerner, *Am. Law of Adm.* (2 ed.) § 487.

³⁹ *Brown v. Fischer*, 77 Minn. 1, 79 N. W. 494; *Wilson v. Erickson*, 147 Minn. 260, 180 N. W. 93.

⁴⁰ *Ketchum v. Ketchum*, 177 Mich. 100, 143 N. W. 25.

⁴¹ *Cain v. McGeenty*, 41 Minn. 194, 42 N. W. 933.

⁴² *Ketchum v. Ketchum*, 177 Mich. 100, 143 N. W. 25; *Welch v. McGrath*, 59 Iowa 519, 10 N. W. 810; *Burris v. Adams*, 96 Cal. 664, 31 *Pac.* 585; 11 A. & E. *Ency. of Law* (2 ed.) 1148; 18 *Cyc.* 771.

⁴³ *Otis v. Kennedy*, 107 Mich. 312, 65 N. W. 219.

⁴⁴ *Barber v. Bowen*, 47 Minn. 118, 49 N. W. 684.

eficiary for an accounting of the profits of the transaction, entitled to a credit for the purchase price, the value of the improvements, and the taxes paid.⁴⁵ The statute cannot be invoked by one who purchased at the sale for the benefit of the representative.⁴⁶ It has been held that a sale to a surety of a representative might be set aside at the instance of a devisee though the surety was an innocent purchaser.⁴⁷

993. Substantial compliance with statutes sufficient—A substantial compliance with the statutes regulating sales is sufficient. In other words the statutes are to be liberally construed so as to uphold titles derived from sales.⁴⁸

994. Waiver of statutory requirements—An instrument executed by one interested in the estate, authorizing the administrator to sell "under the direction of the court," has been held not to dispense with the necessity for complying with the statutory requirements.⁴⁹

995. Correction of mistakes by probate court—While the proceedings are pending and before confirmation the probate court has full control over the proceedings. If it discovers that a mistake has been made it should correct the proceedings or order them corrected and until the correction is made should refuse to confirm the sale.⁵⁰ After a sale and confirmation the probate court cannot correct mistakes so as to affect the title or quantity of land sold.⁵¹ An order nunc pro tunc amending an order of sale after a sale, as to the extent of interest to be sold, held unauthorized.⁵²

996. Vacation of sale by probate court—After a probate court has made an order for the sale of real property of an estate, and it has been accordingly sold, the sale confirmed by the court, and a deed executed to the purchaser as directed by the order of confirmation, and the administrator has been discharged, the matter is out of the jurisdiction of the probate court, and it cannot entertain an application to review and set aside the sale proceedings.⁵³

⁴⁵ *McClellan v. Root*, 147 Wis. 60, 132 N. W. 539.

⁴⁶ *Kelly v. Severson*, 149 Wis. 251, 135 N. W. 875.

⁴⁷ *Fincke v. Bundrick*, 72 Kan. 182, 83 Pac. 403. See 19 Harv. L. Rev. 537.

⁴⁸ *Buntin v. Root*, 66 Minn. 454, 69 N. W. 330; *Smith v. Barr*, 83 Minn. 354, 86 N. W. 342; *In re Heydenfeldt*, 127 Cal. 456, 59 Pac. 839.

⁴⁹ *Hartley v. Croze*, 38 Minn. 325, 37 N. W. 449.

⁵⁰ *Prudential Real Estate Co. v. Hall*, 70 Neb. 808, 116 N. W. 40; *Miller v. Hanna*, 89 Neb. 224, 131 N. W. 226. See *Cathro v. McArthur*, 30 N. D. 337, 152

N. W. 686 (correction of misdescription of property).

⁵¹ *Kurtz v. St. Paul & Duluth R. Co.*, 65 Minn. 60, 67 N. W. 808; *Hanson v. Ingwaldson*, 77 Minn. 533, 80 N. W. 702. See § 996.

⁵² *In re Streiff's Estate*, 146 Wis. 230, 131 N. W. 358.

⁵³ *State v. Probate Court*, 19 Minn. 117 (85); *State v. Probate Court*, 33 Minn. 94, 22 N. W. 10. See *Kurtz v. St. Paul & Duluth R. Co.*, 65 Minn. 60, 67 N. W. 808; *Hanson v. Ingwaldson*, 77 Minn. 533, 80 N. W. 702; *Wilson v. Erickson*, 147 Minn. 260, 180 N. W. 93; *Amundson v. Hanson* (Minn.) 185 N. W. 252.

997. Collateral attack on sales—The proceedings are not subject to collateral attack for error or irregularity, or for want of jurisdiction not affirmatively appearing on the face of the record, except as authorized by G. S. 1913, § 7369.⁵⁴

998. Five essentials of a valid sale—Immaterial irregularities disregarded—Collateral attack—Statute—In case of an action relating to any estate sold by a representative in which an heir or person claiming under the decedent, or a ward or person claiming under him, shall contest the validity of the same, it shall not be avoided on account of any irregularity in the proceedings if it appears:

1. That the representative was licensed to make the sale by the probate court having jurisdiction.

2. That he gave a bond, which was approved by the probate court.

3. That he took the oath prescribed in this chapter.

4. That he gave notice of the time and place of sale as in this chapter prescribed, if such notice was required by the order of license.

5. That the premises were sold in the manner required by the order of license, and the sale confirmed by the court, and that they are held by one who purchased them in good faith.⁵⁵

It is the general rule that the orders and judgments of the probate court are not subject to collateral attack for errors or irregularities, or for jurisdictional defects not appearing on the face of the record.⁵⁶ This statute takes orders and judgments of the probate court respecting sales of realty out of the general rule. If the records of the probate court are silent or wanting in material particulars as to the five essentials of a valid sale prescribed by this statute, or affirmatively show a material defect in respect to any one of such essentials, the sale is subject to collateral attack therefor, any time within five years next after the sale.⁵⁷ This statute is curative in its nature and is to be liberally construed. Probate records relating to the sale of realty must be liberally construed and land titles depending on such records sustained, notwithstanding any mere irregularities or technical omissions in the record as to the five essentials of a valid sale specified in this statute.⁵⁸ This statute applies only to actions in which an heir or person claiming under the decedent, or a ward or person claiming under him, attacks the sale. It does not apply to actions in which the sale is attacked by a person claiming adversely to the title of the decedent or the ward—claiming under

⁵⁴ *Cater v. Steeves*, 95 Minn. 225, 103 N. W. 885; *Doran v. Kennedy*, 122 Minn. 1, 141 N. W. 851, 237 U. S. 362; *Amundson v. Hanson* (Minn.) 185 N. W. 252; *Lake v. Hathaway*, 75 Kan. 391, 89 Pac. 666; 24 C. J. 665. See §§ 946, 967, 970, 972, 974, 976, 977, 978, 998.

⁵⁵ G. S. 1913, § 7369.

⁵⁶ See §§ 8, 34.

⁵⁷ *Cater v. Steeves*, 95 Minn. 225, 103 N. W. 885; *Kurtz v. St. Paul & Duluth R. Co.*, 61 Minn. 18, 63 N. W. 1; *Davis v. Hudson*, 29 Minn. 27, 37, 11 N. W. 136; *Brown v. Pinkerton*, 95 Minn. 153, 103 N. W. 897, 900.

⁵⁸ *Buntin v. Root*, 66 Minn. 454, 69 N. W. 330; *Smith v. Barr*, 83 Minn. 354, 86 N. W. 342.

a title not derived from or through the decedent or ward.⁵⁹ A sale made by a representative licensed to sell by a court with jurisdiction cannot be impeached collaterally for errors or irregularities in the proceedings which culminated in the license.⁶⁰ The statute is exclusive so far as mere errors or irregularities not going to the jurisdiction of the court are concerned. A sale is not subject to collateral attack for errors or irregularities not specified in the statute.⁶¹ If the records show affirmatively compliance with the statutes respecting the five statutory essentials of a valid sale they are conclusive and cannot be collaterally attacked or impeached by any evidence dehors the record.⁶² A sale by one not an executor, administrator or guardian is a nullity and is subject to collateral attack.⁶³ A sale may be collaterally attacked on the ground that the representative was not licensed to make the sale by the probate court having jurisdiction. The phrase "the probate court having jurisdiction" means the probate court whose jurisdiction it is proper to invoke in the particular case. In other words, the probate court appointing the representative, regardless of the county in which the land lies.⁶⁴ A sale may be collaterally attacked for failure of the representative to give a bond approved by the court;⁶⁵ or because he did not take an oath;⁶⁶ or did not give the notice of sale required by the statute.⁶⁷ A sale may be collaterally attacked if it appears that the premises are held under the sale by one who did not purchase in good faith.⁶⁸ A sale to a bona fide purchaser, under the license of a probate court having jurisdiction, cannot be impeached collaterally or set aside by showing, contrary to the petition for a license, that there were in fact no debts against the estate, the record being regular on its face.⁶⁹ This statute operates in favor of one who takes the title from the purchaser at the sale as security for a debt.⁷⁰ The statute ought to be repealed. A con-

⁵⁹ *White v. Iselin*, 26 Minn. 487, 493, 5 N. W. 359. See § 999.

⁶⁰ *Rumrill v. First Nat. Bank*, 28 Minn. 202, 9 N. W. 731; *Curran v. Kuby*, 37 Minn. 330, 33 N. W. 907; *Kurtz v. St. Paul & Duluth Ry. Co.*, 61 Minn. 18, 63 N. W. 1; *Deppe v. Ford*, 89 Minn. 253, 256, 94 N. W. 679.

⁶¹ *McCarthy v. Van Der Mey*, 42 Minn. 189, 44 N. W. 53 (statute as to saleability of homestead now different); *Richardson v. Farwell*, 45 Minn. 210, 219, 51 N. W. 915; *Doran v. Kennedy*, 122 Minn. 1, 141 N. W. 851, 237 U. S. 362.

⁶² *Kurtz v. St. Paul & Duluth R. Co.*, 61 Minn. 18, 63 N. W. 1.

⁶³ *Culver v. Hardenbergh*, 37 Minn. 225, 33 N. W. 792; *Burrell v. Chicago etc. Ry. Co.*, 43 Minn. 363, 45 N. W. 849.

⁶⁴ *Montour v. Purdy*, 11 Minn. 384

(278); *Rumrill v. First Nat. Bank*, 28 Minn. 202, 9 N. W. 731; *Davis v. Hudson*, 29 Minn. 27, 39 N. W. 136; *Culver v. Hardenbergh*, 37 Minn. 225, 33 N. W. 792; *Curran v. Kuby*, 37 Minn. 330, 33 N. W. 907; *West Duluth Land Co. v. Kurtz*, 45 Minn. 380, 47 N. W. 1134; *Smith v. Barr*, 83 Minn. 354, 86 N. W. 342; *Deppe v. Ford*, 89 Minn. 253, 256, 94 N. W. 679; *Brown v. Pinkerton*, 95 Minn. 153, 159, 103 N. W. 897, 900.

⁶⁵ See § 972.

⁶⁶ See § 973.

⁶⁷ See § 976.

⁶⁸ *White v. Iselin*, 26 Minn. 487, 493, 5 N. W. 359.

⁶⁹ *Curran v. Kuby*, 37 Minn. 330, 33 N. W. 907.

⁷⁰ *King v. Nunn*, 99 Mich. 590, 58 N. W. 636.

firmation of a sale should be as conclusive and free from collateral attack as any other judgment or order of the probate court. The statute was enacted before the adoption of the constitution and when probate courts were not courts of superior jurisdiction. Since the adoption of the constitution it has had no justification and works a grave mischief in rendering titles uncertain. It is a palpable absurdity to allow a sale to be collaterally impeached because the records of the probate court, which are nearly always imperfectly kept, do not show affirmatively that the statutes regulating sales have been complied with. Especially is this true of such relatively unimportant matters as the giving of a special sale bond, the filing of an oath, or the manner of conducting the sale.⁷¹

999. Adverse claimants attacking sale—Irregularities not fatal—Statute—If the validity of a sale is drawn in question by a person claiming adversely to the title of the decedent or the ward, or claiming under a title that is not derived from or through the decedent or ward, the sale shall not be void on account of any irregularity in the proceedings, if it appears that the representative was licensed to make the sale by a probate court having jurisdiction, and that he did accordingly execute and acknowledge in legal form a deed for the conveyance of the premises.⁷²

1000. Limitation of actions attacking sales—Statute—No action for the recovery of real estate sold by an executor or an administrator hereunder shall be maintained by any heir or other person claiming under the decedent, unless it is begun within five years next after the sale. And in case of real estate sold by a guardian no action for its recovery shall be maintained by or under the ward, unless it is begun within five years next after the termination of the guardianship: Provided, that minors and others under legal disability to sue when the right of action first accrues may begin such action at any time within five years after the disability is removed.⁷³ The statute has been held constitutional against various objections.⁷⁴ It is one of repose and retroactive.⁷⁵ It is not limited to actions of ejectment.⁷⁶ It applies to actions involving a collateral attack on any of the grounds specified in G. S. 1913, § 7369.⁷⁷ It applies to an action to set aside a fraudulent sale to the representative or to another for his benefit.⁷⁸ It applies to an action to set

⁷¹ See *Davis v. Hudson*, 29 Minn. 27, 36, 11 N. W. 136; *Kurtz v. St. Paul & Duluth R. Co.*, 61 Minn. 18, 63 N. W. 1; *Buntin v. Root*, 66 Minn. 454, 69 N. W. 330.

⁷² G. S. 1913, § 7370. See § 998.

⁷³ G. S. 1913, § 7371. See *Laws 1919*, c. 436; 18 Cyc. 799; 24 C. J. 663.

⁷⁴ *Streeter v. Wilkinson*, 24 Minn. 288;

Rice v. Dickerman, 47 Minn. 527, 50 N. W. 698.

⁷⁵ *Brown v. Pinkerton*, 95 Minn. 153, 103 N. W. 897.

⁷⁶ *Brown v. Fischer*, 77 Minn. 1, 7, 79 N. W. 494; *Hanson v. Nygaard*, 105 Minn. 30, 38, 117 N. W. 235.

⁷⁷ *Cater v. Steeves*, 95 Minn. 225, 103 N. W. 885. See § 998.

⁷⁸ *Brown v. Fischer*, 77 Minn. 1, 79

aside a sale to a stranger claimed to be in fraud of heirs.⁷⁹ It is applicable to void as well as irregular sales if the court had jurisdiction. To set the statute running it is sufficient if there is a sale in fact by a representative licensed by the proper court.⁸⁰ It is not applicable to a sale made without a license from the probate court or by one not a representative, but it applies to a sale by a representative irregularly appointed.⁸¹ It is not applicable to a party in possession defending his title derived from a ward against the affirmative attacks of one relying on a guardian's sale.⁸² Minors and others under legal disability to sue when the right of action first accrues may begin an action any time within five years after the disability is removed.⁸³ Minors are barred if they acquiesce in a sale for five years after obtaining their majority.⁸⁴ A minor claiming title through descent is barred if the statute had commenced to run during the lifetime of the ancestor.⁸⁵ Formerly the statute included an exception in favor of nonresidents.⁸⁶ The limitation was formerly two years.⁸⁷ The statute has been held to bar an action by a cestui que trust who failed within five years after attaining his majority to bring an action for land devised in trust, subject to the payment of debts, and which was sold by the executor for that purpose, the purchaser being in possession under the executor's deed from 1866 to 1891.⁸⁸ A similar statute has been held not applicable to an action by an heir to quiet title to a homestead.⁸⁹ The statute bars a grantee of an heir in five years after the heir attains his majority.⁹⁰ It applies only to an action involving the validity of a sale. It does not apply where a widow asserts a homestead right in behalf of herself and children.⁹¹

N. W. 494; *Kelly v. Severson*, 149 Wis. 251, 135 N. W. 875; *Axton v. Carter*, 141 Ind. 672, 39 N. E. 546. See *In re McClear's Will*, 147 Wis. 60, 132 N. W. 539 (statute not applicable to an action against the representative for an accounting for the profits of a sale to him).

⁷⁹ *Egan v. Grece*, 79 Mich. 629, 45 N. W. 74.

⁸⁰ *Spencer v. Sheehan*, 19 Minn. 338 (292); *Smith v. Swenson*, 37 Minn. 1, 32 N. W. 784; *Rice v. Dickerman*, 47 Minn. 527, 50 N. W. 608; *Brown v. Pinkerton*, 95 Minn. 153, 103 N. W. 897; *Hanson v. Nygaard*, 105 Minn. 30, 117 N. W. 235; *O'Keefe v. Behrens*, 73 Kan. 469, 85 Pac. 555 (sale void for want of notice to heirs); *Hampton v. Murphy*, 45 Ind. App. 513, 86 N. E. 436 (void sale).

⁸¹ *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462; *Culver v. Hardenbergh*, 37 Minn. 225, 33 N. W. 792; *Hanson v. Nygaard*, 105 Minn. 30, 117 N. W. 235.

⁸² *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462.

⁸³ *Jordan v. Secombe*, 33 Minn. 220, 222, 22 N. W. 220.

⁸⁴ *Watson v. Von Derheide*, 61 Mich. 595; 28 N. W. 726; *Kammerer v. Morlock*, 125 Mich. 320, 84 N. W. 319.

⁸⁵ *Lyons v. Carr*, 77 Neb. 883, 110 N. W. 785.

⁸⁶ *Jordan v. Secombe*, 33 Minn. 220, 22 N. W. 383; *Brown v. Pinkerton*, 95 Minn. 153, 158, 103 N. W. 897.

⁸⁷ *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462.

⁸⁸ *Turner v. Schreiber*, 89 Wis. 1, 61 N. W. 280.

⁸⁹ *Brandon v. Jensen*, 74 Neb. 569, 104 N. W. 1054; *Holmes v. Mason*, 80 Neb. 448, 114 N. W. 606. See *Foltz v. Maxwell*, 100 Neb. 713, 161 N. W. 254.

⁹⁰ *Watson v. Lion Brewing Co.*, 61 Mich. 595, 28 N. W. 726.

⁹¹ *Showers v. Robinson*, 43 Mich. 502, 5 N. W. 988.

It does not apply to an heir claiming title paramount to and independent to that of the decedent.⁹² It does not apply where the land sold was not part of the estate of the decedent.⁹³ After the five-year period the probate court cannot revise or correct its former proceedings so as to divest the title acquired by the sale.⁹⁴ The statute begins to run against an action of ejectment from the time the purchaser goes into possession under his deed from the representative.⁹⁵ In Massachusetts it has been held that a remainderman is a person "under legal disability," within the statute, so that he may maintain an action any time within five years after the termination of a precedent life estate. In this state the rule is doubtless otherwise as a remainderman may sue to quiet title during the continuance of the life estate.⁹⁶ One who has been in possession of real estate, under an executor's sale, for more than five years, is not required, in an action by another to recover possession of such real estate, to establish the validity of the executor's sale, before he can avail himself of this statute.⁹⁷

1001. Venue of actions to vacate sales—An action to set aside certain sales and for an accounting held properly brought in the county where the defendants resided though the lands affected were not situated in that county.⁹⁸

1002. Injunction—Where the probate court erroneously allowed an outlawed claim against the estate, it was held that an action would not lie in the district court to enjoin a sale of realty pursuant to a license of the probate court for the payment of the claim.⁹⁹

1003. Reimbursement of purchaser on vacation of sale—Heirs cannot recover land sold by a representative to pay debts of the decedent on account of defects in the sale without reimbursing the purchaser for so much of the proceeds of the sale as were applied to the payment of debts which were a charge on the land, with interest, deduction being made for the value of the use of the land.¹ The reimbursement should include taxes on the land paid by the purchaser, with interest.²

⁹² *Byerly v. Eadie*, 95 Kan. 400, 148 Pac. 757.

⁹³ *Byerly v. Eadie*, 95 Kan. 400, 148 N. W. 757.

⁹⁴ *Betts v. Shotton*, 27 Wis. 667.

⁹⁵ *Jones v. Billstein*, 28 Wis. 221; *Jones v. Lathrop*, 28 Wis. 339.

⁹⁶ *Jewett v. Jewett*, 10 Gray (Mass.) 31. See *Lyons v. Carr*, 77 Neb. 883, 110 N. W. 785; *First Nat. Bank v. Pilger*, 78 Neb. 168, 110 N. W. 704.

⁹⁷ *Holmes v. Beal*, 9 Cush. (Mass.) 223.

⁹⁸ *Smith v. Barr*, 76 Minn. 513, 79 N. W. 507.

⁹⁹ *O'Brien v. Larson*, 71 Minn. 371, 74 N. W. 148.

¹ *Blodgett v. Hitt*, 29 Wis. 169; *Baker v. Martin*, 156 Ind. 53, 59 N. E. 174; *Browne v. Coleman*, 62 Or. 454, 125 Pac. 278; *Cole v. Boyd*, 68 Neb. 146, 93 N. W. 1003. See *Richardson v. Farwell*, 49 Minn. 210, 219, 51 N. W. 915; 18 Cyc. 818; 24 C. J. 680.

² *Ball v. Clothier*, 34 Wash. 299, 75 Pac. 1099. See *Richardson v. Farwell*, 49 Minn. 210, 219, 51 N. W. 915.

1004. Sales of land for public purposes—Statute—Whenever the land of a decedent or ward is desired for any public purpose by any person or corporation having the power of eminent domain, the representative may agree upon and adjust the damages that would result from a taking thereof, and, upon payment of such damages being made, may convey the land, or any right therein, so desired. But no such agreement or conveyance shall be valid unless approved by the probate court.³

1005. Same—Petition for approval of court—Statute—Such approval may be obtained upon filing in such court a verified petition of the person or corporation and the representative, setting forth the name of the decedent or ward, the name of the person or corporation with whom the agreement is made, a description of the land taken and for what purpose, the amount to be paid, and that such amount is the full value of the land taken, and the damages to the remainder. The agreement, signed by the parties, shall be attached to the petition.⁴

1006. Same—Order of approval—Statute—Upon the filing of such petition and agreement, the court shall hear and determine the same without notice, and, after hearing, the court, if satisfied that the agreement is just and equitable, shall make an order approving the same, and the petition, agreement, and order shall be recorded. A certified copy of such order and agreement may be filed for record with the register of deeds of the county wherein such land is situated, and when so filed shall be notice to everybody.⁵ The approval and confirmation by the probate court of a conveyance under this statute is no evidence that the person who executed it was a legally appointed representative.⁶ The provision for recording the order of approval and conveyance did not validate a record made before its enactment.⁷

1007. Construction of obsolete statutes—Cases are cited below involving the construction of various obsolete statutes.⁸

1008. Validating acts—Various statutes have been enacted validating sales and mortgages of realty by representatives.⁹

³ G. S. 1913, § 7365.

⁴ G. S. 1913, § 7366.

⁵ G. S. 1913, § 7367.

⁶ Dawson v. Helmes, 30 Minn. 107, 14 N. W. 462; Burrell v. Chicago etc. Ry. Co., 43 Minn. 363, 45 N. W. 849.

⁷ Dawson v. Helmes, 30 Minn. 107, 14 N. W. 462.

⁸ Montour v. Purdy, 11 Minn. 384 (278) (lien given to purchaser at void sale); Culver v. Hardenbergh, 37 Minn. 225, 33

N. W. 792 (order extending time to sell—indorsement on certified copy of license); McCarthy v. Van Der Mey, 42 Minn. 189, 44 N. W. 53 (sale of fee of homestead—sale during life estate of surviving husband or wife); Harrison v. Harrison, 67 Minn. 520, 70 N. W. 802 (extension of license—power to grant new or second license).

⁹ See G. S. 1913, §§ 7346, 7347, 7372-7375; Laws 1917, c. 423; Laws 1919, c. 430.

SPECIFIC PERFORMANCE

1009. When may be ordered—Statute—When any person under contract in writing to convey any real estate dies or becomes insane or incompetent before making the conveyance, the probate court may direct the representative or guardian, or the guardian of any minor who may take the vendor's interest in such real estate or any part thereof by descent or devise from such decedent, to convey such real estate to the person entitled thereto, in all cases where such decedent, if living, or such ward, if sane or competent, might be compelled to convey.¹⁰ This statute is constitutional.¹¹ It does not give the probate court jurisdiction of an action for specific performance.¹² The remedy afforded by the statute is concurrent with that for specific performance in the district court. The design of the statute is to afford a summary remedy in cases where there is no real controversy as to the rights of the parties. If there is any reasonable doubt of the right to a conveyance the probate court should not order one, but remit the parties to an ordinary action for specific performance in the district court.¹³ The authority of the probate court under the statute is special and not an incident of general probate jurisdiction.¹⁴ The statute does not give the probate court greater powers than are administered by a district court in similar cases.¹⁵ The jurisdiction of the probate court under the statute is concurrent with that of the district court and must be governed by the same rules.¹⁶ A representative has no authority to make a conveyance demanded, without an order of the probate court, and it is the duty of the party demanding the deed to apply to the court for the necessary order.¹⁷ The statute applies only where the contract was in writing. It has no application where specific performance is sought on the ground of a part performance of an oral contract.¹⁸ It applies though the contract could not have been enforced during the life of the decedent because a condition could not then be fulfilled, if it could be enforced against

¹⁰ G. S. 1913, § 7376, as amended by Laws 1915, c. 223. See 20 Ency. Pl. & Pr. 542; 36 Cyc. 795; Gary, Probate Law (3 ed.) §§ 542-557; Church, Probate Law, 968-974.

¹¹ *Mousseau v. Mousseau*, 40 Minn. 236, 41 N. W. 977; *Adams v. Lewis*, 5 Sawyer 229.

¹² *Mousseau v. Mousseau*, 40 Minn. 236, 41 N. W. 977; *Svanburg v. Fosseen*, 75 Minn. 350, 78 N. W. 4.

¹³ *Mousseau v. Mousseau*, 40 Minn. 236, 41 N. W. 977; *Svanburg v. Fosseen*, 75 Minn. 350, 78 N. W. 4.

¹⁴ *Aspley v. Murphy*, 50 Fed. 376.

¹⁵ *In re Corwin's Estate*, 61 Cal. 160.

¹⁶ *Lynes v. Hayden*, 119 Mass. 482.

¹⁷ *Luco v. De Toro*, 91 Cal. 405, 27 Pac. 1082.

¹⁸ *Svanburg v. Fosseen*, 75 Minn. 350, 78 N. W. 4; *Cory v. Hyde*, 49 Cal. 469; *Wadleigh v. Phelps*, 149 Cal. 627, 87 Pac. 93; *McQuilty v. Wilhite*, 218 Mo. 586, 117 S. W. 730; *Bates v. Sargent*, 51 Me. 423; *Bullerdick v. Hermismeyer*, 32 Mont. 541; 81 Pac. 334; 18 Cyc. 816.

him if he were living at the time of the application.¹⁹ To justify an order for a conveyance the contract must be definite.²⁰ The contract must have been to convey a specific tract.²¹ The statute does not apply to a contract which does not become operative until after administration.²² A contract made by a minor but confirmed after maturity may be enforced under the statute.²³ The statute applies to lands of which the decedent died seized.²⁴ It is not applicable to land in another state.²⁵ It is not applicable to a deed absolute in form but intended as a mortgage, and proceedings cannot be had thereunder to compel the representative to execute a deed to the real owner.²⁶ A written contract for the sale of land, executed by an agent of the owner, upon the express condition that it was subject to his approval, cannot, after his death, be specifically enforced against his personal representative, if he did not approve the contract before his death.²⁷

1010. Petition—Notice of hearing—Statute—On presentation of a petition by any person claiming to be entitled to such conveyance, setting forth a description of the land and the facts upon which such claim for conveyance is based, the probate court shall fix a time and place of hearing, and cause three weeks' published notice thereof to be given.²⁸ The petition must show that the contract is in writing.²⁹ It need not be as specific as a bill in equity.³⁰ A representative with whom, as an individual, a valid contract to convey was made by the decedent, may individually petition the probate court to order him, as representative, to execute a contract to himself.³¹ Notice as provided by statute is essential. The order cannot be granted ex parte.³² Unless the record affirmatively shows the contrary it will be conclusively presumed on collateral attack that interested parties were duly served with notice.³³

1011. Hearing on petition—Order for conveyance—Dismissal—Statute—At the time appointed for hearing after due proof of publication of notice, the court shall hear all proper evidence both for and against grant-

¹⁹ *Mousseau v. Mousseau*, 40 Minn. 236, 41 N. W. 977.

²⁰ *Lynes v. Hayden*, 119 Mass. 482. See *Dunnell*, Minn. Digest and Supplements, § 8781.

²¹ *Ferris v. Irving*, 28 Cal. 645; *Marrinet v. Dennison*, 78 Cal. 202, 20 Pac. 386.

²² *In re Healy's Estate*, 137 Cal. 474, 478, 70 Pac. 455.

²³ *Ferguson v. Bell*, 17 Mo. 347.

²⁴ *Little v. Lesia*, 5 Mich. 118.

²⁵ See *Laws 1919*, c. 234; *Watkins v. Holman*, 18 Peters (U. S.) 26.

²⁶ *Wadleigh v. Phelps*, 149 Cal. 627, 87 Pac. 93.

²⁷ *In re Dick's Estate*, 74 Cal. 284, 15 Pac. 837.

²⁸ G. S. 1913, § 7377.

²⁹ *Cory v. Hyde*, 49 Cal. 469; *Bullerdick v. Hermismeyer*, 32 Mont. 541, 81 Pac. 334.

³⁰ *In re Grogan's Estate*, 38 Mont. 540, 100 Pac. 1044.

³¹ *In re Garnier's Estate*, 147 Cal. 457, 82 Pac. 68.

³² *Nazro v. Long*, 179 Mass. 451, 61 N. E. 43. See *Van Aken v. Clark*, 82 Iowa 256, 48 N. W. 73; *Hadley v. Bourdeaux*, 90 Minn. 177, 95 N. W. 1109.

³³ *Hadley v. Bourdeaux*, 90 Minn. 177, 95 N. W. 1109.

ing the petition, and, if satisfied that the conveyance should be made, it shall order the representative to execute such conveyance to the petitioner; otherwise it shall dismiss the petition.³⁴ If the right to a conveyance is not free from reasonable doubt the petition should be dismissed, without prejudice to an action in the district court. The probate court is not authorized to render a judgment against the petitioner on the merits so as to prevent him from bringing an action in the district court after failing in the probate court.³⁵ If there is a controversy as to the title of the decedent the petition should be dismissed.³⁶

1012. Deed—Effect—Recording order—Statute—If no appeal is taken from such order within the time limited therefor by law, or if the same is affirmed on appeal, the administrator or guardian shall execute the conveyance as directed, and a certified copy of the order shall be recorded with the deed in the office of the register of deeds in the county where the land lies. Such conveyance shall be as effectual to pass the estate contracted for as if executed by the decedent while living, or the ward while sane or competent.³⁷ It is not necessary that the heirs should join in the deed.³⁸

1013. Effect of recording order—Statute—Where no conveyance has been executed, the record of a certified copy of the order in such register of deeds' office shall be as effectual to give the person entitled to the conveyance a right to the possession of the lands and to hold them as though the conveyance had been made pursuant to the decree.³⁹

1014. Successors of vendee may petition for order—Statute—If the person to whom the conveyance was to be made dies before the commencement of proceedings, or before the conveyance is completed, any person who would have been entitled to the estate under him, as heir, devisee, or otherwise, in case the conveyance had been made according to the terms of the contract, or the executor or administrator of such person, for the benefit of the person so entitled, may commence such proceedings or prosecute the same if already commenced; and the conveyance shall thereupon be so made as to vest the estate in the persons so entitled to it or in the administrator for their benefit.⁴⁰ The clear intent of this statute was to place the power of the court, in enforcing such contracts, upon the broadest principles of equity, so that the benignant rule of treating as done that which, for a valid consideration, the parties had agreed to do, would be most liberally applied, without regard to any technical rule of law which might otherwise operate

³⁴ G. S. 1913, § 7378.

³⁵ *Mousseau v. Mousseau*, 40 Minn. 236, 41 N. W. 977; *Hartshorn v. Smith*, 19 S. D. 653, 104 N. W. 467.

³⁶ See *Wilson v. Warner*, 84 Conn. 560, 80 Atl. 718.

³⁷ G. S. 1913, § 7379.

³⁸ *Fulwider v. Peterkin*, 2 G. Gn. (Iowa) 522.

³⁹ G. S. 1913, § 7380.

⁴⁰ G. S. 1913, § 7381.

to restrain it. A wife of the vendee is within the protection of the statute.⁴¹

1015. Contracts for conveyance of land in Canada—Statute—There is a special statute for the enforcement of contracts for the conveyance of lands in the Dominion of Canada.⁴²

1016. Curative act—Any decree for conveyance of real estate under contract, by an administrator or executor, made by any probate court of this state, in the matter of the estate of a decedent, when the order for hearing the petition for such decree was published the requisite number of times in a legal and proper newspaper, but the date of such hearing was fixed in said order and the hearing held on a date less than three weeks from the first publication of such order, and such decree issued; and which decree or a certified copy thereof, has been of record in the office of the register of deeds of the county where the real estate thereby affected was at the time of making such record, or is situate, for a period of not less than ten years prior to the passage of this act, be and the same hereby is legalized and made valid, and given the same force and effect as if proper notice had been given and such hearing had been held at the proper time. Nothing herein contained shall be construed to apply to any action or proceeding in which the validity of such decree is involved.⁴³

ACCOUNTING

1017. Jurisdiction—The jurisdiction of the probate court over the accounting of representatives is exclusive.⁴⁴ The court of their appointment has exclusive jurisdiction to settle the accounts of representatives and to determine their compensation.⁴⁵ The probate court has exclusive jurisdiction of the matter of settling the account of a representative, and also to correct errors in its order of settlement, or to set it aside for mistake or fraud.⁴⁶ One who obtains possession of the personal property of a decedent as administrator of his estate may be required by the probate court to account for and deliver to the widow of decedent the portion of such property she is entitled to select as her

⁴¹ *Reed v. Whitney*, 7 Gray (Mass.) 533.

⁴² Laws 1919, c. 234.

⁴³ Laws 1917, c. 457.

⁴⁴ *Brandes v. Carpenter*, 68 Minn. 388, 391, 71 N. W. 402; *Starkey v. Sweeney*, 71 Minn. 241, 244, 73 N. W. 859; *Betcher v. Betcher*, 83 Minn. 215, 86 N. W. 1; *Beaulieu v. Ain-E. Waush*, 126 Minn. 321, 148 N. W. 282; *Pierce v. Maetzold*, 126 Minn. 445, 148 N. W. 302; *Ellis v. Warshauer*, 92 Minn. 444, 100 N. W. 214;

Fischer v. Hintz, 145 Minn. 161, 176 N. W. 177; *Boales v. Ferguson*, 55 Neb. 565, 76 N. W. 18; *Brooks v. Hargrave*, 179 Mich. 136, 146 N. W. 325; *Allen v. Hunt*, 213 Mass. 276, 100 N. E. 552; 11 A. & E. Ency. of Law (2 ed.) 1190; 18 Cyc. 1115; 24 C. J. 940; *Woerner*, Am. Law of Adm. (2 ed.) 503.

⁴⁵ *Magruder v. Drury*, 235 U. S. 106; 24 C. J. 940. See § 1206.

⁴⁶ *Pierce v. Maetzold*, 126 Minn. 445, 148 N. W. 302.

statutory allowance. An action by the widow to recover such property, or its value, cannot be brought in the first instance in the district court. The original jurisdiction of the probate court is exclusive.⁴⁷ Representatives cannot be forced by an action in the district court, either at law or in equity, to render accounts or deliver assets of the estate until their accounts are first settled in the probate court.⁴⁸ A testator, up to the time of his death, was engaged in business in partnership with one of the two executors named in the will. After the testator's death such executor continued the business as the surviving partner. He then entered into an agreement with his co-executor, whereby he purchased the interest of the estate at a certain sum, but no money was paid to the co-executor. Both executors were discharged without having rendered an account, leaving the estate unadministered. From time to time money was paid by such surviving partner to the sole heirs of the testator. In an action against such surviving partner by a subsequently appointed administrator de bonis non, to compel an accounting, held, that such surviving partner was not a debtor of the estate at the death of the testator, and that his relation to the estate still remained that of executor, and the jurisdiction of the probate court to compel an accounting was exclusive, and such jurisdiction was not lost by the fact that the executor was discharged, leaving the estate unadministered. The district court has no jurisdiction of the subject-matter.⁴⁹ A former administrator received funds of the estate, which he failed to account for within the time allowed by the order of the probate court, and which upon due demand he refused to pay over to his successor, as administrator de bonis non. In an action by the administrator de bonis non against the former administrator and the sureties upon his bond, held, that such failure to account to the probate court within the time limited, and to pay the sum received by him as administrator to his successor, amounted to a default in the bond, which was conditioned that he should administer the estate according to law, render a just and true account of his administration when required by the court, and perform all orders and decrees of the court. The district court has jurisdiction to entertain the action upon the bond to enforce the liability, and prima facie the amount of the liability of the sureties is the amount received by the principal, not to exceed the face of the bond.⁵⁰ The probate court has no jurisdiction over the accounting of a testamentary trustee, but it has jurisdiction over the accounting of an executor until there is an order changing his possession from that of an executor to that of a trustee

⁴⁷ *Fischer v. Hintz*, 145 Minn. 161, 176 N. W. 177.

⁴⁸ *Green v. Gaskill*, 175 Mass. 265, 56 N. E. 560; *Foster v. Bailey*, 157 Mass. 160, 31 N. E. 771; *Rhines v. Wentworth*,

209 Mass. 585, 95 N. E. 951; *Allen v. Hunt*, 213 Mass. 276, 100 N. E. 552.

⁴⁹ *Betcher v. Betcher*, 83 Minn. 215, 86 N. W. 1.

⁵⁰ *McAlpine v. Kratka*, 98 Minn. 151, 107 N. W. 961.

and he is discharged as executor.⁵¹ Under former statutes it was held that after the estate had been settled and assigned, and while the final decree of distribution remained unreversed and unmodified, the probate court had no jurisdiction to entertain a petition to issue a citation to the administrator requiring him to further account for the property belonging to the estate which was in his possession, or came into his possession.⁵² An equitable action may be maintained in the district court by an executor against a co-executor to determine the amount of a disputed claim held by the estate against such co-executor, arising on contract entered into with the testator in his lifetime, and due at the time of his death, when the co-executor disputes the amount and refuses to pay until such amount is ascertained, and in such action an accounting may be had with reference to such claim.⁵³ When justice requires it the district court may stay proceedings in an action therein, pending the settlement of an account in the district court.⁵⁴ Representatives who receive money in settlement of a cause of action for the wrongful death of a decedent are officers of the district court and may be required to account for and distribute the fund in accordance with the rules of that court.⁵⁵ In an action on a bond of a representative in the district court for the nonpayment of a claim allowed in the probate court, where there were other claims unpaid, and the assets were insufficient to pay all the claims in full, held, that the defendant was entitled to an accounting of the assets of the estate in order to determine the pro rata share of the claimants.⁵⁶ Where all the statutory fees allowed executors have been received from the estate and retained by one of several co-executors, equity has jurisdiction of a suit by the others against him for an accounting.⁵⁷ An action at law will not lie in the district court for an alleged conversion of the residue of the personal property of the estate by an executor as a residuary legatee by transferring it to himself, if it appears that the validity of the transfer is involved in an accounting pending in the probate court.⁵⁸ If there is danger that before an account is passed upon the property for which the representative is accountable may be wasted or converted by him an interested party may have a bill in equity for its preservation, leaving the final accounting in the probate court.⁵⁹ Though the district court has no jurisdiction as a court

⁵¹ *In re Scheffer's Estate*, 58 Minn. 29, 59 N. W. 956.

⁵² *State v. Probate Court*, 84 Minn. 289, 87 N. W. 783. See G. S. 1913, §§ 7399, 7400, enacted since this decision.

⁵³ *Peterson v. Vanderburgh*, 77 Minn. 218, 79 N. W. 828. See *Betcher v. Betcher*, 83 Minn. 215, 218, 86 N. W. 1.

⁵⁴ *McAlpine v. Kratka*, 98 Minn. 151, 107 N. W. 961.

⁵⁵ *State v. District Court*, 114 Minn.

364, 131 N. W. 381. See *Vukmirovich v. Nickolich*, 123 Minn. 165, 143 N. W. 255.

⁵⁶ *Ames v. Slater*, 27 Minn. 70, 6 N. W. 418.

⁵⁷ *Speirs v. Wisner*, 88 Mich. 614, 50 N. W. 654.

⁵⁸ *Rhines v. Wentworth*, 209 Mass. 585, 95 N. E. 951.

⁵⁹ *Holmes v. Holmes*, 194 Mass. 552, 80 N. E. 614; *Rhines v. Wentworth*, 209 Mass. 585, 95 N. E. 951.

of equity to compel a probate accounting, yet, where a trust fund created by a will has been diverted from the possession and control of the trustee and has passed into the hands of a devisee of one of the cestuis que trust, parties claiming the whole or parts of the fund as against each other may come into equity to secure the preservation of the fund and to have their respective rights determined, leaving the final accounting to be had and the net amount of the trust fund to be determined in the probate court.⁶⁰ If there is an original and ancillary administration the place for final accounting and settlement is in the forum of the original administration.⁶¹

1018. Duty to account—Times—Statute—Every executor and administrator shall render an account of his administration within the time allowed for the settlement of the estate, and at such other times as the court may require, until the estate is wholly settled.⁶² It was held, prior to Laws 1903, c. 195, that after an estate had been settled and assigned and while the final decree of distribution remained unreversed and unmodified, the probate court had no jurisdiction to entertain a petition to issue a citation to a representative requiring him to further account for the property belonging to the estate which was in his possession or had come into his possession.⁶³ Though notice has been given of final settlement of an estate and orders are made thereon, determining the heirs and fixing their interests and adjusting certain uncontested items of an account, orders so adjusting items of account will not be regarded as final, if the representative is not discharged, and additional collections and disbursements are required and a further account necessary.⁶⁴

1019. Keeping accounts—It is the duty of a representative to keep full and accurate accounts of all his transactions in relation to the estate and to be prepared at all times to exhibit them to the probate court.⁶⁵

1020. Scope and nature—In general—An accounting includes the determination of how much has been received by the representative, how much paid out and for what, and the amount of the balance due from the representative. He should be charged with what he has received as representative and credited with what he has paid out to creditors and for expenses of administration.⁶⁶ The primary purpose of the accounting

⁶⁰ *Holmes v. Holmes*, 194 Mass. 552, 80 N. E. 614.

⁶¹ *In re Stevens' Estate*, 171 Mich. 486, 137 N. W. 627. See § 1206.

⁶² G. S. 1913, § 7383. See 19 Ency. Pl. & Pr. 1021; 11 A. & E. Ency. of Law (2 ed.) 1196; 24 C. J. 924; 18 Cyc. 1104; 11 R. C. L. 175; Woerner, *Am. Law of Adm.* (2 ed.) § 501.

⁶³ *State v. Probate Court*, 84 Minn. 289, 87 N. W. 783. See *Lowry v. Tillyen*, 31 Minn. 500, 18 N. W. 452; *Betcher v.*

Betcher, 83 Minn. 215, 86 N. W. 1; 18 Cyc. 1119.

⁶⁴ *In re Wilson's Estate*, 98 Neb. 852, 154 N. W. 717.

⁶⁵ *St. Paul Trust Co. v. Kittson*, 62 Minn. 408, 65 N. W. 74; *Lawson v. Burgee*, 131 Md. 436, 103 Atl. 516; 11 A. & E. Ency. of Law (2 ed.) 1181; 18 Cyc. 235, 1104; 24 C. J. 924; 11 R. C. L. 175.

⁶⁶ *Allen v. Hunt*, 213 Mass. 276, 100 N. E. 552. See 24 C. J. 935.

is to pass on the receipts and disbursements of the representative and determine the amount due from him to the estate. The determination of the court is not binding on third parties as to the facts upon which it is based.⁶⁷ As a general rule an accounting covers only such property as constitutes assets of the estate. If the representative has received property to which he is not entitled in his representative capacity he cannot be compelled to account therefor in the probate court. The remedy of the owner is in the district court.⁶⁸ A representative is accountable for the personal property of the estate only in his representative capacity.⁶⁹ The accounting extends to all transactions of the representative in relation to the estate, proper and improper, including profits from the unauthorized use of funds and property converted by the representative.⁷⁰

1021. Distribution of estate not involved—The final account should not include credits for distribution of the estate, including the payment of legacies. The accounting for the distribution of the estate is a matter for consideration on the final hearing for a discharge.⁷¹ Though it is irregular for a representative to make distribution before a final decree, still, if he does so, and credits himself therefor in his final account, the credits should be allowed on the final accounting, if the distributees are known and their shares undisputed and no objection is made by any one, or if objections are plainly groundless and are overruled.⁷²

1022. Pendency of action against representative—There should be no final settlement pending an action against the representative, at least in the absence of bad faith or collusion.⁷³

1023. Executor not qualifying—An executor named in a will who does not qualify cannot be required to account.⁷⁴

1024. Application of statutes to special administrators—The statutes relating to accounting apply to special administrators.⁷⁵

1025. Accounting of executor when will set aside—If the probate of a will is set aside the executor thereof should not be required to deliver

⁶⁷ *Marvin v. Dutcher*, 26 Minn. 391, 4 N. W. 685.

⁶⁸ 11 A. & E. Ency. of Law (2 ed.) 1198; 18 Cyc. 1114; 24 C. J. 936; 11 R. C. L. 178; 19 Ann. Cas. 560.

⁶⁹ *Fischer v. Hintz*, 145 Minn. 161, 176 N. W. 177.

⁷⁰ *Auguisola v. Armaz*, 51 Cal. 435, 438. See § 1056.

⁷¹ *In re Willey's Estate*, 140 Cal. 238, 73 Pac. 998; *In re Robins' Estate*, 180 Pa. St. 630; 18 Cyc. 1176.

⁷² *Palmer v. Whitney*, 166 Mass. 306,

44 N. E. 229; *Griffin v. Warburton*, 23 Wash. 231, 62 Pac. 765.

⁷³ *In re Klittson's Estate*, 45 Minn. 197, 48 N. W. 419; *Whitney v. Pinney*, 51 Minn. 146, 53 N. W. 198. See *Hallett v. Lathrop*, 20 Colo. App. 212, 77 Pac. 1096 (pendency of action by attorney for his fees held no reason for not settling account); 18 Cyc. 1115.

⁷⁴ *Wever v. Marvin*, 14 Barb. (N. Y.) 376.

⁷⁵ *French v. Superior Court*, 3 Cal. App. 304, 85 Pac. 133. See 24 C. J. 932.

the assets of the estate to an administrator without first giving him an opportunity to have his account settled.⁷⁶

1026. Insanity of representative—The insanity of a representative does not affect the jurisdiction of a court to require an accounting.⁷⁷

1027. By representative who has resigned or been removed—Though a representative has resigned or been removed he is still bound to account and the probate court may summon him before it and subject him to an examination on oath, and order him to pay over the assets to his successor.⁷⁸

1028. When executor is testamentary trustee—Where an executor is also a testamentary trustee he must ordinarily have his account as executor allowed and himself discharged as executor before taking up his duties as trustee and he must then give a bond as trustee.⁷⁹ The rule that a representative should have his accounts settled and be discharged before beginning to discharge his duties as testamentary trustee is not inflexible and the directions of the will may be such as to make it not only proper but his duty to proceed immediately in the discharge of his trust duties.⁸⁰

1029. Death of representative—Accounting by his representative—Statute—Whenever a sole or surviving representative dies, his executor or administrator, immediately upon his appointment, shall file in the probate court an account of the administration of the decedent, together with a petition for the allowance of such account and the discharge of the bondsmen of such deceased representative. Such petition shall be heard and account examined in the same manner and on the same notice as is provided by law for the final settlement of administration accounts and distribution of estates. But if such estate has not been fully administered by the decedent, the bondsmen shall not be discharged or relieved from liability until a successor is appointed and qualified.⁸¹ If a representative dies before a final accounting it is the duty of his rep-

⁷⁶ *Snell v. Weldon*, 162 Ill. App. 11.

⁷⁷ *Michigan Trust Co. v. Ferry*, 228 U. S. 346.

⁷⁸ *Newell v. West*, 149 Mass. 520, 528, 21 N. E. 954; *In re Radovich's Estate*, 71 Cal. 536, 539, 16 Pac. 321; *Hudson v. Barratt*, 62 Kan. 137, 61 Pac. 737; *Michigan Trust Co. v. Ferry*, 228 U. S. 346; *Cerould v. Wilson*, 81 N. Y. 573. See *Francisco v. Wingfield*, 161 Mo. 542, 61 S. W. 842 (statute); *Middleton v. Carter*, 73 N. J. Eq. 624, 68 Atl. 763; 11 A. & E. Ency. of Law (2 ed.) 1183; 18 Cyc. 1110, 1119; 24 C. J. 932; *Woerner Am. Law of Adm.* (2 ed.) § 274.

⁷⁹ *Daggett v. White*, 128 Mass. 398;

White v. Ditson, 140 Mass. 351, 4 N. E. 606; *Welch v. Boston*, 211 Mass. 178, 181, 97 N. E. 893; *Hines v. Levers & Sargent Co.*, 226 Mass. 214, 115 N. E. 252; *Bellinger v. Thompson*, 26 Or. 320, 37 Pac. 714, 40 Pac. 229; *Wallber v. Wilmanns*, 116 Wis. 246, 93 N. W. 47; *In re Roach's Estate*, 50 Or. 179, 92 Pac. 118; *Jones v. Broadbent*, 21 Idaho 555, 123 Pac. 476; *In re Higgins' Estate*, 15 Mont. 474, 39 Pac. 506. See 18 Cyc. 1112; 24 C. J. 935.

⁸⁰ *In re Kellogg*, 214 N. Y. 460, 108 N. E. 844; *In re McDowell*, 163 N. Y. S. 164.

⁸¹ G. S. 1913, § 7301. See 24 C. J. 933.

representative to settle his account. On such an accounting an order directing the representative of the deceased representative to pay into court the amount found due is proper. A failure or refusal of the representative to obey such order is a breach of his bond on which an action may be brought.⁸² Where a representative dies before he has fully discharged his trust, his sureties continue responsible for a just and true accounting of the property which their principal received as representative, and for the payment and turning over to the estate of any balance of that property not found to have been lawfully disposed of by the representative in his lifetime.⁸³ If a guardian of an infant dies without an accounting the probate court appointing him may require his personal representative to appear and render an account of moneys of the ward received by the guardian.⁸⁴ It is not only the duty of the representative of a deceased representative to account for the latter but the probate court has authority under this statute, and independent of the statute, to compel him to do so.⁸⁵ In rendering an account under this statute the representative of the deceased representative stands in the shoes of the latter and is entitled to receive for the latter's estate any balance of fees or compensation that would be due the latter if he still lived and had made the accounting himself, and is himself entitled to a reasonable compensation for making the accounting, payable out of the latter's estate.⁸⁶ In a proceeding under the statute by an administrator de bonis non of the estate of A, to require an administrator of B, who was the original representative of A, to account for A, held, that the administrator of B was not entitled to compensation or attorney's fees out of the estate of A for making such accounting.⁸⁷ If a representative dies leaving the estate partially administered his personal representative cannot complete the administration. It is the duty of an administrator de bonis non to settle an account for that part of the estate not administered by his predecessor and he is chargeable with such assets only.⁸⁸ While a representative of a deceased representative has no authority to complete the administration left incomplete by his decedent, that being the duty of an administrator de bonis non, yet he has a right to retain the assets of such estate until he has made an accounting for his decedent

⁸² *O'Gorman v. Lindeke*, 26 Minn. 93, 1 N. W. 841; 11 A. & E. Ency. of Law (2 ed.) 1182; 18 Cyc. 1112; 24 C. J. 933.

⁸³ *Cook v. Titcomb*, 115 Me. 38, 97 Atl. 133.

⁸⁴ *Peel v. McCarthy*, 38 Minn. 451, 38 N. W. 205.

⁸⁵ *O'Gorman v. Lindeke*, 26 Minn. 93, 1 N. W. 841; *Peel v. McCarthy*, 38 Minn. 451, 38 N. W. 205; *State v. Probate Court*, 76 Minn. 132, 78 N. W. 1039; *In re Wagner's Estate*, 227 Pa. 460, 76 Atl.

215; *In re Huber's Estate*, 249 Pa. 90, 94 Atl. 556; *In re Clark*, 119 N. Y. 427, 23 N. E. 1052 (statute); *Kling v. Chase*, 159 Cal. 420, 115 Pac. 207 (suit in equity held not to lie as statutory remedy is sufficient).

⁸⁶ *State v. Probate Court*, 76 Minn. 132, 78 N. W. 1039.

⁸⁷ *State v. Probate Court*, 76 Minn. 132, 78 N. W. 1039.

⁸⁸ *In re Wagner's Estate*, 227 Pa. 460, 76 Atl. 215.

and it has been determined what part of the estate remains unadministered.⁸⁹ A representative of a deceased representative is not accountable as representative of the original decedent.⁹⁰

1030. Sureties on bond of representative not accountable—The sureties on the bond of a representative cannot be required to account for the acts of their principal.⁹¹

1031. Minors—Guardians ad litem—The fact that some of the distributees are minors is no reason for keeping the estate open until they come of age.⁹² Guardians ad litem need not be appointed for minor heirs, devisees or legatees.⁹³

1032. Payment of inheritance taxes—There can be no final accounting until all inheritance taxes have been paid and proper receipts therefor filed.⁹⁴

1033. Who may call for an accounting—Any person interested in the estate, including heirs, legatees, devisees, creditors and remaindermen, may call for an accounting, at least so far as his interest is concerned. The personal representatives of such persons may also call for an accounting.⁹⁵ The sureties on the bond of a representative may apply to the probate court for an order requiring him to account.⁹⁶ An administrator de bonis non may call for an accounting by his predecessor if the latter has resigned or been removed.⁹⁷

1034. Who may contest account—Any person interested in the estate may object to any item of the account.⁹⁸ The right to appear and contest an account is restricted to those who are interested in the estate, but any doubt as to the existence of interest should be resolved in favor of the contestant. In other words, if he has the appearance of interest, his right to contest ought not to be denied.⁹⁹ The court may hear testimony

⁸⁹ *In re Wagner's Estate*, 227 Pa. 460, 76 Atl. 215; *Foster v. Bailey*, 157 Mass. 160, 31 N. E. 771.

⁹⁰ *Schenck v. Schenck*, 3 N. J. L. 149; 11 A. & E. Ency. of Law (2 ed.) 1182; 18 Cyc. 1112; 24 C. J. 934.

⁹¹ *Ross v. Chambers*, 1 Bailey L. (S. C.) 548; *Teague v. Dendy*, 2 McCord Eq. (S. C.) 209; 24 C. J. 933; 11 A. & E. Ency. of Law (2 ed.) 209.

⁹² *Schmidt v. Stark*, 61 Minn. 91, 93, 63 N. W. 255.

⁹³ *Balch v. Hooper*, 32 Minn. 158, 20 N. W. 124.

⁹⁴ G. S. 1913, § 2275.

⁹⁵ *Fingleton v. Kent* Circuit Judge, 116 Mich. 211, 74 N. W. 473 (legatees); 19 Ency. Pl. & Pr. 1020; 11 A. & E.

Ency. of Law (2 ed.) 1192; 24 C. J. 927; 18 Cyc. 1106; 11 R. C. L. 178.

⁹⁶ *Brandes v. Carpenter*, 68 Minn. 388, 391, 71 N. W. 402. See 18 Cyc. 1110; 24 C. J. 931.

⁹⁷ *Michigan Trust Co. v. Ferry*, 228 U. S. 346; 11 A. & E. Ency. of Law (2 ed.) 1334; 18 Cyc. 1109; 24 C. J. 931; *Woerner*, Am. Law of Adm. (2 ed.) § 536; 40 L. R. A. 73.

⁹⁸ *Bunnell v. Post*, 25 Minn. 376, 381; *In re Adam's Estate*, 131 Cal. 415; 63 Pac. 838; *In re McDougald's Estate*, 146 Cal. 191, 79 Pac. 878; *Woerner*, Am. Law of Adm. (2 ed.) § 541; 18 Cyc. 1172; 24 C. J. 1007; 19 Ency. Pl. & Pr. 1035.

⁹⁹ *Garwood v. Garwood*, 29 Cal. 514, 519.

as to the right of a person to contest an account.¹ A creditor of the estate is entitled to contest the account.² An administrator may contest the account of his predecessor.³ A guardian of minors may contest an account in an estate in which his wards are interested, and the appointment of an attorney for the minors does not supersede the guardian's rights.⁴ Co-representatives may contest each other's accounts.⁵ A surety on the bond of a representative may object to his account.⁶ An attorney of a representative is not entitled, as such, to contest an account.⁷

1035. Time of settlement—No statute of limitations—There is no statute of limitations running against the liability of a representative to account.⁸

1036. Form of account—The statutes do not prescribe the form of the final account. On the debit side should be entered: (1) The appraised value of all the various forms of the estate, real and personal, according to the inventory and appraisal; (2) all money or other property belonging to the estate received since the inventory or for any reason omitted therefrom, with its value stated; (3) any amounts received from the sale of property in excess of its appraised value; (4) any surcharges (omissions) admitted by the representative or duly proved; (5) any interest collected on choses in action, such interest not being included in the inventory; (6) any interest received or profits realized upon loans or investments made by the representative; (7) any interest due from the representative; (8) any rents, profits or income from real property; (9) any accretions or profits accruing to the estate from any source whatever. On the credit side should be entered: (1) All payments on claims against the estate; (2) all expenses of administration, including allowances to widow or children; (3) any losses from the sale of property of the estate below its appraised value; (4) any losses from uncollectible debts, compromises, setoffs or compounding

¹ *Garwood v. Garwood*, 29 Cal. 514, 520.

² *Tompkins v. Weeks*, 26 Cal. 51, 58; *In re McDougald's Estate*, 146 Cal. 191, 79 Pac. 878; 18 Cyc. 1173; 24 C. J. 1007; 19 Ency. Pl. & Pr. 1037.

³ *In re Spanier's Estate*, 120 Cal. 698, 53 Pac. 357. See 24 C. J. 1007.

⁴ *In re Rose's Estate*, 66 Cal. 241, 5 Pac. 220. See 24 C. J. 1007.

⁵ See 22 L. R. A. (N. S.) 1119; 24 C. J. 1007.

⁶ *Bassett v. Fidelity & Deposit Co.*, 184 Mass. 210, 68 N. E. 205.

⁷ *In re Kruger's Estate*, 143 Cal. 141, 76 Pac. 891.

⁸ *In re Sanderson's Estate*, 74 Cal. 199, 15 Pac. 753; *Allen v. Bartlett*, 52 Kan. 387, 34 Pac. 1042; *In re McNally's Estate*, 124 N. Y. S. 864; *Fuller v. Cushman*, 170 Mass. 286, 49 N. E. 631. See *McCleary v. Root*, 147 Wis. 60, 132 N. W. 539 (administrator a trustee of an express trust created by the will—beneficiary of trust not barred by statute of limitations where there is no unequivocal repudiation of the trust); 11 A. & E. Ency. of Law (2 ed.) 1186; 18 Cyc. 1120; 24 C. J. 944; 15 Ann. Cas. 483, 11 R. C. L. 176.

of debts; (5) any interest paid; (6) any other losses or authorized expenditures. The balance will show the amount on hand for further expenses and for distribution. The expenses of administration should be itemized either in the account or in an attached schedule referred to in the account. No credits should be entered in the account for distribution of the estate or for advances made to legatees or distributees. These are not matters for the accounting but for consideration on the application for a final discharge.⁹ The account must be itemized and reasonably specific.¹⁰ It is proper practice to enter as credits the various expenses of administration which the representative seeks to have allowed.¹¹ If a representative pays less than the full amount of a claim he must credit himself in his account with only the amount actually paid.¹²

1037. Petition for final settlement—Notice—Provision is made by statute for a petition for final settlement and for a published notice of the hearing.¹³ A petition by an administrator, which alleges that he has fully administered the estate, paid the debts and expenses of administration, and which prays for the fixing of a time and place for the examination and allowance of his account, is a petition for final settlement alone.¹⁴ Although notice has been given of final settlement of an estate in probate, and orders are made thereon, determining the heirs, and fixing their interests, and adjusting certain uncontested items of the administrator's account, orders so adjusting items of the account will not be regarded as final, if the administrator is not discharged, and additional collections and disbursements by him are required, and a further account necessary.¹⁵ Whether additional notice should be given is discretionary with the court.¹⁶

1038. Proceedings on hearing—Allowance of account—Statute—On hearing such petition, the court may examine the representative on oath and hear all proper testimony offered, touching on account, or relating to, the distribution of the estate. If all taxes, including personal property taxes, assessed against the estate, have been paid so far as there were funds to pay them, and the account is found correct, it shall be settled and allowed, if incorrect, it shall be corrected under the direction of the court, and then settled and allowed. Upon such settlement, the court shall determine who are entitled to the residue of the estate,

⁹ 19 Ency. Pl. & Pr. 1032; 11 A. & E. Ency. of Law (2 ed.) 1309; 18 Cyc. 1136, 1139, 1169; 24 C. J. 1004; Woerner, Am. Law of Adm. (2 ed.) § 509.

¹⁰ Wheaton v. Pope, 91 Minn. 299, 97 N. W. 1046.

¹¹ Maxwell v. McCreery, 57 N. J. Eq. 287. This is not necessary. The amounts may be left blank. Lund v. Lund, 41 N. H. 355; In re Brandreth's Estate, 72 N. Y. S. 333.

¹² G. S. 1913, § 7297.

¹³ See §§ 1068, 1069; 18 Cyc. 1124; 24 C. J. 949.

¹⁴ Carter v. Frahm, 31 S. D. 379, 141 N. W. 370.

¹⁵ Cozad v. Hibner, 98 Neb. 852, 154 N. W. 717.

¹⁶ In re Jessup, 81 Cal. 408, 437, 21 Pac. 976.

and shall then or thereafter make its decree, assigning such residue to the persons entitled thereto by law.¹⁷ Under our statute objections may be oral and made for the first time at the hearing. It is proper practice, however, to file written objections and the court no doubt has discretionary power to require a contestant to do so and to continue the hearing to enable the representative to prepare to meet the objections.¹⁸ The burden of proving objections to an account of an affirmative nature is on the objector.¹⁹ Though there are no objections to the account the probate court should make careful examination of credits claimed by the representative and refuse to allow improper ones.²⁰ Claims which have been allowed by the court cannot be contested on the final accounting.²¹ Possibly any one interested in the estate may raise an issue of fraud and collusion on the part of a representative in the allowance of a claim against the estate.²² The title to real estate cannot be adjudicated upon objections to the final account.²³ The validity of a sale of real property by the representative cannot be questioned.²⁴ An order allowing an account has been held not an order closing administration, discharging an executor and changing his possession from that of an executor to a testamentary trustee.²⁵ Several intermediate accountings were made by the executor, at the last of which the appellant devisees appeared and contested. The court made an order allowing the account, and adjudging that a certain sum was due on a certain day from the executor to the estate. This was based on the amount found due, and allowed on the prior accountings. Held, the last accounting was conclusive on the appellants, and, as it involved the prior accountings, it made them conclusive also. On the attempt made in the final accounting to open up these prior accounts, held, the showing made was not sufficient.²⁶

1039. Rules governing settlement—Law and equity—In settling the accounts of representatives the probate court should be governed by broad principles of equity. The word "equity" is not here used in its

¹⁷ G. S. 1913, § 7390. See, for forms of orders of allowance, *Balch v. Hooper*, 32 Minn. 158, 20 N. W. 124; *State v. Probate Court*, 40 Minn. 296, 41 N. W. 1033; *In re Scheffer's Estate*, 58 Minn. 29, 59 N. W. 956.

¹⁸ *Woerner*, Am. Law of Adm. (2 ed.) § 541; 18 Cyc. 1171; 24 C. J. 1009; 11 R. C. L. 180.

¹⁹ *In re Vance's Estate*, 141 Cal. 624, 75 Pac. 323. See §§ 1041, 1051, 1056, 1057.

²⁰ *In re Sanderson's Estate*, 74 Cal. 199, 15 Pac. 753; *In re More's Estate*, 121 Cal. 635, 54 Pac. 148; *In re Hite's Estate*, 155 Cal. 448, 101 Pac. 448.

²¹ See § 896. The court undoubtedly has discretionary power to continue the hearing on an accounting to give a contestant an opportunity to move the court to vacate its allowance of a claim for cause.

²² See *Sleichter v. Kroger*, 169 Iowa 24, 149 N. W. 227.

²³ *Carlin v. Sewall*, 86 Neb. 367, 125 N. W. 606.

²⁴ *In re Conser's Estate*, 40 Or. 138, 66 Pac. 607.

²⁵ *In re Scheffer's Estate*, 58 Minn. 29, 59 N. W. 956.

²⁶ *Kittson v. St. Paul Trust Co.*, 78 Minn. 325, 81 N. W. 7.

strict technical sense of the rules administered by a court of equity, but is used in its popular sense of what is fair and just to the representative. Regard must be had of course to positive rules of law. If a representative should innocently pay a claim barred by the statute of limitations he could not be allowed credit for it though the probate judge might think it fair and just to do so. The court must apply the statutes and the rules of the common law and equity, but must be fair and just to the representative and not invoke technical rules against him. He should be given every opportunity to show the real nature of his transactions and to justify them in every possible way unimpeded by technical rules of procedure or evidence and the amount for which he is held liable should be restricted to what is fair and just in view of the facts of the particular case.²⁷ In settling accounts the courts may apply rules of equity as well as rules of law.²⁸

1040. Examination of representative on oath—Evidence—The statute provides that the court may examine the representative on oath and hear all proper testimony offered touching the account, or relating to the distribution of the estate.²⁹ The statute provides that the court may hear all "proper" testimony. Whether this means that the technical rules of evidence apply is uncertain. If they apply at all they ought to be applied with great liberality.³⁰ In the examination and settlement of an account the probate court is not bound by the strict rules of evidence applicable to an ordinary action in the district court.³¹ A representative may be examined orally by counsel for persons interested in the estate.³² A party examining a representative is not concluded by his answers, but may offer evidence in contradiction.³³ A representative may be examined though no formal written objections to the account have been filed.³⁴ He may be examined as to the disposition he has made of the balance shown by his account.³⁵ He may be examined fully as to all facts tending to show that he is indebted to the estate.³⁶ He may be examined after the filing and allowance of his account as to the time when he received money of the estate, and the use he made of it, in order to

²⁷ See *Wheaton v. Pope*, 91 Minn. 299, 305, 97 N. W. 1046.

²⁸ In *re Moore's Estate*, 96 Cal. 522, 528, 32 Pac. 584.

²⁹ See § 1038; 18 Cyc. 1186; 24 C. J. 1022; 19 Ency. Pl. & Pr. 1047.

³⁰ See *Marvin v. Dutcher*, 26 Minn. 391, 4 N. W. 685; *Harding v. Canfield*, 73 Minn. 244, 75 N. W. 1112; *Hanson v. Swenson*, 78 Minn. 18, 80 N. W. 833.

³¹ *Sterrett's Appeal*, 2 Penr. & W. (Pa.) 419. See 18 Cyc. 1182.

³² In *re Rathbone*, 44 Mich. 57, 6 N. W. 115.

³³ *Highble v. Bacon*, 8 Pick. (Mass.) 484.

³⁴ In *re Sanderson's Estate*, 74 Cal. 199, 15 Pac. 753 (statute in California requires contestant to file written objections to an account).

³⁵ *Saxton v. Chamberlain*, 6 Pick. (Mass.) 422; *Stearns v. Brown*, 1 Pick. (Mass.) 530; *Griswold v. Chandler*, 5 N. H. 492.

³⁶ *Sigourney v. Wetherell*, 6 Met. (Mass.) 553.

ascertain whether he is liable to pay interest upon it.³⁷ A representative who has resigned or been removed is bound to submit to an examination on oath in relation to his accounts.³⁸ The court will not always require the testimony of persons to whom money has been paid by a representative to support his account.³⁹ A representative cannot be examined as to advances made by him to heirs not properly matters of account.⁴⁰

1041. Payment of claims—Burden of proof—On the final accounting the burden rests on the representative to show affirmatively that he has paid all outstanding claims against the estate or has exhausted all property available therefor.⁴¹

1042. Vouchers—The account should be accompanied by vouchers for all disbursements except for small amounts or where it is not possible or practicable to obtain them. In many states there are statutes dispensing with vouchers for expenditures of small amounts, generally for amounts not exceeding twenty dollars. In this state the matter rests in the discretion of the probate court.⁴²

1043. Ordering representative to pay funds into court—The court may order the representative to pay into court the balance found due on an accounting.⁴³

1044. Effect of allowance—Res judicata—A final settlement is in effect a judgment and if not set aside or reversed is conclusive on the representative, his sureties, and all persons interested in the estate, as to all the matters involved in the account and determined by the court.⁴⁴ The effect of the allowance of an account is to fix the amount of the representative's liability.⁴⁵ The decree of a probate court which has acquired jurisdiction of an estate and settled an account cannot be collaterally attacked. As to what assets came into the hands of the representative, what debts he has paid, and so of every matter properly done or cognizable in the probate court, the judgment of that court is conclusive.⁴⁶ An allowance of an account is not binding on third parties as to the facts

³⁷ *Saxton v. Chamberlain*, 6 Pick. (Mass.) 422.

³⁸ *Newell v. West*, 149 Mass. 520, 21 N. E. 954.

³⁹ *Shearman v. Akins*, 4 Pick. (Mass.) 293.

⁴⁰ *In re Fitzgerald*, 57 Wis. 503, 15 N. W. 794.

⁴¹ *In re Williams' Estate*, 47 Mont. 325, 132 Pac. 421.

⁴² *Woerner*, Am. Law of Adm. (2 ed.) § 540; 18 Cyc. 1184; 24 C. J. 1020; 19 Ency. Pl. & Pr. 1045; *Church*, Probate Law, 1201.

⁴³ *O'Gorman v. Lindeke*, 26 Minn. 93, 1 N. W. 841. See, contra, *In re Sargent's Estate*, 123 Cal. 331, 337, 55 Pac. 1015.

⁴⁴ *Kittson v. St. Paul Trust Co.*, 78 Minn. 325, 81 N. W. 7; 11 A. & E. Ency. of Law (2 ed.) 1311; 18 Cyc. 1188; 24 C. J. 1025; *Woerner*, Am. Law of Adm. (2 ed.) § 506; *Church*, Probate Law, 1231.

⁴⁵ *Marvin v. Dutcher*, 26 Minn. 391, 401, 4 N. W. 685.

⁴⁶ *Jenison v. Hapgood*, 7 Pick. (Mass.) 1, 7; *Magruder v. Drury*, 235 U. S. 106; 18 Cyc. 1192; 24 C. J. 1031.

on which it is based.⁴⁷ An allowance of a final account has been held conclusive as to prior accountings, they being involved in the final accounting.⁴⁸ A final decree on accounting is entitled to full faith and credit under the federal constitution.⁴⁹ An accounting is conclusive only so far as it goes. A subsequent accounting may be had as to property omitted or subsequently received.⁵⁰ An allowance of a final account is not conclusive as to matters not determined, either on account of omissions from the account, or because assets are subsequently received, or because questions were not presented for determination.⁵¹ Approval of an account has been held not *res judicata* as to loans made by the representative to a distributee not reported in the account, but which he subsequently agreed to treat as advancements.⁵² An allowance of a final account has been held not to bar an action against the representative by an assignee of a legacy to enforce the assignment.⁵³ A decree allowing an account of an executor, entered on the request of beneficiaries and next of kin, has been held to protect the executor as though it had been entered after notice ordering him to make the payments which he had made without such order.⁵⁴ Under the present statute an allowance of a final account and a decree of distribution does not discharge the representative.⁵⁵

1045. Intermediate accountings—The probate court may require a representative to account at any time until he is discharged.⁵⁶ Provision is made by statute for intermediate accountings in connection with a partial distribution.⁵⁷ An intermediate accounting is conclusive on all persons contesting it who were under no disability and on all of those under disability who were represented by guardians.⁵⁸ Several intermediate accountings were made by an executor, at the last of which certain devisees appeared and contested. The court made an order allowing the account and adjudging that a certain sum was due on a certain day from the executor. This was based on the amount found due and allowed on prior accountings. Held, that the last ac-

⁴⁷ *Marvin v. Dutcher*, 26 Minn. 391, 4 N. W. 685.

⁴⁸ *Kittson v. St. Paul Trust Co.*, 78 Minn. 325, 81 N. W. 7.

⁴⁹ *Michigan Trust Co. v. Ferry*, 228 U. S. 346.

⁵⁰ *McAfee v. Phillips*, 25 Ohio St. 374; *Dray v. Bloch*, 29 Or. 347, 45 Pac. 772; *Griffith v. Godey*, 113 U. S. 89, 93; 11 A. & E. Ency. of Law (2 ed.) 1313; 18 Cyc. 1190; 24 C. J. 1030; *Woerner*, Am. Law of Adm. (2 ed.) § 506.

⁵¹ *McAfee v. Phillips*, 25 Ohio St. 374; *Davis v. Eastman*, 66 Vt. 651, 30 Atl. 1; 11 A. & E. Ency. of Law (2 ed.) 1313; 18 Cyc. 1190; 24 C. J. 1029.

⁵² *Case v. Clark*, 220 Mass. 344, 107 N. E. 936.

⁵³ *Security Bank v. Callahan*, 220 Mass. 84, 107 N. E. 385.

⁵⁴ *Thompson v. De Visser*, 219 Mass. 40, 106 N. E. 548.

⁵⁵ See § 1144.

⁵⁶ G. S. 1913, § 7383; 11 A. & E. Ency. of Law (2 ed.) 1196; 19 Ency. Pl. & Pr. 1021; 18 Cyc. 1105; 24 C. J. 925. See, under former statute, *State v. Probate Court*, 84 Minn. 289, 87 N. W. 783.

⁵⁷ See § 1063.

⁵⁸ *Kittson v. St. Paul Trust Co.*, 78 Minn. 325, 81 N. W. 7.

counting was conclusive on such devisees, and, as it involved the prior accountings it made them conclusive also. On an attempt made in the final accounting to open up the prior accountings, held, that the showing made was not sufficient.⁵⁹

1046. Amendments and corrections—The court should be very liberal in allowing the representative to amend or correct his account on the hearing.⁶⁰ On a final accounting mistakes in prior reports and accountings may be corrected.⁶¹

1047. Credits allowable—In general—Statute—Every executor, administrator, and guardian shall be allowed all necessary expenses in the care, management, and settlement of the estate, including proper and reasonable fees paid to attorneys, and for his own services such fees as are provided by law or fixed by the court; but when the decedent, by his will, makes some other provision for the compensation of his executor, that shall be a full compensation for his services, unless by an instrument in writing, filed in the probate court, he renounces all claim for compensation provided by the will. When costs are allowed against an executor, administrator or guardian, in any proceeding in any court, he shall pay the same out of the estate, as an expense of administration, and the same shall be allowed to him in his administration account; whenever a person named as executor in any will or codicil defends such will or codicil, either for the purpose of having it admitted to probate, sustained as the will of decedent making lawful disposition of his estate, or establishing the intent of the testator, such court may allow out of the estate of decedent to such person, whether successful or not, his reasonable fees and expenses, reasonable attorneys' fees and the necessary disbursements of such proceeding. Provided, that costs, disbursements and attorneys' fees paid or incurred in actions or proceedings in court shall not be allowed if it appear that such actions or proceedings were prosecuted or resisted without just cause.⁶² A representative should be credited with all expenditures duly made in good faith for any liability of the estate, either arising in the course of administration, or existing against the decedent at the time of his death, and paid in the manner prescribed by law.⁶³ The cost of a monument over the grave of the decedent is a legitimate expense of administration and should accordingly be allowed in the final account. If the estate is insolvent only a very modest expenditure should be allowed, regardless of directions in a will.

⁵⁹ *Kittson v. St. Paul Trust Co.*, 78 Minn. 325, 81 N. W. 7.

⁶⁰ *Loomis v. Armstrong*, 63 Mich. 355, 29 N. W. 867. See 19 Ency. Pl. & Pr. 1033.

⁶¹ *Ryan v. Hutchinson*, 161 Iowa 575, 143 N. W. 433.

⁶² G. S. 1913, § 7298, as amended by Laws 1921, c. 210.

⁶³ *In re Willard's Estate*, 139 Cal. 501, 506, 73 Pac. 240; 11 A. & E. Ency. of Law (2 ed.) 1232; 24 C. J. 968; 18 Cyc. 1139; 11 R. C. L. 179; *Woerner*, Am. Law of Adm. (2 ed.) § 514; *Ann. Cas.* 1918D, 923.

If the estate is solvent the directions of a will should be carried out. If there are no directions in a will and the estate is solvent the wishes of the family should control. If the family disagree the court should keep the expenditure within reasonable limits. The matter rests largely in the discretion of the probate court.⁶⁴ The federal inheritance tax is an expense of administration and if paid by the representative he should be allowed credit therefor.⁶⁵ There can be no legitimate charges of administration where there is nothing to administer.⁶⁶ A claim may be allowable as an expense of administration though it is not of such a nature that it is a claim against the estate in the sense of being a debt of the decedent.⁶⁷ The expenses of one in looking out for his own interests in the estate cannot be allowed as an expense of its administration. Nor can there be so allowed the expenses of one of the heirs or next of kin, incurred after the appointment of an administrator, in hunting for other heirs or next of kin.⁶⁸ A representative is not entitled to credit for expenditures made before his application for appointment.⁶⁹ Items may be allowed though they have not actually been paid, where they have been incurred or are inevitable, such as attorney's fees and official fees.⁷⁰ A representative of a deceased partner is not entitled to an allowance for compensation paid by him to a surviving partner for winding up the business.⁷¹ A representative may properly be allowed a discount paid a bank on the sale of a mortgage to realize funds for the estate, the matter being within his reasonable discretion.⁷²

1048. Credit for payment of claims not presented to probate court—It was held under the former system of allowing claims that where commissioners were appointed to receive, examine and adjust all claims against the estate and proceeded duly and regularly, a representative who paid, out of funds not belonging to the estate, claims which were valid against the estate, and which were properly allowable by the commissioners, but which were not presented or allowed by them, was not entitled to have credit for such payment in his final account.⁷³ Under the present statute it has been held that a representative cannot waive the statute requiring claims to be presented to the probate court, pay a claim himself without allowance by the probate court, and then receive

⁶⁴ *State v. Probate Court*, 138 Minn. 107, 164 N. W. 365; 11 A. & E. Ency. of Law (2 ed.) 1265; 18 Cyc. 267; 24 C. J. 93; Woerner, Am. Law of Adm. (2 ed.) §§ 358-360; 52 L. R. A. (N. S.) 1158; Ann. Cas. 1917B, 256.

⁶⁵ *State v. Probate Court*, 139 Minn. 210, 166 N. W. 125.

⁶⁶ *In re Thompson's Estate*, 57 Minn. 109, 58 N. W. 682.

⁶⁷ *Winston v. Young*, 52 Minn. 1, 5, 53 N. W. 1015.

⁶⁸ *In re Glynn's Estate*, 57 Minn. 21, 58 N. W. 684.

⁶⁹ *In re Byrnes' Estate*, 122 Cal. 260, 54 Pac. 957.

⁷⁰ *In re Parsons' Estate*, 65 Cal. 240, 3 Pac. 817.

⁷¹ *Loomis v. Armstrong*, 49 Mich. 521, 14 N. W. 505.

⁷² *In re Thompson's Estate*, 183 Mich. 618, 150 N. W. 318.

⁷³ *Bunnell v. Post*, 25 Minn. 376.

credit for it in his final account, at least if the claim is barred by the statute.⁷⁴ Under Laws 1899, c. 265, claims theretofore paid by a representative without having been allowed by the probate court, might be credited to him in his final account upon proof that they were just and existing claims against the estate at the time of payment.⁷⁵

1049. Expenses of probating or defending will—The matter of allowing an executor credit for his expenses in securing or defending the probate of a will is now regulated by statute.⁷⁶ It is no part of the duty of an administrator to contest the probate of a will produced after letters of administration have been granted and his expenses in such a contest cannot be allowed as a charge against the estate.⁷⁷

1050. Expenses of securing letters of administration—No hard and fast rule can be laid down as to the allowance of credit for expenses in securing appointment as administrator. The matter rests in the discretion of the court. If there is no contest and the administrator acted in good faith credit should ordinarily be allowed. If there is an unsuccessful contest he should be allowed credit unless there are special circumstances making it unfair to a majority of the persons interested in the estate.⁷⁸

1051. Attorney's fees—Statute—The statute provides that representatives "shall be allowed all necessary expenses in the care, management, and settlement of the estate, including proper and reasonable fees paid to attorneys * * * Provided, that costs and attorneys' fees paid or incurred in actions or proceedings in court shall not be allowed if it appear that such actions or proceedings were prosecuted or resisted without just cause."⁷⁹ If a representative is himself an attorney he may be compensated for professional services to the estate.⁸⁰ A representative has a right to select his counsel regardless of any selection by the decedent in his will.⁸¹ Attorneys employed by a representative have no claim enforceable against the estate directly. The representa-

⁷⁴ *Gilman v. Maxwell*, 79 Minn. 377, 82 N. W. 669. This is a harsh rule and ought to be changed by statute.

⁷⁵ *Nordlund v. Dahlgren*, 130 Minn. 462, 153 N. W. 876.

⁷⁶ See § 1047. For the rules prior to statute, see *Kelly v. Kennedy*, 133 Minn. 278, 158 N. W. 395; *Minnesota Loan & Trust Co. v. Pettit*, 144 Minn. 244, 175 N. W. 540; *L. R. A.* 1917A, 448; *Ann. Cas.* 1918D, 166; 24 C. J. 100; 7 A. L. R. 1499; 10 A. L. R. 783; 4 Minn. L. Rev. 282.

⁷⁷ *In re Dalton's Estate* (Iowa) 168 N. W. 332; *In re Parson's Estate*, 65 Cal. 240, 3 Pac. 817; *Edwards v. Ela*, 5 Allen (Mass.) 87; *Dalrymple v. Gamble*, 68

Md. 156, 11 Atl. 718; 11 A. & E. Ency. of Law (2 ed.) 1237; 18 Cyc. 276.

⁷⁸ *In re Hentges' Estate*, 86 Neb. 75, 124 N. W. 929; 11 A. & E. Ency. of Law (2 ed.) 1237, 1244; 18 Cyc. 276; 24 C. J. 102; *Woerner, Am. Law of Adm.* (2 ed.) § 517; 9 Prob. Rep. Ann. 143; 26 L. R. A. (N. S.) 757.

⁷⁹ § 1047. See 11 A. & E. Ency. of Law (2 ed.) 1240; 18 Cyc. 273; 24 C. J. 97; *Woerner, Am. Law of Adm.* (2 ed.) §§ 515, 516; *Church, Probate Law*, 1143.

⁸⁰ See § 1055.

⁸¹ *Young v. Alexander*, 16 Lea (Tenn.) 108; *In re Ogier's Estate*, 101 Cal. 381, 35 Pac. 900.

tive is personally liable on the contract of employment, but may be reimbursed in the settlement of his account.⁸² A representative pays his attorney at his own risk of having it allowed by the probate court in the final account.⁸³ A representative may be allowed credit in his account for proper attorney's fees incurred but not yet paid.⁸⁴ A representative may agree with counsel for fees contingent on the recovery of assets and if the amount is reasonable it may be allowed by the court.⁸⁵ Only reasonable counsel fees will be allowed regardless of what may have been paid or promised by the representative.⁸⁶ In his account the representative must specify the services rendered by counsel and he has the burden of proving the necessity therefor and the reasonableness of the compensation claimed.⁸⁷ The objections to the allowance of fees may, however, be of such an affirmative character that the objector has the burden of proving them.⁸⁸ The court is not bound to receive expert opinion as to the value of the services but may act on its own knowledge.⁸⁹ While the probate court has exclusive original jurisdiction to determine the amount of counsel fees to be allowed against an estate it has no jurisdiction to determine controversies between a representative and his counsel.⁹⁰ The allowance of attorney's fees upon applications for the probate of wills and the granting of letters testamentary or of administration is considered elsewhere.⁹¹ Counsel fees may be allowed for advice in the conduct of the administration, for services in resisting claims against the estate, in prosecuting or defending actions or proceedings, including appeals, involving the estate, in collecting assets, in preparing, presenting and defending accounts, in securing settlements and compromises of claims, in obtaining leave of court for official acts of the representative, in resisting ill founded charg-

⁸² *Brown v. Quinton*, 80 Kan. 44, 102 Pac. 242; *In re Munger's Estate*, 168 Iowa 372, 150 N. W. 447; 11 A. & E. Ency. of Law (2 ed.) 935; 24 C. J. 66; 18 Cyc. 249; 25 L. R. A. (N. S.) 72; *Church, Probate Law*, 1146-1151; *Woerner, Am. Law of Adm.* (2 ed.) § 356.

⁸³ *State v. District Court*, 53 Mont. 210, 162 Pac. 1053.

⁸⁴ § 1047; *Jackson v. Leech's Estate*, 113 Mich. 391, 71 N. W. 846; *Pennie v. Roach*, 94 Cal. 515, 29 Pac. 956. See 11 A. & E. Ency. of Law (2 ed.) 1243; 18 Cyc. 273.

⁸⁵ *Filbeck v. Davies*, 8 Colo. App. 320, 46 Pac. 214; 11 A. & E. Ency. of Law (2 ed.) 1251; 24 C. J. 104.

⁸⁶ *In re Munger's Estate*, 168 Iowa 372, 150 N. W. 447; *In re Dalton's Estate*, 183 Iowa 1013, 168 N. W. 332; 11 A. & E. Ency. of Law (2 ed.) 1250; 18

Cyc. 278; 24 C. J. 103; *Church, Probate Law*, 1143.

⁸⁷ *In re Munger's Estate*, 168 Iowa 372, 150 N. W. 447; *In re Dalton's Estate*, 183 Iowa 1013, 168 N. W. 332; *In re Miller's Estate*, 40 Or. 424, 67 Pac. 107, 1010; 11 A. & E. Ency. of Law (2 ed.) 1241; 18 Cyc. 1180; 24 C. J. 99; *Woerner, Am. Law of Adm.* (2 ed.) 515; *Church, Probate Law*, 1154.

⁸⁸ *In re Vance's Estate*, 141 Cal. 624, 75 Pac. 323; *In re Kruger's Estate*, 143 Cal. 141, 76 Pac. 891; *In re Dalton's Estate*, 183 Iowa 1013, 168 N. W. 332.

⁸⁹ *Freese v. Pennie*, 110 Cal. 469, 42 Pac. 978; *In re Straus' Estate*, 144 Cal. 553, 77 Pac. 1122.

⁹⁰ *In re Kruger's Estate*, 143 Cal. 141, 76 Pac. 891.

⁹¹ See §§ 1049, 1050.

es or proceedings against the representative, and generally in preserving and protecting the interests of the estate.⁹² Counsel fees are not allowable for services rendered necessary by the culpable fault of the representative, or for services in relation to the private interests of the representative or individual beneficiaries of the estate, or in resisting well founded charges against the representative, or in defending justifiable proceedings against him to recover or secure trust funds, or for services which the representative should have performed personally, or in litigation between beneficiaries of the estate, or for resisting the claims of a pretermitted heir, or for representing a minor distributee as guardian ad litem, or in representing beneficiaries in contesting the final settlement or hastening the administration, or in proceedings to compel the representative to perform his duty when in default, or for services not of a professional nature, or in any matter not involving the interests of the estate.⁹³ Where it appears that a representative has defended an action to which there was in fact no meritorious defence, the mere fact that counsel advised him that he had a defence is not sufficient. He must go further and disclose facts and circumstances sufficient to show that he acted reasonably. If such facts are not shown he is not entitled to credit for his attorney's fees or other expenses in making the defence.⁹⁴ Where the heirs and distributees of an estate in process of settlement in the state courts without any just cause therefor bring suit against the administrator of said estate in the federal court, the administrator is justified in defending such suit, and is entitled to credit on his account as such administrator for his reasonable attorney's fees and expenses in making such defence.⁹⁵ An administrator is not entitled to charge against the estate attorney's fees and other expenses incurred by him in a contest with the heirs of the estate as to his alleged misappropriation of the funds of the estate.⁹⁶ A representative may be allowed court costs and attorney's fees in bringing an action and securing a compromise and a settlement in good faith and upon reasonable grounds, though subsequent events show that the action was not necessary.⁹⁷ It may be shown that services of attorneys have been so negligently performed as to cause damage to the estate and that the estate should not pay therefor on that account.⁹⁸

⁹² 11 A. & E. Ency. of Law (2 ed.) 1240-1249; 18 Cyc. 275; 24 C. J. 97-103; Woerner, Am. Law of Adm. (2 ed.) § 515; Church, Probate Law, 1151.

⁹³ 11 A. & E. Ency. of Law (2 ed.) 1240-1249; 18 Cyc. 278-280; 24 C. J. 105-109; Woerner, Am. Law of Adm. (2 ed.) § 516; Church, Probate Law, 1152.

⁹⁴ In re Bullion's Estate, 87 Neb. 700, 128 N. W. 32.

⁹⁵ Bullion v. Ribble, 87 Neb. 700, 128 N. W. 32.

⁹⁶ In re Wilson's Estate, 97 Neb. 780, 151 N. W. 316.

⁹⁷ Benjamin v. Bush, 89 Neb. 334, 131 N. W. 602.

⁹⁸ In re Kruger's Estate, 143 Cal. 141, 76 Pac. 891.

1052. Traveling expenses—A representative may be allowed credit in his final account for traveling expenses which were reasonably necessary in the discharge of his duties. He may also be allowed credit for the traveling expenses of his attorney.⁹⁹

1053. Expenses of accounting—A representative is entitled to credit for the necessary expenses of accounting and settlement, including attorney's fees.¹ He may be allowed credit for the expenses of a stenographer at hearings on his account, to meet unfounded charges of fraud and collusion.² He is not entitled to credit for the expense of an accountant in preparing the final account except in special cases. Ordinarily it is his duty to prepare the account himself as one of the duties of his office.³

1054. Advances to widow or heirs—A representative is not, as a general rule, entitled as of right to reimbursement on his accounting for advances made by him to the widow or heirs for their support pending administration. He makes such advances at his own risk. It is no part of his duty to relieve the necessities of the family of the decedent, unless the will so directs.⁴ If a representative makes advances to the widow or heirs in anticipation of their distributive shares such payments are at his own risk and cannot be credited on his final account, but in making distribution he may deduct them from their shares and on the final hearing receive credit if the advances were reasonable and made in good faith.⁵ If a representative makes advances to the widow or heirs for their support pending administration and the court subsequently grants them a statutory allowance, the representative may receive a credit in his final account for such advances, if they were reasonably necessary.⁶ Advances made by an administrator to an heir of his intestate, under an agreement that they shall be regarded as partial payments of the amount coming to such heir from the estate, may be so regarded and be applied upon the amount subsequently directed to be

⁹⁹ Rice v. Tilton, 14 Wyo. 101, 82 Pac. 577; Muldrick v. Galbraith, 31 Or. 86, 49 Pac. 886; In re Byrne, 122 Cal. 260, 54 Pac. 957; In re Rose's Estate, 80 Cal. 166, 179, 22 Pac. 86 (attorney); 11 A. & E. Ency. of Law (2 ed.) 1235; 18 Cyc. 285; 24 C. J. 112; Woerner, Am. Law of Adm. (2 ed.) § 514.

¹ Forward v. Forward, 6 Allen (Mass.) 494; Loring v. Wise, 226 Mass. 231, 115 N. E. 302; 11 A. & E. Ency. of Law (2 ed.) 1248; 18 Cyc. 1217.

² Loring v. Wise, 226 Mass. 231, 115 N. E. 302.

³ 18 Cyc. 1218. See § 761.

⁴ Washburn v. Hale, 10 Pick. (Mass.) 429; In re Fitzgerald, 57 Wis. 508, 15 N.

W. 794; In re Rose, 80 Cal. 166, 22 Pac. 86; Elizalde v. Murphy, 4 Cal. App. 114, 87 Pac. 245; 11 A. & E. Ency. of Law (2 ed.) 1270; 18 Cyc. 270, 615, 617; Ann. Cas. 1917A, 134. See § 727.

⁵ Elizalde v. Murphy, 4 Cal. App. 114, 87 Pac. 245; In re Ross' Estate (Cal.) 182 Pac. 303; Howard v. Rutherford, 149 Ala. 661, 43 So. 30; Hyland v. Baxter, 98 N. Y. 610; In re Murphy, 30 Wash. 9, 70 Pac. 109 (funeral expenses of heir advanced by representative); In re Fitzgerald, 57 Wis. 508, 15 N. W. 794; 11 A. & E. Ency. of Law (2 ed.) 1270; 18 Cyc. 615, 617; Ann. Cas. 1917A, 134.

⁶ King v. Whiton, 15 Wis. 684.

paid to the heir by the order for distribution of the estate. And this is so though the heir may have given a note to the administrator for a part of such advances. If the heir dies before the order of distribution the account for such advances need not be presented as a claim against his estate.⁷

1055. Compensation of representative—Statute—The statute provides that every executor or representative shall be allowed for his services "such fees as are provided by law or fixed by the court; but when the decedent, by his will, makes some other provision for the compensation of his executor, that shall be a full compensation for his services, unless by an instrument in writing, filed in the probate court, he renounces all claim for compensation provided by the will."⁸ Under the statute the amount of compensation to be allowed a representative for his services is largely discretionary with the probate court. It may be wholly disallowed.⁹ It is within the province of the probate court to determine the amount due each executor for his services, but where that court, instead of doing so, allows a lump sum for the services of all the executors, the district court may apportion such sum between the executors in proportion to the services which they have respectively rendered to the estate.¹⁰ A representative may be refused all compensation if he has been guilty of wilful misconduct, though he has rendered some service to the estate.¹¹ Compensation may be disallowed for breach of trust.¹² It is only when a representative has been guilty of wilful default, misconduct, or gross negligence in the management of the estate, whereby it has suffered loss, that he can be denied compensation.¹³ If the beneficiaries of an estate claim the benefit of wrongful acts of a representative they cannot object to his being compensated for his services.¹⁴ Where a representative obtained a tax title against the estate it was held proper to disallow his charges for services in obtaining it.¹⁵ The failure of a representative to file an inventory within the statutory time should be considered in determining whether any, and if so, how

⁷ *Lyle v. Williams*, 65 Wis. 231, 26 N. W. 448.

⁸ See § 1047.

⁹ *St. Paul Trust Co. v. Kittson*, 62 Minn. 408, 65 N. W. 74; *Id.*, 88 Minn. 38, 92 N. W. 500; *Poupore v. Stone-Ordean-Wells Co.*, 133 Minn. 421, 158 N. W. 703; *White v. Ditson*, 140 Mass. 351, 362, 4 N. E. 606; *McIntire v. Mower*, 204 Mass. 233, 90 N. E. 567; *Bailey v. Crosby*, 226 Mass. 492, 116 N. E. 238; 11 A. & E. Ency. of Law (2 ed.) 1288; 18 Cyc. 1141, 1154, 1162; 24 C. J. 985.

¹⁰ *Slingerland v. Norton*, 136 Minn. 204, 161 N. W. 497.

¹¹ *McIntire v. Mower*, 204 Mass. 233,

90 N. E. 567 (failing to deposit and care for assets—failure to administer properly the personal estate that came into his hands and the proceeds of the realty which he sold—misappropriation of large sums—absconding with what was left of estate).

¹² *Brooks v. Jackson*, 125 Mass. 307.

¹³ *St. Paul Trust Co. v. Kittson*, 62 Minn. 408, 65 N. W. 74. See *St. Paul Trust Co. v. Kittson*, 88 Minn. 38, 92 N. W. 500; 18 Cyc. 1162; 24 C. J. 997.

¹⁴ *Jennison v. Hapgood*, 10 Pick. (Mass.) 77.

¹⁵ *Morton v. Johnston*, 124 Mich. 561, 83 N. W. 369.

much compensation should be allowed him for his services; but such failure does not, in itself, bar all compensation.¹⁶ Any provision in a will for the compensation of the executor is binding on him, unless he renounces it as provided by statute.¹⁷ If a representative is an attorney he may be compensated for his professional services to the estate, but claims for such services are to be carefully scrutinized and kept within reasonable limits and allowed only where they were reasonably necessary.¹⁸ If a representative's letters are revoked by operation of law, as where an order admitting a will to probate is reversed on appeal, he is entitled to compensation for his services rendered in good faith.¹⁹ An agreement between the representative and the distributees is entitled to great if not controlling consideration.²⁰ An agreement to serve without compensation or for less than allowed by law is valid.²¹ Beneficiaries of the estate may conclude themselves by acquiescing in or consenting to improper allowances.²² In most states compensation is fixed by statute on the basis of a certain percentage of the amount of the estate. The following statute of Michigan is typical and may be useful as a general guide to probate courts of this state. A similar statute is in force in Wisconsin and Iowa. "Commissions upon the amount of personal estate collected and accounted for by him, and of the proceeds of real estate sold under an order of court for the payment of debts, as follows: for the first one thousand dollars, at the rate of five per cent.; for all above that sum and not exceeding five thousand dollars, at the rate of two and one-half per cent.; and for all above five thousand dollars, at the rate of one per cent. And in all cases, such further allowances may be made as the judge of probate shall deem just and reasonable, for any extraordinary services, not required by an executor or administrator in the common course of his duty."²³ Where as

¹⁶ *In re Lane's Estate*, 79 Vt. 323, 65 Atl. 152.

¹⁷ See *Bailey v. Crosby*, 226 Mass. 492, 116 N. E. 238; 18 Cyc. 1143, 1144.

¹⁸ *Harris v. Martin*, 9 Ala. 895; *In re Carmody's Estate*, 163 Iowa 463, 145 N. W. 16; *Turnbull v. Pomeroy*, 140 Mass. 117, 3 N. E. 15; *Newell v. West*, 149 Mass. 520, 21 N. E. 954; *Wisner v. Mahoy*, 74 Mich. 143, 41 N. W. 835; *Sloan v. Duffy*, 117 Wis. 480, 94 N. W. 342; *In re Wilson's Estate*, 83 Neb. 252, 119 N. W. 522; *Nelson v. Schoonover*, 89 Kan. 779, 132 Pac. 1183. See 18 Cyc. 282; 24 C. J. 108; Ann. Cas. 1913A, 1273.

¹⁹ *Brown v. McGee*, 117 Wis. 389, 94 N. W. 363.

²⁰ *Bowker v. Pierce*, 130 Mass. 262 (testamentary trustee).

²¹ *Morton v. Johnston*, 124 Mich. 561,

83 N. W. 369; *Zeldler v. Schneider*, 181 Mo. App. 267, 170 S. W. 334; *In re Schoonover's Estate*, 250 Pa. 353, 95 Atl. 524; *Jones v. Jones*, 141 Ga. 727, 82 S. E. 451 (necessity of consideration); *Shufeldt v. Hughes*, 55 Wash. 246, 104 Pac. 253 (burden on those asserting special agreement to prove it); *In re Irwin*, 123 Mo. App. 508, 100 S. W. 565 (special agreement void if based on consideration that proper objections to appointment shall be withheld); *Fogg v. Quackenbush*, 27 Colo. App. 480, 150 Pac. 726 (waiver of objections to appointment held a sufficient consideration); 11 A. & E. Ency. of Law (2 ed.) 1236; 18 Cyc. 1157; 24 C. J. 995.

²² *In re Martin*, 196 N. Y. 415, 90 N. E. 46.

²³ *Howell's Mich. Statutes*, § 11149.

to the corpus of the estate the executorial and trust duties devolved upon the same persons are so blended as to render them practically incapable of separation, such persons are only entitled to one full commission upon the sums collected and paid out.²⁴ What services are to be deemed extraordinary necessarily depends upon the facts of the particular case. Services in collecting debts due the estate, interviewing creditors, attending court, and the like, are not usually extraordinary services.²⁵ Whether compensation shall be made for extra services and the amount thereof is largely within the discretion of the probate court.²⁶ When compensation is sought for extra services the services should be stated specifically in the account.²⁷ Claims for extra services should be carefully examined by the probate court and allowed only in clear cases and for a reasonable amount.²⁸

1056. Debits chargeable—In general—Statute—No executor or administrator shall make profit by the increase, nor suffer loss by the decrease or destruction without his fault, of any part of the personal estate, but he shall account for the excess when he sells for more than the appraisal, and not be responsible for the loss when he sells for less, if such sale appears to be beneficial to the estate. He shall not be accountable for debts due decedent which remain uncollected without fault on his part, but where he neglects or unreasonably delays to raise money by collecting debts or selling real or personal estate, or neglects to pay over the money in his hands, and by reason thereof the value of the estate is lessened, or unnecessary costs or interest accrues, or the persons interested suffer loss, the same shall be deemed waste, and the executor or administrator shall be charged in his account with the damages sustained. He shall not purchase any claim against the estate he represents, and where he pays less than the full amount of a claim he shall charge in his account only the sum actually paid.²⁹ A representative is prima facie chargeable with the appraised value of all the property included in the inventory. The inventory and appraisal are the basis of the accounting.³⁰ He is accountable for all assets which have come into his possession and also all assets which he culpably failed to collect.³¹ If a representative takes possession of the real estate of the

²⁴ In re Martin, 196 N. Y. 415, 90 N. E. 46; In re Ziegler, 218 N. Y. 544, 113 N. E. 553; 11 A. & E. Ency. of Law (2 ed.) 1304; 18 Cyc. 1160; 24 C. J. 994.

²⁵ In re Carmody's Estate, 163 Iowa 463, 145 N. W. 16.

²⁶ In re Carmody's Estate, 163 Iowa 463, 145 N. W. 16.

²⁷ In re Carmody's Estate, 163 Iowa 463, 145 N. W. 16.

²⁸ In re Carmody's Estate, 163 Iowa 463, 145 N. W. 16.

²⁹ G. S. 1913, § 7297.

³⁰ In re Mullon, 145 N. Y. 98, 39 N. E. 821; In re Sanderson, 74 Cal. 199, 15 Pac. 753. See Ryan v. Williams, 92 Minn. 506, 100 N. W. 380; 11 A. & E. Ency. of Law (2 ed.) 1200; 18 Cyc. 202, 1137; 24 C. J. 965; Woerner, Am. Law of Adm. (2 ed.) § 510.

³¹ In re Kennedy's Estate, 120 Cal. 458, 461, 52 Pac. 820. See § 855.

decedent in his official capacity he must account for the rents and profits received therefrom, and if the amount received cannot be otherwise determined, the court may charge him with the rental value of the lands.³² If a representative in his individual capacity occupies realty of the decedent to which he is entitled as heir, devisee or otherwise, he is not chargeable with the value of the use and occupation or profits therefrom, the property not being needed for the payment of debts or expenses of administration.³³ A representative who, as such, has received money as belonging to the estate must account for it, regardless of whether he could have collected by action, there being no adverse claim asserted.³⁴ Money received by a representative and improperly paid out is still in his hands in contemplation of law and persons interested in the estate may surcharge or falsify his account therefor.³⁵ Assets are not administered by being converted to the use of the representative but must be charged to him in his account.³⁶ A representative is "not accountable for debts due decedent which remain uncollected without fault on his part." The effect of the statute is to throw upon the representative the burden of proving that debts due the estate are uncollectible. He must be charged with the appraised value of all claims in favor of the estate unless he shows affirmatively that they remain uncollected without fault on his part, the presumption being that all such claims are collectible.³⁷ Debts due from the representative to the decedent are chargeable as so much cash in hand if the representative was solvent at any time during the administration.³⁸ A debt of a firm of which the representative is a partner is within the foregoing rule.³⁹ The presumption is that a debt owed by a representative to the decedent could have been collected and this presumption continues until a satisfactory showing to the contrary is made.⁴⁰ A representative is chargeable with a debt due the estate as appraised in the inventory unless it affirmatively appears that it was not collectible. His mere charging himself with a note and crediting himself with the same note does not show that it was uncollectible.⁴¹ If a representative negligently fails to retain the amount of a debt due from a distributee to the estate he is chargeable therefor.⁴² A representative cannot be charged in his account for the loss of property of the estate unless the loss was through his fault.⁴³ A representative is accountable for all income, profits or

³² *Nordlund v. Dahlgren*, 130 Minn. 462, 153 N. W. 876. See § 738.

³³ *Almy v. Crapo*, 100 Mass. 218.

³⁴ *Beaulieu v. Ain-E-Waush*, 126 Minn. 321, 148 N. W. 282.

³⁵ *Hall v. Grovler*, 25 Mich. 428, 432, 436.

³⁶ *Michigan Trust Co. v. Ferry*, 228 U. S. 346.

³⁷ *In re Lohelde's Estate*, 17 Cal. App. 475, 120 Pac. 56. See § 855.

³⁸ See § 820.

³⁹ *In re Consalus*, 95 N. Y. 340.

⁴⁰ *In re Lohelde's Estate*, 17 Cal. App. 475, 120 Pac. 56.

⁴¹ *In re Lohelde's Estate*, 17 Cal. App. 475, 120 Pac. 56.

⁴² 1 A. L. R. 992. See § 1093.

⁴³ G. S. 1913, § 7279; *Pourpore v.*

increase of the personal property of the estate and it should be stated separately in the account.⁴⁴ A representative must account for property treated as a part of the estate though in fact it belonged to another, if the owner voluntarily and with full knowledge turned it over to the estate and consented to its being treated as part of the estate by the representative.⁴⁵ A representative is not bound to account for property received by mistake as a part of the estate but in fact belonging to another.⁴⁶ If a representative occupies realty of the decedent for his own use he must account for the value of the use and occupation or the profits therefrom, unless he is entitled to it as heir, devisee or otherwise, or the other beneficiaries of the estate agree to his occupation without compensation.⁴⁷ A representative is chargeable with assets omitted from the inventory or received by him after the inventory was made or after a former accounting. The burden of proving the existence of such assets is on him who seeks to surcharge the account.⁴⁸ If a representative sells property of the estate for more than its appraised value he must account for the excess.⁴⁹ An account has been held properly surcharged with the amount of a note payable to the order of the decedent and found among her effects, but turned over to the father of the administrator, the husband of the decedent, who claimed it under a void oral trust.⁵⁰ A life tenant under a will, who is also the executrix named therein, may anticipate and discharge a pecuniary obligation, to mature after her death, to a remainderman, and the latter, accepting and retaining the payment, cannot require the executrix to account for the amount when making a final settlement of the estate.⁵¹

1057. Liability of representative for interest—The general rule is not to charge executors or administrators with interest on funds of the estate when their accounts are settled in the ordinary course. They do not, as such, hold funds for investment, but it is their duty to hold the funds intact, to proceed with reasonable promptness to settle the estate, and to be ready at all times to pay over the funds as the will or the probate court directs. Hence they are not ordinarily liable for inter-

Stone-Ordean-Wells Co., 133 Minn. 421, 158 N. W. 703.

⁴⁴ *In re Kernochan*, 104 N. Y. 618 (dividends declared after the death of the decedent); *Atwater v. Barnes*, 21 Conn. 237; 11 A. & E. Ency. of Law (2 ed.) 1206; 18 Cyc. 174.

⁴⁵ *Wrigley v. Watson*, 81 Minn. 251, 83 N. W. 989.

⁴⁶ See *Wrigley v. Watson*, 81 Minn. 251, 83 N. W. 989.

⁴⁷ *Walls v. Walker*, 37 Cal. 424; *In re More's Estate*, 121 Cal. 609, 54 Pac. 97; *In re Alfstad's Estate*, 27 Wash. 175, 67 Pac. 593; *In re Holderbaum*, 82 Iowa 69,

47 N. W. 898; *McIntire v. Mower*, 204 Mass. 233, 90 N. E. 567 (statute).

⁴⁸ *Boston v. Boylston*, 4 Mass. 318; *Hooker v. Bancroft*, 4 Pick. (Mass.) 50; *Schick v. Grote*, 42 N. J. Eq. 352; *In re Mullon*, 145 N. Y. 98, 39 N. E. 821; *In re Rogers*, 153 N. Y. 316, 47 N. E. 589.

⁴⁹ G. S. 1913, § 7297; *In re Radovich's Estate*, 74 Cal. 536, 16 Pac. 321; *Williams v. Ely*, 13 Wis. 1.

⁵⁰ *Ryan v. Williams*, 92 Minn. 506, 100 N. W. 380.

⁵¹ *Wheaton v. Pope*, 91 Minn. 299, 97 N. W. 1046.

est.⁵² If a representative is guilty of unreasonable delay in settling and distributing the estate he is chargeable with interest during such delay.⁵³ A brief delay in accounting is not enough of itself to warrant charging a representative with interest which he did not receive and which he was under no duty to obtain.⁵⁴ Where a representative appeals from an order of settlement and distribution he is not chargeable with interest pending the appeal, unless there are special circumstances justifying it.⁵⁵ Whether a representative should be charged with interest on funds which he has allowed to remain uninvested lies in the discretion of the probate court.⁵⁶ A representative is not chargeable with interest on a checking account to meet current expenses, no interest being received.⁵⁷ Where a representative is directed by a will to invest a fund and to pay the interest annually to the legatees, he is not chargeable with the legal rate of interest, but only for such amount as he receives.⁵⁸ Interest runs on an indebtedness of the representative to the estate.⁵⁹ Whenever a representative has received interest on funds of the estate he must be charged therewith on his accounting.⁶⁰ If a representative employs the funds of the estate in his own business or for his own purposes he is chargeable with simple interest thereon at the legal rate, but if he receives more than the legal rate he is chargeable with the rate received. It is immaterial that the representative acted in good faith or did not hazard the funds in trade or speculation. The rule is inflexible and is grounded in justice and public policy. A special agreement between the representative and the beneficiaries of the estate may take the case out of the general rule.⁶¹ An executor used part of the funds of the

⁵² *Dorris v. Miller*, 105 Iowa 564, 75 N. W. 482; *Wyman v. Hubbard*, 13 Mass. 232; *McIntire v. Mower*, 204 Mass. 233, 90 N. E. 567; *Fogg v. Quackenbush*, 27 Colo. App. 480, 150 Pac. 726; *Lund v. Lund*, 41 N. H. 355; *Stevens v. Ottawa Probate Judge*, 156 Mich. 526, 121 N. W. 477; *In re Raleigh's Estate*, 48 Utah 128, 158 Pac. 705; 11 A. & E. Ency. of Law (2 ed.) 1212; 18 Cyc. 255; 24 C. J. 73; *Woerner*, Am. Law of Adm. (2 ed.) § 511.

⁵³ *In re Sanderson's Estate*, 74 Cal. 199, 15 Pac. 753; *Lommen v. Toblason*, 52 Iowa 605, 3 N. W. 715; *Bullion v. Ribble*, 87 Neb. 700, 128 N. W. 32; *In re Delaney's Estate* (Nev.) 171 Pac. 383; 11 A. & E. Ency. of Law (2 ed.) 1218; 24 C. J. 80; 18 Cyc. 260; 31 L. R. A. (N. S.) 350.

⁵⁴ *McIntire v. Mower*, 204 Mass. 233, 90 N. E. 567.

⁵⁵ *In re Davis' Estate*, 33 Mont. 539, 85 Mont. 273, 88 Pac. 957. See 31 L. R. A. (N. S.) 355.

⁵⁶ *In re Gloyd's Estate*, 93 Iowa 303, 61 N. W. 975.

⁵⁷ *In re Bielby's Estate*, 155 N. Y. S. 133.

⁵⁸ *Fitzgerald v. Paisley*, 110 Iowa 98, 81 N. W. 181.

⁵⁹ *In re Ackerman*, 40 N. J. Eq. 533, 5 Atl. 91. See 24 C. J. 79.

⁶⁰ *Williams v. American Bank*, 4 Met. (Mass.) 317; *Lund v. Lund*, 41 N. H. 355; *Thompson v. Knapp*, 223 Mass. 277, 111 N. E. 792; *Loring v. Wise*, 226 Mass. 231, 115 N. E. 302; 11 A. & E. Ency. of Law (2 ed.) 1214; 18 Cyc. 257; 24 C. J. 83.

⁶¹ *St. Paul Trust Co. v. Kittson*, 62 Minn. 408, 65 N. W. 74; *Davis v. Swedish-American Nat. Bank*, 78 Minn. 408, 80 N. W. 953, 81 N. W. 210; *St. Paul Trust Co. v. Strong*, 85 Minn. 1, 88 N. W. 256; *Miller v. Lux*, 100 Cal. 609, 35 Pac. 345; *Stearns v. Brown*, 1 Pick. (Mass.) 530; *In re Myers*, 131 N. Y. 409, 30 N.

estate in its private business of a loan and trust company, but kept no separate accounts of the investments made from the trust funds, or of the interest or profits received or made by reason of such use. Held, that it was properly charged on its accounting with interest on so much of the trust fund so used by it at the legal rate.⁶² If a representative uses funds of the estate for his own benefit the persons interested in the estate have an option to charge him with interest or with the profit which he has made.⁶³ Where a trust company has charge of several trust funds belonging to separate estates or parties, and has used in its own business a part of such funds, and its cash balance kept on hand is made up of money belonging to all of the trust funds commingled, for the purpose of ascertaining how much money belonging to any particular estate it has so used, only the proportionate part of its cash on hand which belongs to such estate can be deducted from the cash balance due to such estate.⁶⁴ There is authority to the effect that if a representative commingles funds of the estate with his private funds, by depositing them in a bank to his individual credit or otherwise, he is chargeable with interest, it being presumed that he has used them for his own benefit.⁶⁵ It is held in this state that the mere fact that a representative deposits funds of the estate in a bank to his individual credit does not render him chargeable with interest, in the absence of a showing that he used the funds for his own benefit, or received interest thereon.⁶⁶ A representative deposited funds of the estate in a bank of which he was an officer. Held, not chargeable with interest.⁶⁷ A representative who appropriates funds of the estate to his own use is properly charged with interest.⁶⁸ Compound interest is rarely chargeable. It is only chargeable for actual fraud or wilful and flagrant breach of trust. When charged it is usually computed with annual rests.⁶⁹ Compound interest is properly charged where the representative wilful-

E. 135; *Benjamin v. Bush*, 89 Neb. 334, 131 N. W. 602; *In re Pease's Estate*, 149 Cal. 167, 85 Pac. 149; *In re Brown's Estate*, 113 Iowa 351, 85 N. W. 617; 11 A. & E. Ency. of Law (2 ed.) 1215; 18 Cyc. 259; 24 C. J. 77.

⁶² *St. Paul Trust Co. v. Klittson*, 62 Minn. 408, 65 N. W. 74; *Id.*, 67 Minn. 59, 69 N. W. 625.

⁶³ *In re Holbert's Estate*, 39 Cal. 597; 11 A. & E. Ency. of Law (2 ed.) 1216; 18 Cyc. 260; 24 C. J. 78.

⁶⁴ *St. Paul Trust Co. v. Klittson*, 62 Minn. 408, 65 N. W. 74.

⁶⁵ See *St. Paul Trust Co. v. Klittson*, 62 Minn. 408, 65 N. W. 74; *Davis v. Swedish-American Bank*, 78 Minn. 408, 80 N. W. 953, 81 N. W. 210; *St. Paul Trust Co. v. Strong*, 85 Minn. 1, 88 N. W.

256; 11 A. & E. Ency. of Law (2 ed.) 1217; 18 Cyc. 259.

⁶⁶ *In re Shotwell*, 49 Minn. 170, 180, 51 N. W. 909; *Board of Education v. Cooper*, 98 Minn. 535, 107 N. W. 1133; *In re Scofield*, 99 Ill. 513.

⁶⁷ *In re Johnson*, 67 N. Y. S. 1004, affirmed, 170 N. Y. 139, 63 N. E. 63. *Contra*, *In re Brewster's Estate*, 113 Mich. 561, 71 N. W. 1085. See 11 A. & E. Ency. of Law (2 ed.) 1217; 1 A. L. R. 1646.

⁶⁸ *In re Adams*, 64 N. Y. S. 591, affirmed, 166 N. Y. 623, 59 N. E. 1118; 18 Cyc. 258; 24 C. J. 77.

⁶⁹ *St. Paul Trust Co. v. Strong*, 85 Minn. 1, 88 N. W. 256; *Forbes v. Allen*, 166 Mass. 569, 44 N. E. 1065; *Jennison v. Hapgood*, 10 Pick. (Mass.) 77, 104; *White v. Ditson*, 140 Mass. 351, 4 N. E.

ly converts funds to his own use.⁷⁰ A representative who refuses to render an account of the use of money in his hands, and claims it as his own, is chargeable with compound interest.⁷¹ Where a settlement of the estate is delayed because of the administrator's fraudulent claim to land and consequent litigation, and he uses it for his own benefit, he should be charged compound interest on the rental value. The rule that interest, as such, cannot be allowed where the amount of damages is unliquidated, applies only to an action for damages, and is inapplicable to an accounting of a representative.⁷² When an administrator in his report to the probate court obtains an order allowing him credit for a certain sum of money as paid out by him in behalf of the estate, which sum he has not paid out, but thereafter retains for his own use for several years, he may properly in the discretion of the court, be charged with interest on such sum from the time that he obtained possession thereof as his own money and while he so retains it.⁷³ An administrator is not chargeable with interest on money which he holds as administrator subject to the order of the court, unless he received interest thereon, or the circumstances are such that he might and ought to have received such interest. He cannot be allowed interest on money paid out by him for the estate while he holds a general balance in his hands.⁷⁴ The burden of proving facts justifying interest is on those who seek to have it charged.⁷⁵

1058. Foreign assets—If a representative receives foreign assets he must account for them.⁷⁶ A representative appointed in this state is not accountable here for real estate situated in another state or country.⁷⁷

606; *McKim v. Hibbard*, 142 Mass. 422, 8 N. E. 152; *In re Hemphill's Estate*, 157 Wis. 331, 147 N. W. 1089; *In re Sarment's Estate*, 123 Cal. 331, 55 Pac. 1015; *In re Piercy's Estate*, 168 Cal. 755, 145 Pac. 91; *Lommen v. Tobiasson*, 52 Iowa 665, 3 N. W. 715; 11 A. & E. Ency. of Law (2 ed.) 1230; 18 Cyc. 263; 24 C. J. 87; 29 L. R. A. 622.

⁷⁰ *In re McRhee's Estate*, 156 Cal. 335, 104 Pac. 455.

⁷¹ *Jennison v. Hapgood*, 10 Pick. (Mass.) 77.

⁷² *In re Piercy's Estate*, 168 Cal. 755, 145 Pac. 91.

⁷³ *In re Wilson's Estate*, 97 Neb. 780, 151 N. W. 316.

⁷⁴ *In re Wilson's Estate*, 97 Neb. 780, 151 N. W. 316.

⁷⁵ *In re People's Trust Co.*, 155 N. Y. S. 639; *In re Sarment's Estate*, 123 Cal. 331, 55 Pac. 1015.

⁷⁶ *Fox v. Tay*, 89 Cal. 339, 24 Pac. 855; *In re Ortiz's Estate*, 86 Cal. 306, 24 Pac. 1034; *McPike v. McPike*, 111 Mo. 216, 20 S. W. 12; *Sherman v. Page*, 85 N. Y. 123; *Wyatt v. Withite*, 192 Mo. App. 551, 183 S. W. 1107; 11 A. & E. Ency. of Law (2 ed.) 1211; 18 Cyc. 191.

⁷⁷ *Putnam v. Middleborough*, 209 Mass. 456, 95 N. E. 749; *Tod v. Mitchell*, 228 Mass. 541, 117 N. E. 899.

DISTRIBUTION OF ESTATE

IN GENERAL

1059. Jurisdiction—The jurisdiction of the probate court over the distribution of the estate of a decedent is exclusive.⁷⁸ The jurisdiction extends to all the property of the decedent within the state and the final decree may cover all the residue of such property.⁷⁹

1060. Necessity of decree of distribution—Effect of distributing without decree—Regular proceeding requires the entry of a decree of distribution by the probate court. That court alone can determine the devolution of title to the property of the estate. If the executor has transferred property in anticipation of a proper decree, such decree may be made subsequently.⁸⁰ A final decree of distribution is necessary to close the administration, to relieve representatives and their sureties, and to change the possession of representatives as such of any part of the estate into possession as legatees or trustees.⁸¹ A decree of distribution is not necessary to transfer the title to realty. That passes directly to heirs or devisees upon the death of the decedent, subject to the claims of administration. The only effect of a decree of distribution upon realty is to discharge it from administration. Until then it is assets of the estate and is liable to be applied, in default of personal property, to payment of debts, legacies and the charges of administration, whether it remains in the hands of the heir or devisee, or has been by him conveyed to another. A purchaser from an heir or devisee prior to a decree of distribution takes subject to this liability.⁸² A decree of distribution is necessary to change the title to personalty and the right to its possession from the representative to heirs or legatees.⁸³ A decree of distribution is necessary to charge representatives and their sureties for the non-payment of legacies or distributive shares.⁸⁴ Where, upon the death of a mortgagee intestate, the mortgagor, as one of the heirs, is

⁷⁸ *Starkey v. Sweeney*, 71 Minn. 241, 244, 73 N. W. 859; *In re Peavey's Estate*, 144 Minn. 208, 175 N. W. 105. See § 1071; *Wiswell v. Wiswell*, 35 Minn. 371, 29 N. W. 166; *Reiser v. Gigrich*, 59 Minn. 368, 377, 61 N. W. 30; *Kosmerl v. Snively*, 85 Minn. 228, 88 N. W. 753.

⁷⁹ *Chadbourne v. Alden*, 98 Minn. 118, 121, 107 N. W. 148.

⁸⁰ *In re Peavey's Estate*, 144 Minn. 208, 175 N. W. 105.

⁸¹ *In re Scheffer's Estate*, 58 Minn. 29, 59 N. W. 956; *In re Peavey's Estate*, 144 Minn. 208, 175 N. W. 105.

⁸² *State v. Probate Court*, 25 Minn. 22,

25; *Jenkins v. Jenkins*, 92 Minn. 310, 100 N. W. 7; *Wellner v. Eckstein*, 105 Minn. 444, 470, 117 N. W. 830; and cases under §§ 77, 100, 738, 1073, 1209.

⁸³ See §§ 77, 735, 1073; *Granger v. Harriman*, 89 Minn. 303, 94 N. W. 869 (distribution by heirs without administration may transfer title).

⁸⁴ *Huntsman v. Hooper*, 32 Minn. 163, 20 N. W. 127; *Balch v. Hooper*, 32 Minn. 158, 161, 20 N. W. 124; *Wiley v. Lockwood* (Minn.) 186 N. W. 699; *Cathaway v. Palmer*, 112 Me. 156, 91 Atl. 284; 11 A. & E. Ency. of Law (2 ed.) 895; 18 Cyc. 606.

entitled to a distributive share of the estate, but no settlement of such estate has been made, or distribution ordered, the trial court, upon an accounting in respect to the amount due on the mortgage, properly refused to allow any deduction to be made on account of the interest of the mortgagor in the estate of such intestate.⁸⁵ When an executor gives a bond as residuary legatee under the statute the title to the estate does not vest in him without a decree assigning the estate to him as residuary legatee.⁸⁶ A representative may distribute funds of the estate to the parties entitled thereto as heirs, legatees or devisees without a decree of distribution, but he does so at his peril. He assumes responsibility for distributing to the proper persons and in the proper amounts. Distributees, however, may be estopped from questioning such a distribution.⁸⁷ A representative should not go beyond his duty and trench upon the jurisdiction of the court by assuming, in advance of a decree of distribution, to construe the terms of a will, the validity of particular bequests, who are beneficiaries thereunder, or to make payments of the funds of the estate upon his own judgment as to these matters. This is not only trenching upon the jurisdiction of the court, but is infringing the rights of all persons interested in the estate to have these matters disposed of solely on distribution, partial or final.⁸⁸

1061. According to agreement of beneficiaries—The beneficiaries under a will may agree among themselves to a distribution of an estate contrary to the terms of the will. Such an agreement among members of the family of the testator is termed a family settlement. Such settlements are favored in the law and upheld without other consideration and without much regard to technicalities, at least where all the beneficiaries are of age and fully cognizant of the facts. Where an agreement among beneficiaries is the result of a compromise of conflicting claims to the estate the claims must be asserted in good faith and with reasonable ground for belief in the validity of the claims. Agreements among beneficiaries cannot prevent the probate of a valid will nor control the probate court in making a final decree of distribution under the will. In some states there are statutes authorizing the court to make a decree of distribution in accordance with an agreement, but there is none in this state. In the absence of statutory authority it is improper for the probate court to enforce such an agreement when it is contrary to the terms of a will, but if it enters a decree of distribution in accordance with such an agreement it will conclude the parties thereto. And

⁸⁵ *La Crosse Nat. Bank v. Thompson*, 87 Minn. 126, 33 N. W. 907.

⁸⁶ *Jones v. Roberts*, 84 Wis. 465, 54 N. W. 917; *Collins v. Collins*, 140 Mass. 502, 5 N. E. 632.

⁸⁷ *Huntsman v. Hooper*, 32 Minn. 163, 165, 20 N. W. 127; *Kraus v. Kraus*, 81 Minn. 484, 84 N. W. 332; *Wheaton v.*

Pope, 91 Minn. 290, 305, 97 N. W. 1046; *Boales v. Ferguson*, 55 Neb. 565, 76 N. W. 18; *Fauber v. Keim*, 88 Neb. 379, 129 N. W. 538; *Palmer v. Whitney*, 166 Mass. 306, 44 N. E. 229; *Griffin v. Warburton*, 23 Wash. 231, 62 Pac. 765.

⁸⁸ *In re Willey's Estate*, 140 Cal. 238, 73 Pac. 998. See § 1087.

if an executor distributes an estate in accordance with such an agreement the distributees who consent will be estopped from questioning the validity of the distribution. The enforcement of such agreements is properly sought in the district court and not in the probate court. It would be well if we had a statute authorizing the enforcement of such agreements in the probate court, due provision being made for the protection of minors.⁸⁹ Parties interested under a will in the residue of an estate agreed to divide the residue in a manner different from that provided by the will, and directed the executor to make division in accordance with their agreement. The executor did as directed, and distributed the whole residue according to this agreement. Held, that after such distribution those who received under the agreement less than they would have received under the will could not recover the difference from the executor nor from the other heirs.⁹⁰

1062. Attorney's lien—Statute—When any heirs, devisee, or legatee has appeared by attorney, said attorney may acquire a lien upon the distributive share or legacy of such heirs, devisee or legatee in any estate for compensation for such services as he may have rendered respecting such distributive share, by serving upon the executor or administrator, before such decree is made, a notice of his intent to claim a lien for his agreed compensation, or the reasonable value of his services, and filing such notice, with proof of service thereof, in the probate court. The amount of such lien shall be determined and allowed by the probate court at the time of hearing a petition for partial or general distribution of the estate in which such lien has been filed, and any money or property decreed therein to such heir or legatee shall be decreed subject to such lien. Either party may appeal to the district court in the manner provided by section 7492, General Statutes of 1913, from such determination of the probate court. The executor or administrator shall satisfy said lien out of any money or property so decreed, and for that purpose may, by order of the probate court, sell so much of said property as will satisfy said lien claim and the expenses of sale.⁹¹

PARTIAL DISTRIBUTION

1063. Statute—If the court shall deem it proper, a portion of the estate may be assigned to the persons entitled thereto, before the final settlement, and, to that end, the court may require the administrator or

⁸⁹ *State v. Probate Court*, 102 Minn. 268, 290, 113 N. W. 888; *Montgomery v. Grenier*, 117 Minn. 416, 136 N. W. 9; *Rogers v. Benz*, 136 Minn. 83, 161 N. W. 395, 1056; *Kauffman v. Kauffman*, 137 Minn. 457, 163 N. W. 780; *Benz v. Rogers*, 141 Minn. 93, 169 N. W. 477; *State v. Probate Court*, 143 Minn. 77, 172 N. W. 902. See *Sprague v. Stroud*, 114

Minn. 64, 129 N. W. 1053; *Schoellkopf Holding Co. v. Kavinoky*, 216 N. Y. 507, 111 N. E. 60; 12 A. & E. Ency. of Law (2 ed.) 875; 18 Id. 768; §§ 1071, 1073.

⁹⁰ *Kauffman v. Kauffman*, 137 Minn. 457, 163 N. W. 780.

⁹¹ G. S. 1913, § 7386, as amended by Laws 1919, c. 61.

executor, when necessary, to settle his account to date, and may make such other orders as may be proper. Such assignment shall be final both as to the persons entitled to said estate and as to the proportions in which they are entitled to the same. All subsequent assignments of such estate shall be to the same persons and in the same proportions as determined by such decree. But no distribution of any part of an estate shall be made until the expiration of the time limited by the court for filing and allowance of claims, nor until a bond in at least double the amount of the claims, filed against said estate and remaining unpaid, is given to the judge of probate, with such surety as the court directs, to secure payment of the debts of the deceased, unpaid legacies and expenses of administration.⁹² It is only in very exceptional cases that the court should authorize a partial distribution.⁹³ A representative may oppose an application for a partial distribution and appeal from an order allowing it.⁹⁴ A partial distribution cannot be made by a special administrator.⁹⁵ A distribution prior to the expiration of the time for the filing and allowance of claims is void as to creditors presenting their claims within that time, whether they have notice or not.⁹⁶ While a decree of court made under this statute unappealed from cannot be impeached, and will protect those who have acted upon it, yet where the court is called upon to make a subsequent decree disposing of a remainder of the estate, it is again necessary as matter of fact to determine who are entitled to distributive shares. If convinced that the original decree was made on erroneous findings as to those entitled, the court would not be bound to follow it.⁹⁷ The statute provides for a bond to secure the payment of the debts of the decedent, unpaid legacies and expenses of administration.⁹⁸ Legatees are not bound to accept payments of their legacies in instalments, when tendered by executors without an order of the probate court for a partial distribution.⁹⁹

FINAL DECREE OF DISTRIBUTION

1064. Pendency of actions as a bar—The pendency of an action in a federal court involving the estate is a ground for denying a petition for a final settlement and decree of distribution.¹ A representative who ignores the pendency of an action against him in his representative ca-

⁹² G. S. 1913, §§ 7384, 7385. See 24 C. J. 473.

⁹³ See *Painter's Estate*, 115 Cal. 635, 47 Pac. 700.

⁹⁴ *In re Kelley's Estate*, 63 Cal. 106; *In re Mitchell's Estate*, 121 Cal. 391, 53 Pac. 810; *In re Phillips' Estate*, 18 Mont. 311, 45 Pac. 222.

⁹⁵ *In re Welch*, 106 Cal. 427, 39 Pac. 805.

⁹⁶ *Browne v. Doolittle*, 151 Mass. 595, 25 N. E. 23.

⁹⁷ *Shores v. Hooper*, 153 Mass. 228, 26 N. E. 846.

⁹⁸ See, under former statute, *Olson v. Fish*, 75 Minn. 228, 77 N. W. 818.

⁹⁹ *Welch v. Adams*, 152 Mass. 74, 25 N. E. 34.

¹ *In re Kittson's Estate*, 45 Minn. 197, 48 N. W. 419. See *In re Ricaud's Estate*, 57 Cal. 421.

capacity and upon his own motion brings about a final settlement and distribution may render himself personally liable.²

1065. Minority of distributees not a bar—The fact that distributees are minors is no reason for delaying the final decree of distribution. Any shares due to minors should be assigned to them by name and not to their guardians, but they should be turned over to their guardians or testamentary trustees.³

1066. What part of estate subject to assignment—It is only the residue of the estate remaining after the payment of claims and expenses of administration that is to be assigned in a final decree of distribution.⁴ All the residue of the estate must be assigned. The statute does not authorize the reservation of any part of it for future disposition.⁵ Legacies and distributive shares must be assigned.⁶ Where the homestead has been set apart under G. S. 1913, § 7308, it is not necessary to assign it in the final decree. It forms no part of the residue and theoretically ought not to be included in the final decree. In practice it is often included. The practice is unobjectionable and convenient for purposes of record. It should always be assigned in the final decree if it has not already been set apart under section 7308, or if it is claimed under a will.⁷ The personal property selected by the surviving spouse under G. S. 1913, § 7243, should not be assigned by the final decree, if it has already been assigned under G. S. 1913, § 7308.⁸ Property which has been sold in the course of administration for the payment of debts or other purpose should of course not be assigned.⁹

1067. Who may apply for decree—It was formerly expressly provided by statute (G. S. 1878, c. 56, § 4) that any person interested in the estate might apply for a final decree of distribution.¹⁰ The state may appear and claim that there is an escheat.¹¹

1068. Petition for final settlement and distribution—Time—Statute—When the estate is fully administered, the representative shall apply to the court to fix a time and place for adjusting and allowing his final account, and to assign the residue of the estate to the persons entitled thereto. The final account shall be filed with the petition.¹² The petition is probably not jurisdictional.¹³ A petition by only one of two

² Whitney v. Pinney, 51 Minn. 146, 53 N. W. 198.

³ Schmidt v. Stark, 61 Minn. 91, 63 N. W. 255; Sankey v. Sankey, 6 Ala. 607. See §§ 1098, 1099.

⁴ See §§ 1068, 1070.

⁵ Schmidt v. Stark, 61 Minn. 91, 63 N. W. 255.

⁶ Huntsman v. Mooper, 32 Minn. 163, 20 N. W. 127.

⁷ See §§ 807, 808.

⁸ See §§ 113, 807.

⁹ See In re Freud's Estate, 134 Cal. 333, 68 Pac. 476.

¹⁰ Greenwood v. Murray, 28 Minn. 120, 124, 9 N. W. 629. See Starkey v. Sweeney, 71 Minn. 241, 73 N. W. 859.

¹¹ In re McClellan's Estate, 31 S. D. 641, 141 N. W. 965.

¹² G. S. 1913, § 7388.

¹³ See §§ 31, 32.

representatives has been held a mere irregularity not rendering the decree void.¹⁴ A petition for a settlement of a final account is not necessarily a petition for a decree of distribution.¹⁵ A special petition for a construction of a will in making distribution is not necessary.¹⁶ A decree of final distribution can be made only after settlement of the final account of the representative, unless he refuses to present it for settlement.¹⁷ A representative may render himself liable if he neglects an unreasonable time to apply for a decree of distribution.¹⁸

1069. Order for hearing on petition—Notice—Statute—Upon filing said petition, the court shall make an order fixing a time and place for hearing the same, and cause three weeks' published notice thereof to be given, and may order such further notice as it deems advisable; provided that, when death of the deceased is caused by the wrongful act or omission of any person or corporation and such deceased leaves no estate other than the claim for the injury caused by the same act or omission and a personal representative of the decedent has been appointed by the probate court only for the purpose of maintaining an action on said claim or recovering the same, such order or notice thereof need not be published.¹⁹ The notice required by this statute is not jurisdictional in the sense that the want of it renders a decree subject to collateral attack, though it renders it voidable on direct attack. Provision is made by statute for vacating a decree made without notice and also for a confirmatory decree.²⁰ Under a former statute the notice was held jurisdictional.²¹ The order fixing the time and place of hearing need not describe the land belonging to the estate. It is sufficient if the order states that a petition has been filed for a final decree of distribution of the estate and fixes a time and place for hearing it.²²

¹⁴ *State v. Probate Court*, 40 Minn. 296, 41 N. W. 1033.

¹⁵ *Carter v. Frahm*, 31 S. D. 379, 141 N. W. 370.

¹⁶ *Calhoun v. Cracknell* (Mich.) 168 N. W. 547.

¹⁷ *Spreckels v. Spreckels*, 165 Cal. 597, 133 Pac. 289; *In re Lamble's Estate*, 112 Mich. 118, 70 N. W. 442 (refusal of representative to present account for final settlement).

¹⁸ *Sanford v. Thorp*, 45 Conn. 241 (assets lost in consequence of delay).

¹⁹ G. S. 1913, § 7389, as amended by Laws 1921, c. 62. See for validating act where hearing was had at a date later than that set in the order, G. S. 1913, § 7397.

²⁰ See § 1080; *Hanson v. Nygaard*,

105 Minn. 30, 117 N. W. 235; *In re Barlow's Estate* (Minn.) 188 N. W. 282; G. S. 1913, §§ 7393-7396; *Barrette v. Whitney*, 36 Utah 574, 106 Pac. 522; 37 L. R. A. (N. S.) 368.

²¹ *Wood v. Myrick*, 16 Minn. 494 (447); *Greenwood v. Murray*, 28 Minn. 120, 122, 9 N. W. 629; *McNamara v. Casserly*, 61 Minn. 335, 339, 63 N. W. 880. See *Jacobs v. Fouse*, 23 Minn. 51, 54; *Lanier v. Irvine*, 24 Minn. 116; *Cater v. Frahm*, 31 S. D. 379, 141 N. W. 370 (notice held jurisdictional); *Bresee v. Stiles*, 22 Wis. 120; *Ruth v. Oberbrunner*, 40 Wis. 238; 18 Cyc. 644; *Woerner, Am. Law of Adm.* (2 ed.) § 505; 37 L. R. A. (N. S.) 368.

²² *Chadbourn v. Alden*, 98 Minn. 118, 107 N. W. 148.

1070. Final decree—How made—Recording—Statute—In such decree the court shall name the distributees and describe the proportion or part to which each is entitled. A certified copy of any decree of distribution of real estate may be filed for record with the register of deeds of any county in which any of the lands therein described are situated. The register of deeds shall enter in his reception book the name of the decedent as grantor, and the names of the distributees as grantees, making a separate entry for each person so taking lands in such county as grantee under the decree: Provided, that before a certified copy of any decree of distribution of real estate is recorded in the office of the register of deeds, it shall be presented to the county auditor of the county in which such real estate is situated, who shall transfer the same, and note upon every such certified copy "Transfer entered," over his official signature. Unless such statement is made upon such certified copy, the register of deeds shall refuse to record the same.²³ The lien of a docketed judgment against a beneficiary under a will does not attach to his interest until a copy of the decree of distribution is recorded in the office of the register of deeds. The records of the probate court are not within the recording statutes.²⁴

1071. Powers and duties of court in making distribution—Jurisdiction—Construction of wills—Form of decree—The statute provides that "upon such settlement, the court shall determine who are entitled to the residue of the estate, and shall then or thereafter make its decree, assigning such residue to the persons entitled thereto by law. In such decree the court shall name the distributees and describe the proportion or part to which each is entitled."²⁵ The primary object in making a decree of distribution is to determine who takes the property left by the decedent.²⁶ The court may determine the fact of ownership by the decedent for the purpose of fixing liability for inheritance taxes.²⁷ The power of the court to decide what shall be done with the property owned by the decedent does not include the power to decide what property the decedent owned, as against adverse claimants.²⁸ It cannot determine the title to realty as against one claiming title under a deed from the decedent.²⁹ The court determines the respective rights of those interested in the estate so far only as they are derived from the estate, and not as to their rights claimed adversely to the title of the decedent.³⁰ It has power to determine a right of inheritance under a contract of

²³ G. S. 1913, § 7391. See § 1071.

²⁴ *Butterwick v. Fuller & Johnson Mfg. Co.*, 140 Minn. 327, 168 N. W. 18.

²⁵ G. S. 1913, §§ 7390, 7391.

²⁶ *Christianson v. King County*, 239 U. S. 356.

²⁷ *State v. Probate Court*, 140 Minn. 342, 168 N. W. 14.

²⁸ *State v. Probate Court*, 140 Minn.

342, 168 N. W. 14; *Byerly v. Eadie*, 95 Kan. 400, 148 Pac. 757. See 6 Ann. Cas. 878.

²⁹ *Hershey v. Meeker County Bank*, 71 Minn. 255, 73 N. W. 967; *Rux v. Adam*, 143 Minn. 35, 172 N. W. 912.

³⁰ *Stewart v. Lohr*, 1 Wash. 341, 25 Pac. 457; *Byerly v. Eadie*, 95 Kan. 400, 148 Pac. 757.

adoption.³¹ It may determine that there are no heirs and declare an escheat to the state.³² It has the power and duty to determine the succession of the property of the decedent, subject to administration and the rights of creditors. It must determine who are the heirs, devisees or legatees, and what part of the estate passes to each, either under the will or the statutes of descent and distribution.³³ The statute contemplates that the entire residue shall be assigned to those entitled to it and that the proportion or part to which each is entitled shall be described. It does not provide for reserving any portion of the estate for future disposition.³⁴ A decree of distribution should assign all the property and the whole title thereto and all the estates therein. If by a will the title in fee is vested in children, subject to a trust and to the possession of the property by the trustee during the period of the trust, such title in fee, subject to such trust, should be assigned to the children.³⁵ Future interests must be assigned as well as those carrying the immediate right to possession.³⁶ The decree should cover the residue of all the property of the decedent within the state and not merely that which is in the county where the court sits.³⁷ Cemetery lots should be assigned according to the special statute governing their descent in case of intestacy or in accordance with the will.³⁸ If there is a will the court necessarily construes it and determines its legal effect, so far as may be necessary to make a proper assignment.³⁹ It has even been held that a final decree of distribution necessarily determines the terms and conditions under which a devisee or legatee takes his share, but this seems questionable.⁴⁰ While it is the duty of the court to construe a will in

³¹ *Fiske v. Lawton*, 124 Minn. 85, 144 N. W. 455.

³² *Christianson v. King County*, 239 U. S. 356. See *In re McClellan's Estate*, 31 S. D. 641, 141 N. W. 965.

³³ *Greenwood v. Murray*, 26 Minn. 259, 261, 2 N. W. 945; *Huntsman v. Hooper*, 32 Minn. 163, 166, 20 N. W. 127; *Farnham v. Thompson*, 34 Minn. 330, 336, 26 N. W. 9; *Reiser v. Gigrich*, 59 Minn. 368, 377, 61 N. W. 30; *Schmidt v. Stark*, 61 Minn. 91, 63 N. W. 255; *Kleeberg v. Schrader*, 69 Minn. 136, 138, 72 N. W. 59; *Hershey v. Meeker County Bank*, 71 Minn. 255, 268, 73 N. W. 967; *Fiske v. Lawton*, 124 Minn. 85, 144 N. W. 455; *Odenbreit v. Uthelm*, 131 Minn. 56, 59, 154 N. W. 741; *Fischer v. Sklenar*, 101 Neb. 553, 163 N. W. 861 (determination of heirship—evidence—record).

³⁴ *Schmidt v. Stark*, 61 Minn. 91, 63 N. W. 255. See § 1066.

³⁵ *In re Reith's Estate*, 144 Cal. 314, 77 Pac. 942.

³⁶ *Hardy v. Mayhew*, 158 Cal. 95, 110 Pac. 113.

³⁷ *Chadbourne v. Alden*, 98 Minn. 118, 121, 107 N. W. 148.

³⁸ See G. S. 1913, §§ 6288, 6289, as amended by Laws 1915, c. 233, §§ 1, 2.

³⁹ *State v. Ueland*, 30 Minn. 277, 15 N. W. 245; *Huntsman v. Hooper*, 32 Minn. 163, 20 N. W. 127; *Eddy v. Kelly*, 72 Minn. 32, 74 N. W. 1020; *Bengtsson v. Johnson*, 75 Minn. 321, 78 N. W. 3; *Duxbury v. Shanahan*, 84 Minn. 353, 355, 87 N. W. 944; *Appleby v. Watkins*, 95 Minn. 455, 104 N. W. 301; *Long v. Willsey*, 132 Minn. 316, 156 N. W. 349; *In re Peavey's Estate*, 144 Minn. 208, 175 N. W. 106. See *Mingo v. Huntington*, 92 Minn. 13, 15, 99 N. W. 45; *Calhoun v. Cracknell* (Mich.) 168 N. W. 547; 18 Cyc. 653; *Woerner*, Am. Law of Adm. (2 ed.) § 155; 5 Ann. Cas. 473.

⁴⁰ *Eddy v. Kelly*, 72 Minn. 32, 74 N. W. 1020; *Bengtsson v. Johnson*, 75 Minn. 321, 78 N. W. 3.

making distribution thereunder it is important to observe that this duty extends only so far as may be necessary to determine the property which passes by the will, the persons to whom it passes, the part or proportion to which each is entitled, and the validity of the gift. It is not necessary for the court to construe the will for the purpose of determining all the terms and conditions under which the distributees take their shares. It is proper practice to assign the shares "subject to the terms and conditions of said will," thus avoiding a construction of such terms and conditions.⁴¹ In making a final decree it is not only the right but the duty of the court to construe the will so far as may be necessary to determine the persons to whom the property is to be assigned and the proportions or parts to which each is entitled, including the validity of the provisions of the will in this regard. It is the duty of the court to determine the nature of the estate to which each devisee is entitled and to define it in the decree, if the will defines or describes the particular estate devised. That is, it must assign specific tracts of land, describing them, to named individuals, "in fee" or "for life" or "in trust" and the like, as the case may require. Unless the will defines the estate clearly it is not proper merely to follow the language of the will. The fact that the will is indefinite as to the estate devised does not justify a like indefiniteness in the decree. It is the duty of the court to solve any doubts by construction and to make a decree that is perfectly clear, definite and technically accurate in describing the estate assigned. On the other hand, if the will does not define or attempt to define the estate devised the court is not authorized to define it in the decree. In such case the only proper practice is to assign the property by describing it without mentioning the title or estate.⁴² If a will attempts to create a trust the probate court has jurisdiction to determine the validity of the trust for purposes of administration, and necessarily does so in making a decree of distribution.⁴³ But in making a decree involving a trust it is not necessary for the court to construe or set out all the various provisions of the will in relation to the trust. It is proper practice to assign the property to the trustee "in trust for the purposes and subject to the terms and conditions specified in said will."⁴⁴ The court has power to determine what distribution shall be made under its decree to trustees named in the will, and to construe the will of the testator, and determine his intention in creating a trust thereunder, and to distribute the estate to the trustees in accordance with its own views

⁴¹ *Faloon v. Flannery*, 74 Minn. 38, 76 N. W. 954; *Mingo v. Huntington*, 92 Minn. 13, 99 N. W. 45.

⁴² See *Whiting v. Whiting*, 42 Minn. 548, 551, 44 N. W. 1030; 18 Cyc. 660.

⁴³ *Greenwood v. Murray*, 26 Minn. 259, 2 N. W. 945; *Appleby v. Watkins*, 95 Minn. 455, 104 N. W. 301; *Innis v. Flint*,

106 Minn. 343, 119 N. W. 48. See § 1073; *State v. Probate Court*, 112 Minn. 279, 128 N. W. 18; *Crew v. Pratt*, 119 Cal. 139, 51 Pac. 38.

⁴⁴ See *Greenwood v. Murray*, 26 Minn. 259, 2 N. W. 945; *Shanahan v. Kelly*, 88 Minn. 202, 92 N. W. 948; *Goodwin v. McGaughey*, 108 Minn. 248, 122 N. W. 6.

of his intention, and of the powers and duties of the trustees appointed thereunder; and, where no appeal is taken from its decree by the trustees, it becomes conclusive upon them, and they can no longer contend for a different construction from that which is imported by the terms of the decree, which must be regarded as a construction by the court of the testator's intention, and is to be treated as if he had created the trust in the terms of the decree.⁴⁵ The jurisdiction of the probate court to construe wills is only for purposes of administration. For any other purpose or upon any other question its construction of a will is *coram non judice*.⁴⁶ The jurisdiction of the probate court to construe wills for the purposes of administration, including assignment and distribution, is exclusive. The district court has no jurisdiction to entertain an independent action to secure a construction of a will for purposes of administration.⁴⁷ Where it has been necessary to sell, for payment of charges, debts or legacies, the realty of one or more of several devisees, or unequal advancements are chargeable against the interests of heirs, the court has power to make a decree which has the effect of taking from one and giving to another of the heirs or devisees.⁴⁸ It is the duty of the court to make such deductions and adjustments as may be necessary to carry out directions of a will making legacies payable by other beneficiaries.⁴⁹ If land is devised charged with the payment of legacies it is the duty of the court to assign it subject to such charge, if it has not been sold in the course of administration. If the will imposes a personal liability on the devisee, the land should be assigned to him upon the condition that he pay the legacies, or with a direction that he pay them, and not merely subject to their payment or subject to the charge.⁵⁰ The court has authority to assign realty to heirs subject to an annuity, without providing for the payment of future instalments of the annuity. It is not necessary for the court to retain control of the property for the purpose of raising funds with which to pay such instalments.⁵¹ In assigning property under a will the court may properly determine whether the will has been partially revoked, the question of revocation not having been previously raised and determined. Often

⁴⁵ *Goad v. Montgomery*, 119 Cal. 552, 51 Pac. 681; *Goldtree v. Allison*, 119 Cal. 344, 51 Pac. 561; *Sweinhart v. Plant Inv. Co. (Cal.)* 172 Pac. 386.

⁴⁶ *Hershey v. Meeker County Bank*, 71 Minn. 255, 268, 73 N. W. 967.

⁴⁷ *State v. Ueland*, 30 Minn. 277, 15 N. W. 245; *Duxbury v. Shanahan*, 84 Minn. 353, 355, 87 N. W. 944; *Appleby v. Watkins*, 95 Minn. 455, 104 N. W. 301; *Kosmerl v. Snively*, 85 Minn. 228, 88 N. W. 753. See § 1059.

⁴⁸ *Greenwood v. Murray*, 26 Minn. 259, 261, 2 N. W. 945.

⁴⁹ *Miller v. Klossner*, 135 Minn. 377, 160 N. W. 1025.

⁵⁰ *Eddy v. Kelly*, 72 Minn. 32, 74 N. W. 1020; *Wherley v. Rowe*, 106 Minn. 494, 119 N. W. 222; *Hause v. O'Leary*, 136 Minn. 126, 161 N. W. 392. See *Bengtsson v. Johnson*, 75 Minn. 321, 324, 78 N. W. 3; *Miller v. Klossner*, 135 Minn. 377, 160 N. W. 1025, and § 398.

⁵¹ *Desnoyer v. Jordan*, 30 Minn. 80, 14 N. W. 259.

the question is raised and determined on the petition for probate.⁵² In determining the share of a distributee in an estate the court should deduct any indebtedness of the distributee to the estate from his share of the personal property or charge it on his share of the real estate, or deduct it from the proceeds of such share of the real estate. In doing so the court has jurisdiction to pass on such indebtedness.⁵³ In determining the share of a distributee in an estate the court should make such deductions as are directed by the will.⁵⁴ In determining the amount due distributees of an intestate estate it is the power and duty of the court to determine the amount of any advancement to a distributee, to deduct it from his share, and to specify the advancement in the decree.⁵⁵ Where a will recites that the testator has advanced a certain amount to one child and gives another child a certain amount to equalize their shares the recital of the amount advanced is conclusive on the court in making distribution. Evidence is inadmissible to show that the testator was mistaken in the amount advanced.⁵⁶ If there is any surplus on the sale of land under a license from the court to pay debts it is the duty of the court to assign it to the heir or devisee to whom it would have gone had there been no sale.⁵⁷ Where land is sold under a power in a will and the proceeds are in the residue they should be assigned to the persons who would have taken the land had there been no sale, unless the will directs otherwise.⁵⁸ Where a child of a testator is born after the death of the latter without any provision for him in the will, or where a child of the testator is unintentionally disinherited, the statute prescribes the duties of the court in assigning the residue.⁵⁹ The court has the power and duty to determine whether a person has elected to take under or against a will and to apply the equitable doctrine of election as well as the statutory rules in appropriate cases. If a widow elects to take under the statute the court has the power and duty to make the necessary deductions from the other gifts and to adjust the resulting losses and make compensation in accordance with the rules of equity. This is an extraordinary power, but it necessarily results from the rule that such an election does not revoke the will as a whole.⁶⁰ It is the duty of the

⁵² *Rice County v. Scott*, 88 Minn. 386, 93 N. W. 109; *Battis v. Montaba*, 143 Wis. 234, 126 N. W. 9; *Cornell v. Burr*, 32 S. D. 1, 141 N. W. 1081. See § 242.

⁵³ See § 1093.

⁵⁴ See § 1093.

⁵⁵ G. S. 1913, § 7407; *Greenwood v. Murray*, 26 Minn. 259, 261, 2 N. W. 945; *McClave v. McClave*, 60 Neb. 464, 83 N. W. 668; *Liginger v. Field*, 78 Wis. 367, 47 N. W. 613; *Case v. Clark*, 220 Mass. 344, 107 N. E. 936; 18 Cyc. 653. See § 119.

⁵⁶ *Buchanan v. Hunter*, 166 Iowa 663, 148 N. W. 881.

⁵⁷ See § 981.

⁵⁸ *Ness v. Davidson*, 45 Minn. 424, 48 N. W. 10.

⁵⁹ See §§ 147-151.

⁶⁰ See *State v. Ueland*, 30 Minn. 277, 15 N. W. 245; *In re Gotzian's Estate*, 34 Minn. 159, 24 N. W. 920; *Schacht v. Schacht*, 86 Minn. 91, 90 N. W. 127; *Mechling v. McAllister*, 135 Minn. 357, 160 N. W. 1016; *In re Prerost's Estate*, 40 S. D. 536, 168 N. W. 630; and § 520, *supra*.

court to determine whether any devise or legacy has lapsed, and if it has, to so find in the decree, and to assign the property in accordance with the rules for the devolution of lapsed devises and legacies.⁶¹ It is the duty of the court to determine whether any legacy has been adeemed, and if it has, to so find in the decree.⁶² It is the duty of the court to determine the amount of any attorney's lien properly claimed on any distributive share of the estate and to assign such share subject to the lien.⁶³ If a distributee is a minor his share should be assigned to him by name and not to his guardian.⁶⁴ If a distributee has died after the decedent and before the decree his share should be assigned to him as if living, unless there is a will providing for the disposition of his share in case of his death, in which case the decree should include a finding as to his death and make distribution in accordance with the will. There is no provision in the statutes for making distribution to the heirs of a deceased distributee. Independent administration must generally be had on his estate. Property should not be assigned to the personal representative of a deceased distributee.⁶⁵ The court should disregard all mortgages, judgment liens or other incumbrances attaching subsequent to the death of the decedent. They are not affected by the decree of distribution and it is not proper for the court to pass on their validity, or to assign the estate subject to them, or to take any notice of them.⁶⁶ The court has no authority to assign property to a mortgagee or judgment creditor of an heir, legatee or devisee.⁶⁷ In making a decree the court should disregard any assignments or pledges of the heirs or legatees. It is not the function of the probate court in making distribution to pass on the validity or effect of such assignments or pledges.⁶⁸ The court has no authority to assign the property to a grantee or assignee of a legatee, devisee or heir, at least if there is any controversy to be determined.⁶⁹ The court has no jurisdiction to determine the validity or effect of transfers or conveyances of the property of the estate made by heirs or devisees after the death of the decedent.⁷⁰ The court has no

⁶¹ See §§ 444-453.

⁶² See § 396.

⁶³ See § 1062.

⁶⁴ See § 1098.

⁶⁵ See § 1096; Woerner, *Am. Law of Adm.* (2 ed.) § 565.

⁶⁶ *In re Crook's Estate*, 125 Cal. 459, 58 Pac. 89; *Martinovich v. Marsicano*, 137 Cal. 354, 70 Pac. 459.

⁶⁷ *Martinovich v. Marsicano*, 137 Cal. 354, 357, 70 Pac. 459.

⁶⁸ *Security Bank v. Callahan*, 220 Mass. 84, 107 N. E. 385. See 18 Cyc. 654.

⁶⁹ *Hause v. O'Leary*, 136 Minn. 126, 161 N. W. 392; *Harrington v. La Roque*, 13 Or. 344, 10 Pac. 498; *Security*

Bank v. Callahan, 220 Mass. 84, 107 N. E. 385; *Johnson v. Jones*, 47 Mo. App. 237; 18 Cyc. 654; 19 Ency. Pl. & Pr. 1090; 18 C. J. 898. In some states there are statutes authorizing this to be done. *In re Ryder's Estate*, 141 Cal. 366, 369, 74 Pac. 993; *In re Conroy's Estate*, 6 Cal. App. 741, 93 Pac. 205; Woerner, *Am. Law of Adm.* (2 ed.) §§ 151, 563; 18 Cyc. 654; 18 C. J. 898. See *Laws* 1919, c. 299.

⁷⁰ *Hershey v. Meeker County Bank*, 71 Minn. 255, 268, 73 N. W. 967; *Hause v. O'Leary*, 136 Minn. 126, 161 N. W. 392; *Archer v. Harvey*, 164 Cal. 274, 128 Pac. 410.

power to determine the rights of one claiming, through the acts of an heir or devisee, the realty to which such heir or devisee succeeds. In other words it has no authority to determine controversies between heirs or devisees and third parties, not claiming as heirs or devisees concerning the property to be distributed.⁷¹ But such a claimant may appear in the probate court, demand an accounting as to the share of the heir or devisee and oppose proceedings to divest the heir or devisee of his share to the prejudice of the claimant. This does not mean that the probate court can determine the controversy between the claimant and the heir or devisee and assign the share of the heir or devisee to the claimant.⁷² It has no jurisdiction to determine the rights of purchasers from the decedent.⁷³ The court can only determine the respective interests of the parties in such title as the testator had at his death, and cannot determine conflicting rights between distributees and persons claiming rights in the property from the decedent during his life.⁷⁴ The court has no authority to assign the estate to one who claims it, not under a will or the statutes of descent and distribution, but under a contract with the decedent to make a will in his favor.⁷⁵ The court cannot by its decree affect the rights of a lessee under the decedent. An assignment is subject to any lease of the property by the decedent whether made so subject by the decree or not.⁷⁶ In assigning an estate to trustees for the beneficial use of another the court has no power to determine what taxes will accrue in the future or provide for their payment.⁷⁷ If the beneficiaries of an estate have entered into a compromise agreement or family settlement it should be disregarded by the court in making a decree of distribution, the remedy of the beneficiaries being in the district court.⁷⁸ Possibly in some cases the court may enter a decree in accordance with the stipulations of all the bene-

⁷¹ *Farnham v. Thompson*, 34 Minn. 330, 336, 26 N. W. 9; *Dobberstein v. Murphy*, 44 Minn. 526, 47 N. W. 171; *Kleeberg v. Schrader*, 69 Minn. 136, 138, 72 N. W. 59; *Starkey v. Sweeney*, 71 Minn. 241, 244, 73 N. W. 859; *Hause v. O'Leary*, 136 Minn. 126, 161 N. W. 392. See *Odenbreit v. Uthelm*, 131 Minn. 56, 154 N. W. 741; *State v. Probate Court*, 140 Minn. 342, 168 N. W. 14; *State v. Probate Court*, 143 Minn. 77, 172 N. W. 902.

⁷² *Starkey v. Sweeney*, 71 Minn. 241, 73 N. W. 859. See *In re Langevin's Will*, 45 Minn. 429, 47 N. W. 1133.

⁷³ *Hershey v. Meeker County Bank*, 71 Minn. 255, 73 N. W. 967.

⁷⁴ *Triba v. Lass*, 146 Wis. 202, 131 N. W. 357.

⁷⁵ *Odenbreit v. Uthelm*, 131 Minn. 56,

154 N. W. 741 (the distinction made in this case between the authority of the court in distributing real and personal property is of doubtful validity). See *Kleeberg v. Schrader*, 69 Minn. 136, 72 N. W. 59; *Fiske v. Lawton*, 124 Minn. 85, 144 N. W. 455; *Carroll v. Swift*, 10 Ind. App. 6, 137 N. E. 1061.

⁷⁶ *Triba v. Lass*, 146 Wis. 202, 131 N. W. 357.

⁷⁷ *State v. Probate Court*, 112 Minn. 279, 128 N. W. 18.

⁷⁸ *Renwick v. Macomber*, 225 Mass. 380, 114 N. E. 720; *Rogers v. Benz*, 136 Minn. 83, 92g, 921, 161 N. W. 395, 1056; *Kauffman v. Kauffman*, 137 Minn. 457, 163 N. W. 780; *In re Rice's Will*, 150 Wis. 401, 136 N. W. 956; *In re Kane's Estate (Wis.)* 168 N. W. 402. See *Laws 1919, c. 299* (validating act); § 1061.

ficiaries of the estate, but only in subordination to the general rule that the assignment of the residue must be in accordance with the will of the decedent or the statutes of descent and distribution, and cannot be made in accordance with a contract of the beneficiaries contrary thereto.⁷⁹ If a decree is entered in accordance with an agreement of the beneficiaries contrary to the terms of a will or the provisions of the statutes of descent and distribution it is conclusive on the parties to the agreement. Such a decree has been held conclusive on the state in computing an inheritance tax.⁸⁰ The decree should ordinarily specify the exact amount or value of the personal property assigned to each distributee.⁸¹ The purpose of a decree of distribution, so far as the distribution of money is concerned, is to determine the persons to whom payments are to be made and the proportion and the exact sum each is entitled to receive out of the residue. It is the duty of the court to decide from an examination of the whole record, and a consideration of all competent evidence, the exact amount which each distributee ought to receive in order to make the distribution of the whole estate, including all prior advancements, conform to the provisions of law and be just to all parties in interest. This result can be reached only by a consideration of all pertinent facts which have occurred during the settlement of the estate.⁸² A decree should not be made in the general terms of the statute of descent, for example, to "the brothers and sisters, and the children of any deceased brother or sister," but should assign the property to individuals by name.⁸³ In determining the amount of distributive shares and in making distribution the court may apply rules of equity as well as rules of law.⁸⁴ To cover property unintentionally omitted in the administration proceedings it is customary to include in the final decree some such phrase as this, "and any other property of which said decedent died seized or possessed but not included in this administration."⁸⁵ In some counties it is customary to include in an assignment of real estate an habendum clause, as follows, "To have and to hold the same, together with all the hereditaments and appurtenances thereto belonging or in anywise appertaining, to said persons, their heirs and

⁷⁹ *Rogers v. Benz*, 136 Minn. 83, 92g. 921, 161 N. W. 395, 1056; *In re Reynold's Will*, 151 Wis. 375, 138 N. W. 1019. See *Sprague v. Stroud*, 114 Minn. 64, 129 N. W. 1053.

⁸⁰ *State v. Probate Court*, 143 Minn. 77, 172 N. W. 902.

⁸¹ *Case v. Clark*, 220 Mass. 344, 107 N. E. 936; 18 Cyc. 660; 24 C. J. 523; *Woerner*, Am. Law of Adm. (2 ed.) § 562. See *Maldaner v. Beurhaus*, 108 Wis. 25, 84 N. W. 25 (specification held not conclusive where certain securities assigned were subsequently found to be forgeries).

⁸² *Case v. Clark*, 220 Mass. 344, 107 N. E. 936.

⁸³ *Loring v. Stelneman*, 42 Mass. 204. See *Woerner*, Am. Law of Adm. (2 ed.) § 562.

⁸⁴ *In re Moore's Estate*, 96 Cal. 522, 528, 32 Pac. 584; *In re Prerost's Estate* (S. D.) 168 N. W. 630.

⁸⁵ See *Fraser v. Farmers & Mechanics Sav. Bank*, 89 Minn. 482, 95 N. W. 307; *Smith v. Blacilluz*, 83 Cal. 344, 21 Pac. 15, 23 Pac. 314; *Heydenfeldt v. Osmont* (Cal.) 175 Pac. 1.

assigns forever, without prejudice, however, to any lawful conveyance of said property or any part thereof by said persons or any of them.”⁸⁶ This is not required or contemplated by the statute and is clearly not necessary and should be omitted. In some counties it is customary to attach the seal of the court to the decree but this is not necessary and the better practice is to omit it.⁸⁷ The decree need not find that a distributee is a resident or non-resident.⁸⁸ In determining heirship, where there is a contest or doubt, the court should proceed only upon competent sworn testimony and the record should disclose the names of the witnesses examined and the fact of the examination. If the court is not satisfied with the proof it should investigate the facts on its own motion.⁸⁹ A testator, after making certain specific legacies, and giving a certain share of his property to his widow, gave and bequeathed the remainder to his children, five in number, as residuary legatees and directed his executors to invest it in bonds, and to expend so much of the income as might be necessary for the maintenance and benefit of the children during their minority, as the necessities of each might require, and then pay over to each his share on his attaining the age of twenty-one years. In making an order or decree directing the payment to one of these children of his distributive share as such residuary legatee, and fixing the amount of the same, the court would have to ascertain, not only whether the debts, costs of administration, and specific legacies had all been paid, but also how much had been expended for the benefit of such child during minority, which might be either more or less than the amounts expended for the benefit of the others.⁹⁰ In making a decree it is the right and duty of the court to hear all pertinent and competent evidence and it may investigate the relevant facts upon its own motion, whether there is a contest or not.⁹¹ Whether a beneficiary under a will has forfeited his rights by a contest is properly determinable.⁹² The proceeding is not adversary and a claimant may testify as to conversations with the decedent.⁹³ Claimants may present all the facts relevant to their claims to the estate.⁹⁴ The objection that a will of a non-resident was revoked by subsequent marriage so far as realty in this state is concerned may be raised on the hearing.⁹⁵ In making distribution

⁸⁶ See *Tidd v. Rines*, 26 Minn. 201, 2 N. W. 497; *Faloon v. Flannery*, 74 Minn. 38, 76 N. W. 954.

⁸⁷ See *Tidd v. Rines*, 26 Minn. 201, 2 N. W. 497,

⁸⁸ *Bell v. Willson*, 159 Cal. 57, 112 Pac. 1100.

⁸⁹ *Fischer v. Sklenar*, 101 Neb. 553, 163 N. W. 861; *Woerner*, Am. Law of Adm. (2 ed.) § 562.

⁹⁰ *Huntsman v. Hooper*, 32 Minn. 163, 20 N. W. 127.

⁹¹ *Case v. Clark*, 220 Mass. 344, 107 N. E. 936; *Fischer v. Sklenar*, 101 Neb. 553, 163 N. W. 861; 18 Cyc. 77.

⁹² *In re Bergland's Estate* (Cal.) 170 Pac. 400.

⁹³ *Sorenson v. Sorenson*, 68 Neb. 483, 100 N. W. 930, 103 N. W. 455.

⁹⁴ *Spreckels v. Spreckels*, 165 Cal. 597, 133 Pac. 289.

⁹⁵ *Cornell v. Burr*, 32 S. D. 1, 141 N. W. 1081. See § 305.

under a will the decree admitting it to probate is conclusive as to its due execution and the capacity of the testator to execute it.⁹⁶

1072. Construction of decrees—Effect of referring to will—Unless the decree is made subject to the provisions of the will or is ambiguous on its face the will cannot be resorted to for the purpose of modifying or affecting the decree.⁹⁷ A decree which in absolute and unequivocal terms assigns the whole estate to one person is not affected with uncertainty or ambiguity by a recital that the distribution is in accordance with the terms of the will.⁹⁸ The court may incorporate the terms of the will in the decree, either in express terms or by reference thereto. In such case the terms of the will become the language of the decree, but it is still the decree, and not the will, by which the rights of the parties are determined.⁹⁹ The decree supersedes the will and prevails over any provision thereof inconsistent with the decree. The will cannot be used to impeach the decree.¹ After the decree a will ordinarily drops out of existence so far as the rights of the parties are concerned. The law of the estate is the decree and not the will.² While the will cannot be used to contradict the decree it may be used to aid in the construction of a decree which is ambiguous on its face.³ It is only when by apt language a will is incorporated in a decree that resort may be had to the will to determine the rights of the distributees.⁴ An assignment of realty to a named person "to have and to hold the same unto her, her heirs and assigns, forever," is an assignment of an estate in fee.⁵ An assignment to "the said members, both brothers and sisters, of the Society of the Most Precious Blood, and their successors," held as indefinite as to the beneficiaries as the will and ineffectual.⁶ An assignment to one "as sole heir" held not to assign the property on the condition that the party was the sole heir. An innocent purchaser from such party held not estopped, as against the true heir, from asserting title in himself.⁷ An assignment held to assign a life estate to a widow and a vested remainder to seven others, share and share alike.⁸ A will directed a widow to divide realty between children "to the best advantage as she sees fit and proper." The decree of distribution assigned

⁹⁶ *In re Ford's Estate*, 144 Minn. 454, 175 N. W. 913. See §§ 242, 259, 260.

⁹⁷ *Long v. Willsey*, 132 Minn. 316, 156 N. W. 349.

⁹⁸ *Long v. Willsey*, 132 Minn. 316, 156 N. W. 349.

⁹⁹ *Goad v. Montgomery*, 119 Cal. 552, 51 Pac. 681. See *Mingo v. Huntington*, 92 Minn. 13, 99 N. W. 45.

¹ *Goad v. Montgomery*, 119 Cal. 552, 51 Pac. 681.

² *Toland v. Earle*, 120 Cal. 152, 61 Pac. 914; *Drexler v. Washington Development Co.*, 172 Cal. 758, 159 Pac. 166.

³ *In re Ewer's Will* (Cal.) 171 Pac. 683.

⁴ *Wills v. Wills*, 166 Cal. 529, 137 Pac. 249.

⁵ *Tidd v. Rines*, 26 Minn. 201, 2 N. W. 497; *Thompson v. Lake Madison Chautauqua Assn. (S. D.)* 170 N. W. 578.

⁶ *Society of the Most Precious Blood v. Moll*, 51 Minn. 277, 53 N. W. 648.

⁷ *McNamara v. Casserly*, 61 Minn. 335, 63 N. W. 880.

⁸ *Ladd v. Weiskopf*, 62 Minn. 29, 64 N. W. 99.

the property to her "subject to the conditions and provisions of the will." Held, that she did not, by the terms of the decree take the property for her own use and benefit, but was required to divide it among the children, and, in doing so could not exclude any of them.⁹ An assignment "and of all the real property of which the said testator died seized, whether the same is described in the inventory herein or not," held not to include a homestead.¹⁰ An assignment of realty subject to a legacy "as provided under the will" of the decedent, construed.¹¹ An assignment of realty "in fee, * * * as provided by the terms of the last will and testament of said deceased," held not indefinite and to assign a fee.¹² A decree held not so clearly inconsistent with the provisions of the will as to demonstrate that such provisions were overlooked.¹³

1073. Effect of final decree—Res judicata—Collateral attack—The effect of a decree of distribution is to transfer the title to personalty and the right of possession of the realty from the representative to the legatees, devisees or heirs. The property ceases to be the estate of the decedent and becomes the individual property of the distributees, with full right of control and possession, and right to recover it from the representative by action in the district court if he refuses to deliver it.¹⁴ The final decree of distribution divests the probate court of jurisdiction of the property distributed, and, prior to Laws 1903, c. 195 (G. S. 1913, § 7399), it was held that it divested the probate court of jurisdiction of the estate.¹⁵ A decree assigning to a devisee property devised establishes the validity of the devise conclusively as against all persons interested in the estate. It establishes the right to the property assigned of the person to whom it is assigned, the same as would the judgment of any other court of competent jurisdiction; and if assigned to a devisee in trust, it establishes the validity of the trust.¹⁶ The effect of a decree of distribution upon realty is to discharge it from the administration. Until then it is an asset of the estate and liable to be applied, in default of sufficient personalty, to the payment of debts and

⁹ *Faloon v. Flannery*, 74 Minn. 38, 76 N. W. 954.

¹⁰ *Fraser v. Farmers & Mechanics Sav. Bank*, 89 Minn. 482, 95 N. W. 307.

¹¹ *Mingo v. Huntington*, 92 Minn. 13, 99 N. W. 45.

¹² *Long v. Willsey*, 132 Minn. 316, 156 N. W. 349.

¹³ *Robinson v. Thomson*, 137 Minn. 446, 163 N. W. 786.

¹⁴ *Pratt v. Pratt*, 22 Minn. 148; *State v. Probate Court*, 25 Minn. 22, 25; *Schmidt v. Stark*, 61 Minn. 91, 63 N. W. 255; *Ganser v. Ganser*, 83 Minn. 199, 201, 86 N. W. 18; *State v. Probate*

Court, 84 Minn. 289, 294, 87 N. W. 783. See *Reiser v. Gigrich*, 59 Minn. 368, 377, 61 N. W. 30; 24 C. J. 529.

¹⁵ *Hurley v. Hamilton*, 37 Minn. 160, 33 N. W. 912; *State v. Probate Court*, 40 Minn. 296, 41 N. W. 1033; *Schmidt v. Stark*, 61 Minn. 91, 63 N. W. 255; *State v. Probate Court*, 84 Minn. 289, 87 N. W. 783.

¹⁶ *Greenwood v. Murray*, 26 Minn. 259, 2 N. W. 945; *Appleby v. Watkins*, 95 Minn. 455, 104 N. W. 301; *Innis v. Flint*, 106 Minn. 343, 119 N. W. 48. See *Sprague v. Stroud*, 114 Minn. 64, 129 N. W. 1053.

charges of administration, whether it remains in the hands of the heir or devisee, or has been conveyed by him to another. A purchaser from an heir or devisee takes subject to this liability.¹⁷ If the court has jurisdiction the final decree of distribution, unless reversed on appeal or set aside on motion, is conclusive on all persons interested in the estate, whether under disability or not, or whether in being or not. Administration proceedings are in rem, acting directly on the res, which is the estate of the decedent. The decree is in rem and binds all persons interested in the estate, not only as to its legal consequences, but also as to the facts upon which it is based. It is conclusive not only as to the persons entitled to the estate and their shares, but also as to the nature and extent of their title, including the terms, conditions and charges thereof, at least if such title, terms, conditions and charges are actually determined. It is so conclusive upon heirs, devisees, legatees, creditors of the decedent, the representative and his sureties.¹⁸ If a decree is improperly entered in accordance with an agreement of the beneficiaries contrary to a will or the provisions of the statutes of descent and distribution it is conclusive on the parties to the agreement.¹⁹ While the decree is binding on all persons interested in the estate as to the facts upon which it is based, it is not binding on all the world as to such facts. It is not evidence of the death or domicile of the decedent, or of

¹⁷ *State v. Probate Court*, 25 Minn. 22; *State v. Probate Court*, 40 Minn. 296, 41 N. W. 1033; *State v. Probate Court*, 84 Minn. 289, 294, 87 N. W. 783; *Carter v. Frahm*, 31 S. D. 379, 141 N. W. 370.

¹⁸ *Greenwood v. Murray*, 26 Minn. 259, 2 N. W. 945; *Id.*, 28 Minn. 120, 9 N. W. 629; *McNamara v. Casserly*, 61 Minn. 335, 63 N. W. 880; *Ladd v. Welskopf*, 62 Minn. 29, 64 N. W. 99 (the statement in this case to the effect that a decree of distribution has as wide an effect as a decree in admiralty, that it binds all the world as to the facts on which it is based, is erroneous); *Eddy v. Kelly*, 72 Minn. 32, 74 N. W. 1020; *Faloon v. Flannery*, 74 Minn. 38, 76 N. W. 954; *Bengtsson v. Johnson*, 75 Minn. 321, 78 N. W. 3; *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140, 147, 90 N. W. 378; *Chadbourne v. Hartz*, 93 Minn. 233, 101 N. W. 68; *Wellner v. Eckstein*, 105 Minn. 444, 453, 117 N. W. 830; *Innis v. Flint*, 106 Minn. 343, 346, 119 N. W. 48; *Sprague v. Stroud*, 114 Minn. 64, 129 N. W. 1053; *Long v. Willsey*, 132 Minn. 316, 156 N. W. 349;

Leighton v. Bruce, 132 Minn. 176, 156 N. W. 285; *Rickert v. Wardell*, 142 Minn. 96, 170 N. W. 915; *Christianson v. King County*, 239 U. S. 356; *Sjoli v. Hogenson*, 19 N. D. 82, 122 N. W. 1008; *Thompson v. Lake Madison Chautauqua Assn. (S. D.)* 170 N. W. 578; *Goad v. Montgomery*, 119 Cal. 552, 51 Pac. 681; *Mulcahy v. Dow*, 131 Cal. 73, 63 Pac. 158; *Krohn v. Hirsch*, 81 Wash. 222, 142 Pac. 647; *Glover v. Reid*, 80 Mich. 228, 45 N. W. 91; *In re Brown's Estate (Mich.)* 165 N. W. 929; *Calhoun v. Cracknell*, 202 Mich. 430, 168 N. W. 547; *Triba v. Lass*, 146 Wis. 202, 131 N. W. 357; *Fischer v. Sklenar*, 101 Neb. 553, 163 N. W. 861; 24 C. J. 528; 18 Cyc. 664; 19 Ency. Pl. & Pr. 1093; 32 Harv. L. Rev. 79. See *Stackhouse v. Berryhill*, 47 Minn. 20, 23, 49 N. W. 392; *Eggleson v. Merriam*, 83 Minn. 98, 103, 85 N. W. 937, 86 N. W. 444; *Knutsen v. Krook*, 111 Minn. 352, 358, 127 N. W. 11. In *Wood v. Myrick*, 16 Minn. 494 (447) it is erroneously said that the proceeding is not in rem but in personam.

¹⁹ *State v. Probate Court*, 143 Minn. 77, 172 N. W. 902. See § 1071.

heirship, as against strangers to the estate.²⁰ It is conclusive on the state in computing an inheritance tax.²¹ It is conclusive on the representative and his bondsmen.²² It is conclusive only as to the rights of heirs, legatees, or devisees, in so far as they claim in such capacities.²³ It merely determines the succession to such title as the decedent may have had; it does not determine that he had any title.²⁴ It is conclusive as to the right of a pretermitted child to inherit under G. S. 1913, § 7260.²⁵ It is conclusive as to the right of the widow of the decedent to household goods.²⁶ It is not conclusive on third parties claiming adversely to the decedent.²⁷ It is not conclusive as to a claim under a conveyance from one of the heirs or devisees.²⁸ It is not conclusive upon purchasers from the decedent.²⁹ It is not conclusive against a child claiming under a contract whereby the decedent agreed to adopt the child and make provision for him by will, at least if the claim is not submitted to the probate court.³⁰ A decree of distribution is not an original source of title. It simply declares what the law has ordained, and, if occasion requires, divides in severalty what the parties in interest have already acquired in cotenancy.³¹ Title to realty does not originate in a decree of distribution, but the decree releases the title from administration and furnishes the distributee with legal evidence of his title.³² The decree is a muniment of title.³³ It determines merely to whom, and upon what conditions, the property passes, and does not recognize or affect transfers or conveyances of the property made by heirs or devisees.³⁴ It is not subject to collateral attack for

²⁰ *Morin v. St. Paul etc. Ry. Co.*, 33 Minn. 176, 22 N. W. 251; *Backdahl v. Grand Lodge*, 46 Minn. 61, 48 N. W. 454; *Kosmerl v. Snively*, 85 Minn. 228, 88 N. W. 753; *Dewaney v. Ancient Order, etc. Ins. Fund*, 122 Minn. 221, 142 N. W. 316; *Tilt v. Kelsey*, 207 U. S. 43.

²¹ *State v. Probate Court*, 143 Minn. 77, 172 N. W. 902.

²² *Sjoli v. Hogenson*, 19 N. D. 82, 122 N. W. 1008. See *Balch v. Hooper*, 32 Minn. 158, 162, 20 N. W. 124, and §§ 687, 1044.

²³ *Rockey v. Vieux (Cal.)* 178 Pac. 712.

²⁴ *Rockey v. Vieux (Cal.)* 178 Pac. 712.

²⁵ *Odenbreit v. Utheim*, 131 Minn. 56, 154 N. W. 741.

²⁶ *Rickert v. Wardell*, 142 Minn. 96, 170 N. W. 915.

²⁷ *Archer v. Harvey*, 164 Cal. 274, 128 Pac. 410; *Alexander v. Fidelity Trust Co.*, 238 Fed. 938; *Rockey v. Vieux (Cal.)* 178 Pac. 712; 18 Cyc. 665; 24 C. J. 529.

²⁸ *Dobtstein v. Murphy*, 44 Minn.

526, 47 N. W. 171; *Hershey v. Meeker County Bank*, 71 Minn. 255, 268, 73 N. W. 967; *Hause v. O'Leary*, 136 Minn. 126, 161 N. W. 392; *Archer v. Harvey*, 164 Cal. 274, 128 Pac. 410.

²⁹ *Hershey v. Meeker County Bank*, 71 Minn. 255, 73 N. W. 967; *Rux v. Adam*, 143 Minn. 35, 172 N. W. 912.

³⁰ *Odenbreit v. Utheim*, 131 Minn. 56, 154 N. W. 741. See *Rogers v. Schlottback*, 167 Cal. 35, 138 Pac. 728.

³¹ *Ward v. Ives*, 91 Conn. 12, 98 Atl. 337. See *Wellner v. Eckstein*, 105 Minn. 444, 471, 117 N. W. 830.

³² *Carter v. Frahm*, 31 S. D. 379, 141 N. W. 370. See *Thompson v. Lake Madison Chautauqua Assn. (S. D.)* 170 N. W. 578.

³³ *Blair v. Hazzard*, 158 Cal. 721, 112 Pac. 298; *Johnson v. Canty*, 162 Cal. 391, 123 Pac. 263; *Sjoli v. Hogenson*, 19 N. D. 82, 122 N. W. 1008. See 24 C. J. 529.

³⁴ *Hause v. O'Leary*, 136 Minn. 126, 161 N. W. 392.

mere error or irregularity.³⁵ A decree of distribution made by a court of competent jurisdiction in one state is entitled to full faith and credit in other states and cannot be set aside for fraud or mistake.³⁶ A final decree of the county court of Wisconsin wherein the will was probated, and to which the executor-trustee made report and received his discharge held final and conclusive on the courts of this state under the full faith and credit clause of the federal Constitution.³⁷ Presumptively a decree expresses the deliberate judgment of the court.³⁸ Persons not interested in the estate cannot question the distribution.³⁹ It will be presumed that a decree is in accordance with a will.⁴⁰ A purchaser claiming title from an heir under a decree of distribution is chargeable with notice of everything appearing on the face of the record in the probate proceeding, and is not an innocent purchaser without notice of want of jurisdiction of the probate court to appoint an administrator and order a distribution of the estate, as against heirs not appearing and they may maintain an action for the recovery of their share in the estate.⁴¹

1074. Representative protected by decree of distribution—A decree of distribution made by a probate court with jurisdiction is a complete protection to a representative who makes distribution thereunder in good faith and without negligence, though the time of appealing from the decree has not expired, or the decree is subsequently reversed.⁴² In case of the reversal of a decree of distribution a representative who has made distribution in good faith thereunder is entitled to restitution from the distributees or their successors in interest.⁴³ An action was pending against a representative in his official capacity when he petitioned the probate court for a decree of final distribution, but he did not disclose its pendency to the court. A final decree was made and the estate was

³⁵ *Wood v. Myrick*, 16 Minn. 494 (447); *Stackhouse v. Berryhill*, 47 Minn. 20, 23, 49 N. W. 392; *Sprague v. Stroud*, 114 Minn. 64, 129 N. W. 1053; *Christianson v. King County*, 239 U. S. 356; *Stenson v. H. S. Halvorson Co.*, 28 N. D. 151, 147 N. W. 800; *French v. Phelps*, 20 Cal. App. 101, 128 Pac. 772; *Fischer v. Dolwig* (N. D.) 166 N. W. 793. See *McNamara v. Casserly*, 61 Minn. 335, 63 N. W. 880; 18 Cyc. 665; 19 Ency. Pl. & Pr. 1093.

³⁶ *Whittaker v. Meeds*, 146 Minn. 160, 178 N. W. 597; *Mooney v. Hinds*, 160 Mass. 469, 36 N. E. 484.

³⁷ *Whittaker v. Meeds*, 146 Minn. 160, 178 N. W. 597.

³⁸ *Robinson v. Thomson*, 137 Minn. 446, 163 N. W. 786.

³⁹ *Spreckels v. Spreckels*, 165 Cal. 597, 133 Pac. 289.

⁴⁰ *Hart v. Hart*, 110 Minn. 478, 480, 126 N. W. 133; *Robinson v. Thomson*, 137 Minn. 446, 163 N. W. 786.

⁴¹ *Carter v. Frahm*, 31 S. D. 379, 141 N. W. 370.

⁴² *Ernst v. Freeman*, 129 Mich. 271, 88 N. W. 636; *Cleveland v. Draper*, 194 Mass. 118, 80 N. E. 227. See *Whitney v. Pinney*, 51 Minn. 146, 53 N. W. 198; *Jones v. Jones*, 223 Mass. 540, 112 N. E. 224; 11 A. & E. Ency. of Law (2 ed.) 1174; 18 Cyc. 632; 24 C. J. 530; 30 Harv. L. Rev. 190.

⁴³ *Ashton v. Heggerty*, 130 Cal. 516, 62 Pac. 934; *Ashton v. Zella Mining Co.*, 134 Cal. 408, 66 Pac. 494.

fully distributed thereunder. Held, that the decree was no defence to an action on the judgment against the representative entered in such action.⁴⁴

1075. Further order of distribution—Statute—If the whole of the debts and legacies were not paid by the first distribution, and the whole assets have not been distributed, or if other assets afterward come to the hands of the executor or administrator, the court may, from time to time, make further order for the distribution of the assets.⁴⁵

1076. Confirmatory decree for want of notice—Statute—In any case where a decree affecting the title to real estate has heretofore been made by a probate court without due notice being given as required by law, any person interested in the property affected by such decree, whether as heir, devisee, grantee, or otherwise, may apply to such probate court, by petition, to enter a new and confirmatory decree assigning such property to the person or persons to whom the same was assigned by such former decree, according to the terms of such former decree.⁴⁶

1077. Same—Notice of hearing—Statute—Upon the filing of such petition, the court shall by order or citation appoint a time for hearing said petition; notice of which shall be given by three weeks' publication of a copy of said order in the manner provided by law for the publication of other notices of proceedings in the probate court. The court in its discretion may require other or further notice of such hearing to be given to such persons as it may deem proper.⁴⁷

1078. Same—Hearing—Decree—Statute—If upon such hearing the court shall be satisfied that the person or persons to whom such property was assigned by such former decree were in fact the persons entitled thereto, it shall enter a new decree assigning such property to the persons to whom the same was assigned by such former decree, in the proportions and upon the conditions specified therein; subject, however, to the rights of all persons claiming under any person named in such former decree, as owner, mortgagee, or otherwise. Such former decree shall be prima facie evidence of the truth of the recitals contained therein, and of the fact that the persons named therein were entitled to the property therein mentioned, in the proportions and upon the conditions therein specified. Provided, however, that this act shall not be construed to authorize the entry of a new and confirmatory decree in any case where it shall be made to appear that the dispositions made by such former decree were erroneous in fact or in law.⁴⁸

1079. Final decree of distribution after discharge of representative—Statute—Where an executor or administrator has been discharged, and

⁴⁴ *Whitney v. Pinney*, 51 Minn. 146,
53 N. W. 198.

⁴⁵ G. S. 1913, § 7341.

⁴⁶ G. S. 1913, § 7394.

⁴⁷ G. S. 1913, § 7395.

⁴⁸ G. S. 1913, § 7396.

by neglect or other cause no final decree assigning the residue of the estate has ever been entered, an heir, devisee, legatee, or any one claiming by, through, or under any one of them, may petition the court for the assignment of the residue to the persons entitled thereto by law, and the court shall make an order for hearing, which shall be published according to law. If on hearing it appears that such decree should be entered, the court shall determine the rights of all persons to the residue, and make decree accordingly, assigning such residue to the persons entitled thereto.⁴⁹

1080. Same—For want of due notice—Statute—Any decree of distribution made without due notice may be set aside, for want of such notice, by the court in which it was entered, upon the petition of any person interested in the property which it purports to assign. Three weeks' published notice of hearing upon such petition shall be given. And if it shall appear that all debts of the decedent, and all claims upon his estate, have been paid or provided for, the court shall assign such estate to the persons entitled thereto.⁵⁰ Laches will bar relief under this statute.⁵¹

1081. Vacation of final decree by motion in probate court—Amendment—The probate court is authorized to vacate a final decree of distribution on the ground of fraud, misrepresentation, surprise, excusable inadvertence or neglect.⁵² After the time to appeal from a decree has expired the probate court has no power to change or modify it for mere error of law, the error not being due to mistake of fact or a mere clerical error in entering the decree, or due to "mistake, inadvertence, surprise, or excusable neglect," or the decree not being absolutely void but merely erroneous.⁵³ Where the application to vacate or amend a decree is on the ground of "mistake, inadvertence, surprise, or excusable neglect," it may be made at any time and is not limited to the time within which an appeal may be taken from the decree.⁵⁴ A probate court made a decree vesting in certain named persons a remainder left by will to "the grandchildren" of the testator. One grandchild had been born after the death of the testator and before the decree. Of this fact the

⁴⁹ G. S. 1913, § 7392.

⁵⁰ G. S. 1913, § 7393; *McNamara v. Casserly*, 61 Minn. 335, 63 N. W. 880 (necessity of personal notice of proceeding to residents of state).

⁵¹ *In re Barlow's Estate* (Minn.) 188 N. W. 282.

⁵² § 53; *Fern v. Leuthold*, 39 Minn. 212, 39 N. W. 399 (fraud—inadvertence); *St. Paul Gaslight Co. v. Kenny*, 97 Minn. 150, 106 N. W. 344 (fraud); *Savela v. Erickson*, 138 Minn. 93, 163 N. W. 1029 (mistake of fact—inadvertence). See

Hurley v. Hamilton, 37 Minn. 160, 33 N. W. 912; *Stackhouse v. Berryhill*, 47 Minn. 20, 49 N. W. 392; *Paul v. Paul* (S. D.) 170 N. W. 658 (fraud).

⁵³ *Tomlinson v. Phelps*, 93 Minn. 350, 101 N. W. 496; *Leighton v. Bruce*, 132 Minn. 176, 156 N. W. 285; *Robinson v. Thompson*, 137 Minn. 446, 163 N. W. 786; *Sevela v. Erickson*, 138 Minn. 93, 163 N. W. 1029.

⁵⁴ *Savela v. Erickson*, 138 Minn. 93, 163 N. W. 1029.

court had no knowledge. Another was born after the decree but before the estate vested in enjoyment in the grandchildren. The rights of these were not presented to the court and no provision was made for them. The court had power after the estate vested in enjoyment in the grandchildren to amend the final decree so as to protect the rights of these after-born children.⁵⁴ A final decree may be set aside and a creditor allowed to present his claim against the estate.⁵⁵ The probate court has jurisdiction to set aside void decrees.⁵⁶ To justify the vacation of a decree on the ground of fraud, as against a stranger to the record who purchases the property assigned from one of the distributees, such purchaser must be connected, by actual or constructive notice or collusion, with the fraud. In other words a bona fide purchaser from a distributee will be protected.⁵⁷ While a decree of distribution may be set aside if obtained by fraud, or erroneously rendered by inadvertence, it requires a strong case to justify the court in doing so after a lapse of two years.⁵⁸ An estate having been fully administered, the administration closed, and the administrator discharged, and the real estate assigned to one as sole heir, a will devising the real estate to others was subsequently admitted to probate, and an administrator with the will annexed appointed. Held, there being nothing to administer, there could be no legitimate charges of administration under the second administrator for which real estate could be sold; that such administrator had no interest in the real estate, and could not apply for a revocation of the decree assigning it.⁵⁹ A decree cannot be set aside for perjury in a claimant's testimony on the direct issue of his right to succeed to the property and the claimants are dealing openly at arm's length. The fraud must relate to collateral matters.⁶⁰ One who was a minor at the time of the distribution may move to vacate a decree though he was not represented by a guardian at the distribution.⁶¹ The distributees of the property are properly made parties to the motion.⁶² A final decree may be corrected on motion to include therein property omitted from the same or from administration.⁶³

⁵⁴ *Savelle v. Erickson*, 138 Minn. 93, 163 N. W. 1029. See *Harris v. Starkey*, 176 Mass. 445, 57 N. E. 698.

⁵⁵ *State v. Bazille*, 89 Minn. 440, 95 N. W. 211.

⁵⁶ *Stackhouse v. Berryhill*, 47 Minn. 20, 49 N. W. 392; *McNamara v. Casserly*, 61 Minn. 335, 63 N. W. 880.

⁵⁷ *St. Paul Gaslight Co. v. Kenny*, 97 Minn. 150, 106 N. W. 344. See *Stackhouse v. Berryhill*, 47 Minn. 20, 49 N. W. 392.

⁵⁸ *Fern v. Leuthold*, 39 Minn. 212, 30 N. W. 399.

⁵⁹ *In re Thompson's Estate*, 57 Minn. 109, 58 N. W. 682.

⁶⁰ *Krohn v. Hirsch*, 81 Wash. 222, 142 Pac. 647; *Meeker v. Waddle*, 83 Wash. 628, 145 Pac. 967; *French v. Phelps*, 20 Cal. App. 101, 128 Pac. 772.

⁶¹ *In re Leavens' Estate*, 65 Wis. 440, 27 N. W. 324.

⁶² *In re Leavens' Estate*, 65 Wis. 440, 27 N. W. 324. See *McNamara v. Casserly*, 61 Minn. 335, 63 N. W. 880.

⁶³ G. S. 1913, § 7211(4). See § 51.

1082. Vacation by equitable action in district court—A final decree obtained through fraud, or which is the result of a mistake of fact, may be vacated in an equitable action in the district court.⁶⁴ An action in equity will not lie to amend a decree of distribution made by a probate court where there is no fraud and no mistake other than an erroneous construction of the terms of a will.⁶⁵ The right to have a decree set aside for fraud is lost by laches.⁶⁶

1083. Enforcement of decrees—Jurisdiction—The probate court has no power to enforce its decrees of distribution. One who is deprived of his share under a decree must resort to the district court for remedy even as against representatives.⁶⁷

1084. Certain decrees of heirship—Prima facie evidence—Statute—That where decrees of heirship to real estate in the state of Minnesota were made by any of the probate courts of this state, under the provisions of chapter 50 of the General Laws of Minnesota, 1885, and said decrees were entered in the records of said courts and certified copies thereof were recorded in the offices of the register of deeds as provided by said chapter, prior to the repeal of said chapter, said decrees, and said records thereof, and certified copies of either said decrees or said records, shall be taken and held in all legal proceedings in this state, in respect to the succession of the real estate described in the decrees, as prima facie evidence of all the facts found in said decrees.⁶⁸

PAYMENT OF LEGACIES AND DISTRIBUTIVE SHARES

1085. Who may make distribution—The executor of a deceased executor cannot make distribution.⁶⁹ A special administrator cannot make distribution.⁷⁰

⁶⁴ *Leighton v. Bruce*, 132 Minn. 176, 156 N. W. 285; *Robinson v. Thomson*, 137 Minn. 446, 163 N. W. 786; *Savela v. Erickson*, 138 Minn. 93, 163 N. W. 1029; *Bruski v. Bruski*, 148 Minn. 458, 182 N. W. 620; *Schmitz v. Martin*, 149 Minn. 386, 183 N. W. 978. The jurisdiction of the probate court over the distribution of estates is exclusive (See § 1059) and for a district court to vacate a decree of the probate court is to invade this exclusive jurisdiction. In a sense the probate court loses jurisdiction of the estate when it makes a final decree, but it does not thereby lose jurisdiction over its own records. It is a court of superior jurisdiction and ought to have the same power to set aside its judgments as the district court. See *McNamara v. Casserly*, 61 Minn. 335, 342, 63 N. W. 880. The right of the

district court to entertain an action to set aside a decree of the probate court should be limited to cases where the property affected has passed into the hands of third parties or where for any other reason there is no remedy in the probate court. See *Davis v. McCamman*, 165 Mich. 287, 130 N. W. 691.

⁶⁵ *Robinson v. Thomson*, 137 Minn. 446, 163 N. W. 786.

⁶⁶ *Ewing v. Lamphere*, 147 Mich. 659; 111 N. W. 187; *Beem v. Kimberly*, 72 Wis. 343, 39 N. W. 542.

⁶⁷ *Schmidt v. Stark*, 61 Minn. 91, 63 N. W. 255; *State v. Probate Court*, 84 Minn. 289, 294, 87 N. W. 783. See §§ 699, 1105, 1124.

⁶⁸ G. S. 1913, § 7403.

⁶⁹ See § 642; *In re Moehring*, 154 N. Y. 423, 48 N. E. 818.

⁷⁰ See § 1147.

1086. Payment of inheritance taxes—A representative is not authorized and cannot be compelled to deliver a devise, bequest or distributive share until all inheritance taxes thereon are fully paid.⁷¹

1087. When legacies and distributive shares payable—At common law a legacy of money is due and payable at the end of a year from the death of the testator without regard to when administration is initiated and bears interest from that time, in the absence of a contrary direction in the will.⁷² In this state a legacy or distributive share is not due and payable, as a matter of right and obligation, until a decree of distribution, either partial or final, is made by the probate court assigning it to the legatee or distributee. The statutes upon this subject have been enacted at different times and need revision.⁷³ Though a representative is not bound to do so he may pay over funds of the estate to the party entitled thereto as legatee or distributee without a decree of distribution, but he does so at his peril. If he pays to the proper person it operates as a satisfaction of the legacy or distributive share, to the extent thereof, as against the legatee or distributee, or others whose rights are not paramount.⁷⁴ If a representative pays legacies before his appointment his subsequent appointment validates the payment so made.⁷⁵

1088. Assent of executor to legacy—At common law it is necessary for a legatee to obtain the assent of the executor to the legacy before it becomes due and an action can be maintained therefor.⁷⁶ This whole doctrine of assent is abolished in this state. A legacy becomes due when the decree of distribution is made by the probate court.⁷⁷

1089. Out of what funds payable—The directions of a will as to the funds out of which a legacy shall be paid are controlling.⁷⁸ If legacies are charged on realty by the will they are payable accordingly.⁷⁹ It is the general rule that if a legacy is not made a charge on real property by will the personal property of the estate is not only the primary but the sole fund for its payment and the real property cannot be resorted to

⁷¹ G. S. 1913, § 2274.

⁷² Wiley v. Lockwood (Minn.) 186 N. W. 699; In re Brandon's Estate, 164 Wis. 387, 160 N. W. 177; 11 A. & E. Ency. of Law (2 ed.) 1166; 18 Id. 792, 793.

⁷³ G. S. 1913, §§ 7337, 7341, 7384, 7385, 7387, 7390, 7391, 7400; Huntsman v. Hooper, 32 Minn. 163, 20 N. W. 127; Wiley v. Lockwood (Minn.) 186 N. W. 699. See § 1060.

⁷⁴ Kraus v. Kraus, 81 Minn. 484, 84 N. W. 332; Wheaton v. Pope, 91 Minn. 299, 305, 97 N. W. 1046. See Huntsman v. Hooper, 32 Minn. 163, 165, 20 N. W. 127; and § 1060.

⁷⁵ Pinkham v. Grant, 78 Me. 158, 3 Atl. 179.

⁷⁶ 11 A. & E. Ency. of Law (2 ed.) 1160; 18 Id. 785; 18 Cyc. 598; 24 C. J. 467; Woerner, Am. Law of Adm. (2 ed.) §§ 453, 469.

⁷⁷ See § 1087; Woerner, Am. Law of Adm. (2 ed.) §§ 453, 469.

⁷⁸ Hale v. St. Paul, 54 Minn. 421, 56 N. W. 63; Fox v. Hicks, 81 Minn. 197, 83 N. W. 538; Goodwin v. McGaughey, 108 Minn. 248, 122 N. W. 6; Baldwin v. Zien, 117 Minn. 178, 134 N. W. 498. See 28 R. C. L. 305.

⁷⁹ See § 398.

for that purpose.⁸⁰ This common-law rule may possibly have been modified by statute in this state.⁸¹ When a residuary legatee is directed by the will to pay a legacy such legacy is a charge on the personal property received by the residuary legatee.⁸² If there are insufficient funds to pay a specific legacy, it is not entitled to come on the estate as a general legacy. On the other hand if the funds out of which a demonstrative legacy is payable are insufficient it is payable out of the corpus of the estate, and abates only with general legacies.⁸³ General pecuniary legacies are payable out of the general personal estate remaining after the payment of debts. If such fund is insufficient to pay the legacies and no other fund is provided general legacies will abate.⁸⁴ A substituted or additional legacy is *prima facie* payable out of the same funds and subject to the same incidents and conditions as is the original legacy. The rule that a substituted or additional legacy is *prima facie* payable out of the same funds and subject to the same conditions as the original legacy is established to carry into effect the intention of testator, and, unless testator by a codicil intended to make an independent bequest, the rule is applied, and the limitations imposed on the original bequest presumptively follow it in the codicil, irrespective of any change in the amount thereof or in the persons to whom it is given.⁸⁵ Testator devised his real estate, consisting of three farms, to his three children, one farm to each. He bequeathed to each daughter a certain sum and provided that "said sums of money have to be paid by my son." The three children were also residuary legatees. During his lifetime testator conveyed to each child the farm devised to the same. Held, the specific legacies were not revoked by the conveyance, since they were not made specific charges upon the land devised. The intention of the testator is clear that the specific legacies were not to be paid by the estate direct, but were to be paid by the son, and the court rightly deducted from his share as residuary legatee the sums bequeathed to the sisters and added the same to their respective shares.⁸⁶

1090. Interest on legacies—Unless the will provides otherwise legacies do not bear interest until the court orders them paid, or there is

⁸⁰ *Miller v. Klossner*, 135 Minn. 377, 160 N. W. 1025; *Hoyt v. Hoyt*, 85 N. Y. 146; *Alderman v. Dystrup*, 293 Ill. 504, 127 N. E. 707; *Lacey v. Collins*, 134 Iowa 583, 112 N. W. 101; *Carpenter's Estate v. Wiley*, 166 Iowa 48, 147 N. W. 175; *Hibler v. Hibler*, 104 Mich. 274, 62 N. W. 361; 19 A. & E. Ency. of Law (2 ed.) 1349; 40 Cyc. 2011; 28 R. C. L. 305; 12 Prob. Rep. Ann. 102; 129 Am. St. Rep. 1056.

⁸¹ See § 957.

⁸² *Miller v. Klossner*, 135 Minn. 377, 160 N. W. 1025.

⁸³ *Merriam v. Merriam*, 80 Minn. 254, 83 N. W. 162; *In re Hawgood's Estate*, 37 S. D. 565, 159 N. W. 117. See § 395.

⁸⁴ *Carpenter's Estate v. Wiley*, 166 Iowa 48, 147 N. W. 175. See *Miller v. Klossner*, 135 Minn. 377, 160 N. W. 1025, and § 395.

⁸⁵ *Carpenter's Estate v. Wiley*, 166 Iowa 48, 147 N. W. 175.

⁸⁶ *Miller v. Klossner*, 135 Minn. 377, 160 N. W. 1025.

a decree of distribution. The common-law rules upon this subject do not prevail in this state.⁸⁷ Interest payable on a legacy which is not paid when due is not, strictly speaking, a part of the testator's gift, but is a penalty exacted for the failure to make the payment when due.⁸⁸ Where a legacy is made payable a specified or determinable time after the death of the testator, payment at that time, without interest or accumulations, satisfies the bequest.⁸⁹ The time from which a legacy bears interest is fixed by the law of the domicile of the testator at the time of his death, unless a contrary intention is clearly manifested by the will.⁹⁰

1091. Form of payment—Pecuniary legacies are ordinarily payable in cash, but any form of payment acceptable to the legatees is permissible.⁹¹ Where a will directs the payment of a debt in specific securities it gives the creditor a right at his election to the securities named.⁹²

1092. Satisfaction by payment by testator—Whether a payment made by a testator to his legatee was in satisfaction of the legacy depends on the intention of the testator in making the payment. There is no presumption of satisfaction where the testator does not stand in loco parentis to the legatee. Parol evidence is admissible to show the intention with which the payment was made.⁹³

1093. Deductions—Setoff—Retainer—Where a testator provides that a specific sum or obligation shall be deducted from a legacy the amount stated cannot be disputed though erroneous.⁹⁴ A claim which has been satisfied is not to be deducted under a general direction.⁹⁵ Even though the setoff clause is specific the deduction should be lessened by whatever amount the testator actually received in satisfaction.⁹⁶ Where a will

⁸⁷ *Wiley v. Lockwood* (Minn.) 186 N. W. 699. See *Huntsman v. Hooper*, 32 Minn. 163, 20 N. W. 127; *Wherley v. Rowe*, 106 Minn. 494, 496, 119 N. W. 222; *Cobb v. Stratton's Estate*, 56 Colo. 278, 138 Pac. 35; *Smullen v. Wharton*, 83 Neb. 328, 119 N. W. 773, 121 N. W. 441; *In re Knight's Estate*, 91 Neb. 127, 135 N. W. 379; *Wheeler v. Hatheway*, 54 Mich. 547, 20 N. W. 579; *In re Brandon's Estate*, 164 Wis. 387, 160 N. W. 177; *Melone v. Davis*, 67 Cal. 279, 7 Pac. 703; *Marconnier v. Preston*, 96 Wash. 374, 165 Pac. 72; 18 A. & E. Ency. of Law (2 ed.) 793; 18 Cyc. 637; 40 Cyc. 2098; 24 C. J. 504; *Woerner*, Am. Law of Adm. (2 ed.) §§ 458, 459; *Gary*, Probate Law (3 ed.) § 426; Ann. Cas. 1915C, 1166.

⁸⁸ *Buchanan v. Hunter*, 166 Iowa 663, 148 N. W. 881.

⁸⁹ *Buchanan v. Hunter*, 166 Iowa 663,

148 N. W. 881; 18 A. & E. Ency. of Law (2 ed.) 795; 40 Cyc. 2099.

⁹⁰ *Welch v. Adams*, 152 Mass. 74, 25 N. E. 34.

⁹¹ *Villard v. Villard*, 219 N. Y. 482, 114 N. E. 789; 18 Cyc. 618; 24 C. J. 484.

⁹² *Hill v. Treasurer and Receiver General*, 227 Mass. 331, 116 N. E. 609.

⁹³ *Johnson v. McDowell*, 154 Iowa 38, 134 N. W. 419; 18 A. & E. Ency. of Law (2 ed.) 784; 40 Cyc. 1914-1918.

⁹⁴ *In re Wood*, 32 Ch. Div. 517; *Dunshree v. Dunshree*, 243 Pa. St. 599, 90 Atl. 362. See *Skinner v. Cottrill*, 148 Iowa 633, 127 N. W. 986; 1 A. L. R. 997.

⁹⁵ *Howe v. Howe*, 184 Mass. 34, 67 N. E. 639; *Aster v. Ralston*, 179 Ill. App. 194. See *Pierce v. Loomis*, 224 Mass. 226, 112 N. E. 1027; 30 Harv. L. Rev. 298.

⁹⁶ *Sibley v. Maxwell*, 203 Mass. 94,

recites that the testator has advanced a certain amount to one child and gives another child a certain amount to equalize their shares the recital of the amount advanced is conclusive.⁹⁷ If a legatee under a pecuniary bequest or a distributee is indebted to the estate the amount may be retained or deducted from the legacy or distributive share, and the balance, if any, paid to the legatee or distributee in full of his claim, whether he is solvent or not. This right of retainer or setoff applies against assignees, incumbrancers, purchasers or other successors in interest of the legatee or distributee. It is immaterial whether the indebtedness was incurred before or after the death of the decedent, or is secured.⁹⁸ As to whether an indebtedness of an heir or devisee to the estate is a prior equitable lien on his share of the real estate or may be deducted from the proceeds thereof, there is considerable conflict of authority. According to the better view it constitutes such a lien and may be so deducted.⁹⁹ It is within the jurisdiction of the probate court to determine the amount of a debt to be retained.¹ The right of retainer is based on the equitable principle that no one should be admitted to share in the distribution of a fund until he has discharged his obligation to contribute to the fund.² According to the better view a debt barred by the statute of limitations cannot be retained or set off unless the will so directs, but there are many cases to the contrary.³ If the will directs that an obligation shall be deducted the deduction must be made though the statute of limitations has run against it.⁴ Debts not

103, 89 N. E. 323; 30 Harv. Law Rev. 298.

⁹⁷ *Buchanan v. Hunter*, 166 Iowa 663, 148 N. W. 881.

⁹⁸ *Christians v. Christians*, 108 Minn. 157, 121 N. W. 633; *In re Angle's Estate*, 148 Cal. 102, 82 Pac. 668; *Blackler v. Boott*, 114 Mass. 24; *Holden v. Spler*, 65 Kan. 412, 70 Pac. 348; *Head v. Spler*, 66 Kan. 386, 71 Pac. 835; *Stenson v. H. S. Halvorson Co.*, 28 N. D. 151, 147 N. W. 800; *Seneff v. Brackey*, 165 Iowa 525, 146 N. W. 24; *In re Barnes' Estate*, 177 Iowa 122, 158 N. W. 754; *Marvin v. Bowlby*, 142 Mich. 245, 105 N. W. 751; 11 A. & E. Ency. of Law (2 ed.) 1170; 18 Id. 781; 18 Cyc. 621, 653; 18 C. J. 883; 24 C. J. 487; *Woerner*, Am. Law of Adm. (2 ed.) § 564; 28 Harv. L. Rev. 108; 4 L. R. A. (N. S.) 189; L. R. A. 1915A, 1179; 7 Ann. Cas. 564; 113 Am. St. Rep. 574; 1 A. L. R. 991.

⁹⁹ *Stenson v. H. S. Halvorson Co.*, 28 N. D. 151, 147 N. W. 800; *Lester v. Toole*, 20 Ga. App. 381, 93 S. E. 55;

Boyer v. Robinson, 26 Wash. 117, 66 Pac. 119; *In re Dickenson's Estate*, 148 Pa. 142, 22 Atl. 1053; *Wilson v. Channell*, 102 Kan. 793, 175 Pac. 95; 24 C. J. 489; Ann. Cas. 1916D, 1294; 28 Harv. L. Rev. 108; 1 A. L. R. 1017. See, contra, *Marvin v. Bowlby*, 142 Mich. 245, 105 N. W. 751; *Broas v. Broas*, 153 Mich. 310, 116 N. W. 1077.

¹ *Christians v. Christians*, 108 Minn. 157, 121 N. W. 633; 1 A. L. R. 998.

² 1 A. L. R. 993.

³ *In re Schaeffer's Estate* (Cal.) 200 Pac. 508; *Allen v. Edwards*, 136 Mass. 138; *Holt v. Libbey*, 80 Me. 329, 14 Atl. 201; *Boden v. Mier*, 71 Neb. 191, 98 N. W. 701; *Gray v. Hayhurst*, 157 Ill. App. 488; *In re Reiser's Estate* (Utah) 195 Pac. 317; 11 A. & E. Ency. of Law (2 ed.) 1172; 40 Cyc. 1924; 18 C. J. 884; 1 A. L. R. 1007; 16 Id. 341; 14 Harv. L. Rev. 73; 35 Id. 340.

⁴ *In re Gillingham's Estate*, 220 Pa. St. 353, 69 Atl. 809; *Gray v. Hayhurst*, 157 Ill. App. 488. See *Stephenson v. Norris*, 128 Wis. 242, 107 N. W. 343;

yet due probably cannot be retained, in the absence of testamentary direction.⁵ Sums which the estate has been compelled to pay by reason of the decedent's suretyship for a distributee may be retained.⁶ The right of retainer includes the right to retain interest on the debt up to the time of the settlement.⁷ The right of retainer is not affected by the fact that after the death of the decedent the distributee has gone into bankruptcy or made an assignment for the benefit of his creditors, if the representative does not seek to enforce the claim in the insolvency proceedings.⁸ The right of retainer probably applies against the issue of a deceased legatee taking under the statute against the lapsing of legacies.⁹ There is great conflict of authority as to whether the right of setoff or retainer applies against distributees taking the shares of deceased ancestors by representation under the statutes of descent and distribution.¹⁰ The right of an executor to set off against a devisee for life debts owing the estate cannot affect the rights of remaindermen.¹¹ The right of setoff or retainer is superior to the rights of creditors of the distributee. This is true even as to attaching and judgment creditors.¹² A representative may deduct from the share of a distributee, as fixed by the decree of distribution, advances made by him to such distributee on account of the latter's needy circumstances.¹³ A representative cannot retain the amount of a debt owing to himself individually and not arising out of his administration of the estate.¹⁴ A father devised land to his son, and, before the will was finally held valid, the son mortgaged the land to secure pre-existing debts. At the time of the father's death the son had in his possession moneys belonging to the estate for which he refused to account. Held, that the son being insolvent and unable to pay the judgment recovered by the administrator against him, the judgment may be set off against his interest in the land notwithstanding the mortgages; the mortgagees not being bona fide purchasers.¹⁵

1094. Gift to representative—No formal transfer is necessary in case a representative is residuary legatee.¹⁶ Any act on the part of a representative, showing an intention to retain assets in payment of his legacy or distributive share vests title in him without any formal transfer.¹⁷

16 Col. L. Rev. 266; 40 Cyc. 1924; L. R. A. 1918C, 623; 1 A. L. R. 1009.

⁵ 1 A. L. R. 1000.

⁶ 1 A. L. R. 1001.

⁷ 1 A. L. R. 1011; 24 C. J. 489.

⁸ 1 A. L. R. 1043.

⁹ See § 444.

¹⁰ See *Brookhouse v. Pray*, 92 Minn. 448, 100 N. W. 235; 1 A. L. R. 1037.

¹¹ In re *Brackey's Estate*, 166 Iowa 109, 147 N. W. 188. See 1 A. L. R. 1038.

¹² *Boyer v. Robinson*, 26 Wash. 117, 66 Pac. 119; 1 A. L. R. 1034.

¹³ *Lyle v. Williams*, 65 Wis. 231, 26 N. W. 448; 18 Cyc. 616; 24 C. J. 483; Ann. Cas. 1917A, 134. See § 1054.

¹⁴ *McLaughlin v. Barnes*, 12 Wash. 873, 41 Pac. 62; 18 Cyc. 622; 24 C. J. 489; 1 A. L. R. 1006.

¹⁵ *Senneff v. Brackey*, 165 Iowa 525, 146 N. W. 24.

¹⁶ In re *Mullon*, 145 N. Y. 98, 39 N. E. 821.

¹⁷ *Williams v. Cobb*, 219 Fed. 663; 11 A. & E. Ency. of Law (2 ed.) 1170; 18 Cyc. 603.

1095. Conflicting claimants—In the absence of an agreement between contesting claimants or an adjustment of differences between heirs, a representative is not authorized to surrender the estate to one claimant, or close it up, except in the usual course.¹⁸ A representative has no authority to take part in litigation between claimants or to employ attorneys therein.¹⁹

1096. Death of distributee—Payment of a legacy should be made to the personal representative of a deceased distributee.²⁰ Where the distributee dies intestate and without creditors it may possibly be unnecessary to have an administrator appointed solely to receive the distributive share.²¹

1097. To assignee of legatee or distributee—While the probate court in making a decree of distribution does not take cognizance of assignments of legacies or shares of distributees a representative cannot ignore them if he has notice thereof but must make payment according to the order of the legatee or distributee.²² If there is a controversy between the assignor and assignee the representative may compel them to interplead.²³ An administrator who pays the share of a distributee on his order takes the risk of the genuineness and validity of the order, and in the hearing on the allowance of the account of the representative it must be determined by the probate court whether the payment is to be allowed or not. If it is found that the order is valid and that the payment was according to the terms of the order it should be allowed.²⁴ An assignee of a distributee may maintain an action at law or in equity against the representative to collect his claim. If the representative refuses to recognize the assignment the assignee may have injunctive relief.²⁵ A creditor of a legatee may compel an executor to account to him for the amount of a partial assignment of a legacy of which the executor had notice before he made any payment to the legatee.²⁶

1098. To minors—Where a minor is entitled to a legacy or distributive share payment can only be made to his general guardian or testa-

¹⁸ *Crane v. Michigan Trust Co.*, 95 Mich. 524, 55 N. W. 433.

¹⁹ *In re Ross' Estate* (Cal.) 182 Pac. 803.

²⁰ *Moore v. Gordon*, 24 Iowa 158; *Foster v. Fifield*, 20 Pick. (Mass.) 67; *Walter v. Frank*, 118 N. Y. S. 268; 11 A. & E. Ency. of Law (2 ed.) 1166; 18 Cyc. 624; 24 C. J. 491.

²¹ See *In re Riley's Estate* (N. J. Eq.) 113 Atl. 485.

²² *Kauffman v. Kauffman*, 137 Minn. 457, 163 N. W. 780; *Harrington v. La Rocque*, 13 Or. 344, 10 Pac. 498; *Palmer*

v. Whitney, 166 Mass. 306, 44 N. E. 229; *Security Bank v. Callahan*, 220 Mass. 84, 107 N. E. 385; 18 Cyc. 624; 24 C. J. 491.

²³ *Security Bank v. Callahan*, 220 Mass. 84, 107 N. E. 385.

²⁴ *Palmer v. Whitney*, 166 Mass. 306, 44 N. E. 229; *Security Bank v. Callahan*, 220 Mass. 84, 107 N. E. 385.

²⁵ *Palmer v. Whitney*, 166 Mass. 306, 44 N. E. 229; *Security Bank v. Callahan*, 220 Mass. 84, 107 N. E. 385.

²⁶ *Security Bank v. Callahan*, 220 Mass. 84, 107 N. E. 385.

mentary trustee.²⁷ Payment cannot be made to the minor.²⁸ It cannot be made to a parent of the minor.²⁹ If the will directs the representative to hold the legacy until the legatee arrives at age it controls and payment should not be made to the guardian.³⁰ Payment of a legacy to the guardian of a legatee who is appointed by the court of another state, of which the guardian and legatee are resident, is valid.³¹

1099. Payment to trustee for minors—Statute—In case there is sufficient assets in the hands of the executor or administrator for that purpose he shall proceed to pay all the debts and legacies of the deceased in full. When a legacy is contingent on the event of the legatee living to a certain age and the testator has omitted to appoint any person or persons to receive and hold said legacy until the legatee arrives at the prescribed age, the probate court may appoint some discreet person to act as trustee, who, upon giving a bond, as hereinafter prescribed, shall receive, invest and control said legacy, and the income thereof until the legatee shall arrive at the age prescribed in the last will and testament of the testator, or in case of the death of said legatee before arriving at said age, said legacy shall be disposed of according to the provisions of the last will and testament of the testator. Said trustee shall before entering upon the duties of his trust give a bond to the judge of probate with sufficient sureties in such sum as the judge of probate shall direct, conditioned that said trustee will faithfully execute the duties of his trust and will render a just and true account of his trusteeship to the probate court at any time when required by said court; that he will perform all orders and decrees of the probate court to be by him performed in the premises, and that when the legatee arrives at the prescribed age he will pay to said legatee the amount of said legacy and the income thereof, or in case of the death of said legatee before arriving at such age, that he will pay said legacy and the income thereof to the person or persons designated in the last will and testament of the testator as being entitled thereto.³²

1100. Life tenant—Bond to secure remainderman—Inventory—The donee for life of personal property is entitled to the possession thereof without executing a bond to the remainderman as security for its safe-keeping, except in cases of real danger. It is not usual or proper practice to exact anything more in the first instance than the filing of an inventory in the proper court. In case of real danger of the property

²⁷ *Schmidt v. Stark*, 61 Minn. 91, 93, 63 N. W. 255; *Davis v. Crandall*, 101 N. Y. 311, 4 N. E. 721; 11 A. & E. Ency. of Law (2 ed.) 1165; 18 Cyc. 625; 24 C. J. 492.

²⁸ *Sparhawk v. Buell*, 9 Vt. 41; 11 A. & E. Ency. of Law (2 ed.) 1165; 18 Cyc. 626.

²⁹ *In re Hobson*, 131 N. Y. 575, 30 N. E. 63; *Miles v. Boyden*, 3 Pick. (Mass.) 213.

³⁰ *Hinckley v. Harriman*, 45 Mich. 343, 7 N. W. 907. See § 1099.

³¹ *Gardiner v. Thorndike*, 183 Mass. 81, 66 N. E. 633.

³² G. S. 1913, § 7337.

being wasted, secreted, or removed the life-tenant may be called to account and required to give bond.⁸³

1101. Deposit with county treasurer if distributee not found—Statute—If it shall appear that any part of the money on hand has not been paid over because the person entitled thereto cannot be found in the state, or his place of residence is unknown, or has not appeared and claimed and received his share of the estate according to the decree of distribution within one year after the date of the decree, or for any good and sufficient reason the same has not been paid over, the court may direct the petitioner to deposit the same with the county treasurer, taking duplicate receipts therefor, one of which he shall file with the county auditor, and one in the probate court. Upon filing such receipts the petitioner shall be entitled to the discharge provided for in § 7399 (1144 *infra*).⁸⁴

1102. Same—Subsequent disposal of fund—Statute—Money so deposited shall be credited to the county revenue fund; but upon application made to the probate court within twenty-one years after such deposit, and upon personal notice to the county attorney and county treasurer, it may direct the county auditor to issue to the person entitled thereto his warrant for the amount thereof. No interest shall be allowed or paid thereon, and if not claimed within said twenty-one years no recovery thereof shall be had.⁸⁵

1103. Receipts—A representative who is a legatee or distributee should file a receipt for his share.⁸⁶ In the absence of fraud or mistake a receipt in full discharges a representative from further liability as representative to the legatee or distributee.⁸⁷ A receipt may be impeached for fraud even collaterally.⁸⁸

1104. Overpayment—Mistake—Recovery—Any overpayment to a legatee or distributee will be disregarded on the final accounting. In legal contemplation the sum overpaid is still in the hands of the representative as assets of the estate which he must pay over to the parties entitled thereto and he is liable to those who are prejudiced.⁸⁹ If the overpayment is directed by the decree of distribution the representa-

⁸³ *In re Oertle's Estate*, 34 Minn. 173, 181, 24 N. W. 924; *Fisk v. Cobb*, 6 Gray (Mass.) 144; *Taggard v. Piper*, 118 Mass. 315; *Weeks v. Weeks*, 5 N. H. 326; *Woolfitt v. Preston* (Mich.) 169 N. W. 838; *Abbott v. Wagner* (Neb.) 188 N. W. 113; 11 A. & E. Ency. of Law (2 ed.) 1162; 18 Cyc. 614; 24 C. J. 480; *Woerner*, Am. Law of Adm. (2 ed.) § 456.

⁸⁴ G. S. 1913, § 7401.

⁸⁵ G. S. 1913, § 7402.

⁸⁶ *Johnson v. Johnson*, 108 N. C. 619,

13 S. E. 183; 18 Cyc. 611; 24 C. J. 477.

⁸⁷ *Klinney v. Newbold*, 115 Iowa 145, 88 N. W. 328; 18 Cyc. 610; 24 C. J. 477.

⁸⁸ *Schmidt v. Stark*, 61 Minn. 91, 93, 63 N. W. 255; *Sjoli v. Hogenson*, 19 N. D. 82, 122 N. W. 1008; 18 Cyc. 609; 24 C. J. 477.

⁸⁹ *In re Underhill*, 117 N. Y. 471, 22 N. E. 1120; 11 A. & E. Ency. of Law (2 ed.) 1176; 18 Cyc. 630; 24 C. J. 501.

tive is protected thereby.⁴⁰ In case of an overpayment the probate court cannot enforce a refundment.⁴¹ A payment through mistake may be recovered in the district court by the representative in an action at law. In some states a recovery may be had though the mistake is one of law.⁴²

1105. Recovery of legacy or distributive share—Action—Setoff—A legacy or distributive share cannot be recovered from a representative by action until there is a decree of distribution assigning it to the legatee or distributee.⁴³ A legatee or distributee may sue a representative on a final decree of distribution to recover a legacy or distributive share and in such an action the decree is conclusive. No demand is necessary before suit. Interest is recoverable as damages.⁴⁴ A legacy may be recovered as upon implied contract in an action in the nature of *assumpsit*.⁴⁵ An agreement to refrain from legal proceedings to recover a legacy has been held to have a sufficient consideration.⁴⁶ Plaintiff, the maker of a promissory note, paid it before it was due to defendant, who held it for the payee, and on whose representation that he had authority from the payee to receive such payment plaintiff relied. The defendant then delivered the note to plaintiff, who destroyed it. The payee had already, by her will, bequeathed the note to plaintiff; and, a few days after such payment, she died. She never authorized such payment, or ratified the same, and never received the money. Defendant was appointed her administrator, and paid the money to himself as such administrator. Plaintiff demanded a return of the money. Held, he is entitled to recover it back.⁴⁷ A testator, after providing for his wife and other children, made a bequest to his insane daughter in these words: "I further give and bequeath the sum of one thousand dollars to my only other daughter (naming her), who is now in the Hospital for the Insane at St. Peter, this state, said amount to be paid her on the recovery of her sanity, provided that if she does not recover her reason or dies, then the amount is to be divided equally between her three children now living." Held, that the children are only entitled to the bequest

⁴⁰ *Young v. Thrasher*, 48 Mo. App. 327; 18 Cyc. 632.

⁴¹ *In re Underhill*, 117 N. Y. 471, 22 N. E. 1120; *Lang v. Stringer*, 144 N. Y. 275, 39 N. E. 363.

⁴² *Walker v. Hill*, 17 Mass. 380 (action for money had and received); *Mansfield v. Lynch*, 59 Conn. 320 (mistake of law or fact); *Kunkel v. Kunkel* (Pa.) 110 Atl. 73; 13 Ency. Pl. & Pr. 16; 11 A. & E. Ency. of Law (2 ed.) 1179; 18 Cyc. 634; 24 C. J. 502; *Woodward*, *Quasi Contracts*, § 185; 32 Harv. L. Rev. 329.

⁴³ *Huntsman v. Hooper*, 32 Minn. 163, 20 N. W. 127; *State v. Germania Bank*, 103 Minn. 129, 145, 114 N. W. 651; *Wiley v. Lockwood* (Minn.) 186 N. W. 699. See §§ 1060, 1087.

⁴⁴ *Sjoli v. Hogenson*, 19 N. D. 82, 112 N. W. 1008; *Melone v. Davis*, 67 Cal. 279, 7 Pac. 703. See § 1124; 13 Ency. Pl. & Pr. 9.

⁴⁵ *Allen v. Edwards*, 136 Mass. 138. See 13 Ency. Pl. & Pr. 10.

⁴⁶ *Thayer v. Pray*, 111 Minn. 449, 127 N. W. 392.

⁴⁷ *Braithwait v. Bain*, 66 Minn. 325, 69 N. W. 4.

in case their mother dies before recovering her reason, and that, until the possibility of her recovery is extinguished by her death, they cannot maintain an action to enforce the payment of the bequest to themselves.⁴⁸ A complaint in an action against an administratrix and her bondsmen for failure to pay a distributive share held to state a cause of action.⁴⁹ It is no defence to an action to recover a legacy against an administrator de bonis non, with the will annexed, that the original executor, who was also the residuary legatee, gave a bond to pay debts and legacies.⁵⁰ In an action against a representative to recover a legacy or distributive share, a debt due from the plaintiff to the decedent may be set off against the legacy or distributive share. If there is a deficiency of assets, the setoff will apply to so much only of the claim upon the legacy or distributive share as shall be found to be justly recoverable upon a full settlement of the estate.⁵¹ If the debt is barred by the statute of limitations it cannot be set off.⁵²

1106. Rights of creditors of distributees—The rights of creditors of distributees are subordinate to the claims of creditors of the decedent, duly proved and allowed, and to the charges and expenses of administration.⁵³ They are also subordinate to the claims of the estate against the distributees.⁵⁴ Creditors of distributees cannot have the shares of the distributees assigned to them in the final decree of distribution.⁵⁵ But they may appear at the hearing on the final settlement and assert their claims therein.⁵⁶ They may sue the distributees pending administration proceedings and before a final decree of distribution. In proper cases they may attach or garnishee the interests of distributees before or after a final decree of distribution. If they recover and docket a judgment it will be a lien on the real estate which has been, or may thereafter be, assigned to the distributee. Execution may issue against the interest of a distributee even before a final decree of distribution, subject to administration proceedings.⁵⁷ If they take an assignment of the shares of distributees they have a remedy thereon against the representative, if they notify him of the assignment.⁵⁸ If a creditor of an heir recovers and docket a judgment against him prior to the death of the ancestor the lien of the judgment attaches to the interest of the heir accruing after the death of the ancestor.⁵⁹ Any surplus on a sale of real estate to pay claims against the estate must be applied to the

⁴⁸ *Mingo v. Huntington*, 92 Minn. 13, 99 N. W. 45.

⁴⁹ *Miller v. Ganser*, 87 Minn. 345, 92 N. W. 3.

⁵⁰ *Collins v. Collins*, 140 Mass. 502, 5 N. E. 632.

⁵¹ *Blackler v. Boot*, 114 Mass. 24.

⁵² *Kimball v. Schribner*, 161 N. Y. S. 511.

⁵³ *Kolars v. Brown*, 108 Minn. 60, 121 N. W. 229; 18 O. J. 985. See §§ 77, 1060, 1073.

⁵⁴ See § 1093.

⁵⁵ See § 1071.

⁵⁶ See § 1071.

⁵⁷ See §§ 1134, 1135, 1070, 1137, 1140.

⁵⁸ See § 1097.

⁵⁹ *In re Langevin's Will*, 45 Minn. 429, 47 N. W. 1133. See § 1070.

payment of a judgment obtained against an heir, and duly docketed after the death of the decedent and before the sale.⁶⁰ If the interest of a distributee is of an equitable nature not subject to attachment it may be reached through a creditors' suit.⁶¹

PARTITION

1107. When authorized—Statute—When, upon the hearing of the petition for a decree of distribution, the estate to be assigned to two or more persons is in common and undivided, and the respective shares are not separated and distinguished, partition may be made on the petition of any person interested. Upon such petition being made, the court may appoint three disinterested persons as referees to make partition, and shall issue a warrant to them for that purpose. Unless otherwise directed by the court, the referees shall make partition of all the real estate situated within the state; but if there be real estate in different counties, the court may appoint different referees for each county, and in such case the real estate in each county shall be divided separately, as if there were no other estate to be divided by the court. Such referees shall have power, but shall not be required, to divide specific tracts.⁶² The probate court has no general jurisdiction over the partition of real estate. The proceeding authorized by the statute can only be had during administration proceedings and as preliminary to a final decree of distribution therein. After such a decree the probate court has no jurisdiction to entertain partition proceedings.⁶³

1108. A cumulative remedy—The statutory remedy for partition in the probate court is not exclusive. Resort may be had to the district court.⁶⁴

1109. Effect of controversy as to shares—Our statute does not explicitly exclude cases where the shares are in dispute or uncertain. In Massachusetts there is such an exclusion, but even in such cases it is held there that the probate court may exercise jurisdiction by consent of the parties.⁶⁵

1110. No sale authorized—No sale of the land is authorized in case an equitable division cannot be had.⁶⁶

⁶⁰ *Kolars v. Brown*, 108 Minn. 60, 121 N. W. 229.

⁶¹ *Merriam v. Wagener*, 74 Minn. 215, 77 N. W. 44.

⁶² G. S. 1913, § 7408. See Gary, *Probate Law* (3 ed.) §§ 689-725; 21 A. & E. Ency. of Law (2 ed.) 1144; 41 Am. St. Rep. 140.

⁶³ *Hurley v. Hamilton*, 37 Minn. 160, 33 N. W. 912; *State v. Probate Court*, 84

Minn. 289, 293, 87 N. W. 783. See *Kelly v. Slack*, 93 Minn. 489, 497, 101 N. W. 797.

⁶⁴ *Donnor v. Quartermas*, 90 Ala. 164, 8 So. 715.

⁶⁵ *Ruggles v. Jewett*, 213 Mass. 167, 90 N. E. 1093.

⁶⁶ *Kelly v. Slack*, 93 Minn. 489, 495, 101 N. W. 797.

1111. Effect of conveyances by heirs—A conveyance by an heir prior to the proceeding probably ousts the probate court of jurisdiction.⁶⁷ A conveyance by an heir pending partition proceedings in the probate court does not affect the jurisdiction of the court and the land should be set off and assigned as belonging to the heir.⁶⁸

1112. Mode of setting off shares—Statute—The several shares in the real and personal estate shall be set off to each individual, in proportion to his right as determined by the court, by metes and bounds or descriptions, so that the same can be easily distinguished, unless any two or more of the parties interested consent to have their shares set off so as to be held by them in common and undivided.⁶⁹ The referees are expressly authorized to divide specific tracts, but they are not required to do so.⁷⁰ Where the land is partly improved and partly woodland the referees need not set off to each party an exact proportionate part of each kind.⁷¹ Where the estate consists of several separate tracts of land the referees need not set off to each cotenant a portion of every tract, but may assign to one or more or all a separate entire tract, according to the situation and circumstances of the estate.⁷² Shares are to be assigned according to their market value and not according to their area.⁷³

1113. Indivisible estate—Assignment—Statute—When any such real estate cannot be divided without prejudice or inconvenience to the owners, the court may assign the whole to one or more of the parties entitled to share therein, who will accept it, and pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction. In such case, the true value shall be ascertained by appraisers appointed by the court for that purpose.⁷⁴

1114. Indivisible tract—Assignment—Statute—When any tract of land or tenement is of greater value than either party's share in the estate to be divided, and cannot be divided without injury to the same, it may be set off by the referees to either of the parties who will accept it, and pay or secure to one or more of the others such sums as the referees award to make the partition equal, and they shall make their award accordingly. Such partition shall not be confirmed until the sums so awarded are paid to the parties entitled thereto or secured to their satisfaction.⁷⁵

1115. Notice—Appointment of guardians or agents—Statute—Before partition is made the court shall appoint guardians for all minors and

⁶⁷ Pond v. Pond, 13 Mass. 413.

⁶⁸ Cook v. Davenport, 17 Mass. 345. 502.

See Farnham v. Thompson, 34 Minn.

330, 26 N. W. 9; Dobberstein v. Murphy, 152.

44 Minn. 526, 47 N. W. 171.

⁶⁹ G. S. 1913, § 7409.

⁷⁰ G. S. 1913, § 7408.

⁷¹ Buck v. Wolcott, 15 Gray (Mass.)

502.

⁷² Hagar v. Wiswall, 10 Pick. (Mass.)

152.

⁷³ Petition of King, 129 Mass. 413, 415.

⁷⁴ G. S. 1913, § 7410.

⁷⁵ G. S. 1913, § 7411.

insane persons interested in the estate to be divided for whom guardians have not already been appointed, and discreet persons as agents of parties who reside out of the state and are not otherwise represented. The warrant shall recite such appointments, and the referees shall give notice to all persons interested in the partition, their guardians or agents, of the time when they will proceed to make partition.⁷⁶

1116. Report of referees—Confirmation—Decree—Statute—The referees shall make written report of their proceedings to the court; and the court may, for sufficient cause, set it aside, and appoint other referees, or direct the same referees to make another partition. When the report is confirmed it shall be recorded, and the court shall make a decree assigning the estate to the persons entitled thereto in accordance therewith.⁷⁷ The mere assignment of portions of the property, in severalty, carries to each tenant the same estate in the premises set off to him that he had as a tenant in common of the whole property, and it is not necessary to use the word "heirs" if the tenancy in common is a fee simple.⁷⁸ A decree of the probate court making partition among devisees and deciding that one of them holds a life estate in the part allotted to him, and acquiesced in by him, precludes him from thereafter asserting a different tenure.⁷⁹ The court may annex reasonable easements to one part of the land and impose reasonable servitudes upon another part, for the benefit of the several owners, in the use of their respective shares of the property.⁸⁰

1117. Expenses—How paid—Statute—If at the time of the partition or distribution the executor or administrator has retained sufficient effects in his hands which may lawfully be applied to that purpose, the expenses of such partition or distribution may be paid by him, when it appears to the court just and equitable, and not inconsistent with the intention of the testator. But if there be no such effects the expenses shall be paid by the parties interested, in proportion to their respective shares or interests in the premises, as shall be determined by the court. If any person neglects to pay the sum so assessed against him, the court may issue execution therefor in favor of the person entitled thereto.⁸¹

1118. Appointment of agent for non-resident—Statute—When an estate is assigned by decree of court, as herein provided, to any person residing out of the state, and having no agent therein, and it is necessary that some person be authorized to take possession and charge of the same for his benefit, the court may appoint an agent for that purpose, as well as to act for such absent person in the partition. Such agent shall give bond to the judge, to be approved by him, faithfully to manage and

⁷⁶ G. S. 1913, § 7412.

⁷⁷ G. S. 1913, § 7413.

⁷⁸ *Bornstein v. Doherty*, 204 Mass. 280, 90 N. E. 531.

⁷⁹ *Parkinson v. Parkinson*, 139 Mich. 530, 102 N. W. 1002.

⁸⁰ *Bornstein v. Doherty*, 204 Mass. 280, 90 N. E. 531.

⁸¹ G. S. 1913, § 7414.

account for such estate, and the court may examine and allow his account, and award a reasonable sum out of the estate for his services and expenses.⁸²

1119. Comments on statutes—The statutes governing partition in the probate court are very faulty and might well be repealed altogether. They are not much resorted to as the procedure is cumbersome and uncertain. Usually the beneficiaries of an estate make partition by agreement after a final decree of distribution. If they are unable to agree it is usual and more satisfactory to resort to the statutory action in the district court.

ACTIONS BY AND AGAINST REPRESENTATIVES

1120. Representative may sue in his own name—An executor or administrator may sue in his own name without joining the heirs or other beneficiaries of the estate.⁸³

1121. On what causes of action representative may sue—In general—An executor or administrator may sue on any cause of action, either *ex contractu* or *ex delicto*, existing in favor of the decedent at the time of his death, or upon which he might sue if living, except causes of action arising out of injury to the person.⁸⁴ He may maintain an action to recover possession of the real property of the decedent or to quiet title thereto.⁸⁵ He may maintain an action to recover possession of the personal property of the decedent or other assets of the estate.⁸⁶ He may set aside fraudulent conveyances of the decedent.⁸⁷ He may maintain an action in the nature of trover for a conversion of personal property constituting assets of the estate, irrespective of whether the estate is indebted or not.⁸⁸ He may maintain replevin for personal property belonging to the estate. What shall be done with the property in the course of administration cannot be litigated in such action.⁸⁹ He may sue on a bond to pay money to the decedent "on demand" though the decedent did not make demand.⁹⁰ He may sue on a note payable to the decedent though another has a beneficial interest therein.⁹¹ He may sue on a covenant of seizin running to the decedent.⁹² He may sue on

⁸² G. S. 1913, § 7415.

⁸³ G. S. 1913, § 7876; *Miller v. Hoberg*, 22 Minn. 249; *Cooper v. Hayward*, 71 Minn. 374, 74 N. W. 152; *Hamilton v. McIndoo*, 81 Minn. 324, 84 N. W. 118.

⁸⁴ G. S. 1913, § 8174.

⁸⁵ See § 738.

⁸⁶ See §§ 735, 858.

⁸⁷ See § 865.

⁸⁸ *Bergh v. Calmenson*, 136 Minn. 322, 162 N. W. 353; *Horton v. Jack*, 115 Cal. 29, 46 Pac. 920. See *Kemp v. Holz*, 149

Minn. 237, 183 N. W. 287 (trover held not to lie); § 1122.

⁸⁹ *Wiswell v. Wiswell*, 35 Minn. 371, 29 N. W. 166. See *Kemp v. Holz*, 149 Minn. 237, 183 N. W. 287 (replevin held not to lie).

⁹⁰ *Portner v. Wilfahrt*, 85 Minn. 73, 88 N. W. 418.

⁹¹ *Cooper v. Hayward*, 67 Minn. 92, 69 N. W. 638; *Id.*, 71 Minn. 374, 74 N. W. 152.

⁹² *Lowry v. Tillyen*, 81 Minn. 500, 18 N. W. 452.

a promise to decedent to pay a mortgage debt or reconvey.⁹³ He may sue for the recovery of money loaned by the decedent.⁹⁴ He may sue for the purchase price of land sold by the decedent though the sole heir of the decedent has conveyed the land to the purchaser under the contract and received the purchase price.⁹⁵ He may maintain an action to recover royalties under a mining lease executed by the decedent, accruing during the year for redemption from a sale on foreclosure of a mortgage executed by the decedent.⁹⁶ He cannot maintain an action for trespass upon real property committed after the death of the decedent unless he has first asserted his right under the statute by taking possession of such property. But, if he takes possession of such property he may then maintain an action for a trespass committed thereon before he took possession and after the death of the decedent. In such case his possession, as well as his letters of administration, relate back to the death of the decedent. If the land is vacant the bringing of an action is equivalent to taking possession. The amount of his recovery is not limited to the amount necessary to pay debts. He is entitled to recover the full amount of the damage caused by the trespass and holds it as assets of the estate. If the heirs or devisees have already commenced an action the representative has a right to be substituted therein when he takes possession. If they have recovered before he takes possession he is entitled to the proceeds if needed for purposes of administration.⁹⁷ He may maintain an action to set aside a contract for the sale of real property made by the decedent on the ground of mental incompetency.⁹⁸ It has been held that a representative could not maintain replevin or trover to recover certain assets held through a fraudulent transfer, his exclusive remedy being an action under G. S. 1913, § 7131.⁹⁹ He may maintain an action to cancel a contract for the sale of real estate and to quiet title thereto.¹ He may demand of a corporation stock therein to which the decedent was entitled and maintain an action for damages for its failure to issue the stock.² He may maintain an action to impress a trust upon real property purchased with money fraudulently obtained from his decedent.³ If a representative of a surety pays the principal debt he may maintain an action in his own name against the principal debtor for repayment, or an action against a co-surety for

⁹³ *Connolly v. Connolly*, 26 Minn. 350, 4 N. W. 233.

⁹⁴ *Chamberlain v. Tiner*, 31 Minn. 371, 18 N. W. 97.

⁹⁵ *Vachon v. Nichols-Chisholm Lumber Co.*, 126 Minn. 303, 144 N. W. 223, 148 N. W. 288.

⁹⁶ *Orr v. Bennett*, 135 Minn. 443, 161 N. W. 165.

⁹⁷ *Noon v. Finnegan*, 29 Minn. 418, 13 N. W. 197; *Id.*, 32 Minn. 81, 19 N. W. 391.

⁹⁸ *Wheeler v. McKeon*, 137 Minn. 92, 162 N. W. 1070. See 1 A. L. R. 1517.

⁹⁹ *Kemp v. Holz*, 149 Minn. 237, 183 N. W. 287.

¹ *Smith v. Stiles*, 68 Wash. 345, 123 Pac. 448.

² *Coray v. Perry Irrigation Co.*, 50 Utah 70, 166 Pac. 672.

³ *Morris v. Vyse*, 154 Mich. 253, 117 N. W. 639.

contribution.⁴ He cannot sue to recover money payable to the heirs of the decedent.⁵ He cannot maintain an action for the purpose of procuring the issue of an execution upon a judgment recovered in the district court by the decedent. His remedy is by motion in the action in which the judgment was rendered.⁶ He cannot maintain an action to set aside a transfer of personal property made in anticipation of death by the decedent, if the estate is not prejudiced thereby.⁷ He cannot maintain partition proceedings.⁸ He cannot maintain trespass if he has surrendered possession.⁹

1122. In what capacity representative must sue—Upon causes of action belonging to him in his representative capacity a representative must sue in that capacity and not individually.¹⁰ It is the general rule that upon all causes of action, whether on contract or for tort, accruing during the life of the decedent, a representative must sue in his representative capacity.¹¹ Upon causes of action growing out of the contracts of the representative in relation to the estate he may sue either in his representative or individual capacity whether the contract purports to be made with him in his individual or representative capacity.¹² A representative may maintain trover for a conversion of the property of the estate occurring after the death of the decedent, whether before or after his appointment and whether he ever had actual possession or not, either in his individual or representative capacity. If allegations of representative capacity are made in the complaint they may be disregarded as surplusage.¹³ The same rule applies to replevin. A representative may maintain replevin for property of the estate either in his representative or individual capacity.¹⁴ Although the proper form of

⁴ *De Paris v. Wilmington Trust Co.* (Del.) 104 Atl. 1352.

⁵ *Bombash v. Supreme Sitting*, 42 Minn. 241, 44 N. W. 12. See *Vachon v. Nichols-Chisholm Lumber Co.*, 126 Minn. 303, 144 N. W. 223, 148 N. W. 288.

⁶ *Lough v. Pitman*, 25 Minn. 120.

⁷ *Ober v. Brewster*, 113 Minn. 388, 129 N. W. 776.

⁸ *Owings v. Owings*, 150 Mich. 609, 114 N. W. 393; *Ryer v. Fletcher Ryer Co.*, 126 Cal. 482, 58 Pac. 908.

⁹ *Plumley's Admr. v. Plumley*, 84 Vt. 286, 79 Atl. 45.

¹⁰ *Hamilton v. McIndoo*, 81 Minn. 324, 84 N. W. 118 (action by administrator de bonis non on a foreign judgment rendered in his favor as administrator).

¹¹ *Kent v. Bothwell*, 152 Mass. 341, 25 N. E. 721; *Buckland v. Gallup*, 105 N. Y. 453, 11 N. E. 843; *Dunphy v. Callahan*, 110 N. Y. S. 179; 18 Cyc. 874; 24

C. J. 732; 8 Ency. Pl. & Pr. 658; Ann. Cas. 1916E, 115.

¹² *Bond v. Corbett*, 2 Minn. 248 (209) (action for recovery of money of estate loaned by the representative); *Morse v. King*, 73 N. J. L. 548, 63 Atl. 986; *Buckland v. Gallup*, 105 N. Y. 453, 11 N. E. 843; 18 Cyc. 874; 24 C. J. 732; 8 Ency. Pl. & Pr. 658; *Woerner*, Am. Law of Adm. (2 ed.) § 303.

¹³ *Kent v. Bothwell*, 152 Mass. 341, 25 N. E. 721; *Buckland v. Gallup*, 105 N. Y. 453, 11 N. E. 843; *Knox v. Bigelow*, 15 Wis. 455; *Dunphy v. Callahan*, 110 N. Y. S. 179; *Reichard v. Hutton*, 133 N. Y. S. 44; *Leavitt v. Scholes Co.*, 210 N. Y. 107, 103 N. E. 965; *Munch v. Williams*, 24 Cal. 167; *Jahns v. Nolting*, 29 Cal. 507; *Ham v. Henderson*, 50 Cal. 367; *Horton v. Jack*, 115 Cal. 29, 46 Pac. 920; 18 Cyc. 879.

¹⁴ *Kent v. Bothwell*, 152 Mass. 341, 25 N. E. 721; 18 Cyc. 879.

action on a cause of action arising out of the administration of the estate is by the representative in his individual capacity, basing his right and title on his letters of administration or letters testamentary, yet he may sue either individually or in his representative capacity, since, no matter in what capacity a recovery is had, it becomes assets of the estate for which he is accountable, and the same defences and remedies are available to the defendant whose liability will be discharged by the satisfaction of the recovery no matter in which form it may be had. The rule is otherwise in actions against representatives.¹⁵ Where property of an estate has been wrongly interfered with by a third party, though with the permission of the representative, thus making the representative liable on an accounting, the representative may sue for the wrong in his representative capacity.¹⁶ The entire record may be examined to determine in what capacity an action was brought and tried.¹⁷

1123. Against representatives—Statutes—An action will lie against a representative on any claim or cause of action against the decedent which survives and which cannot be proved and allowed against his estate in the probate court; otherwise if it can be so proved and allowed.¹⁸ No action at law shall lie against an executor or administrator for the recovery of money upon any demand against the decedent allowable by the probate court, and no claim against a decedent shall be a charge upon his estate unless presented to the probate court for allowance within five years after his death: Provided, that nothing in this section shall be construed as preventing an action to enforce a lien existing at the date of decedent's death, nor as affecting the rights of a creditor to recover from the next of kin, legatees, or devisees to the extent of assets received.¹⁹ This statute has been held not to bar an action on the bond of a representative.²⁰ There was a similar provision barring actions on claims not presented to commissioners under the former system.²¹ The "action" referred to in this statute is the proper action to be brought in

¹⁵ *Leavitt v. Scholes Co.*, 210 N. Y. 107, 103 N. E. 965. See 24 C. J. 732.

¹⁶ *Reichard v. Hutton*, 133 N. Y. S. 44.

¹⁷ *First Nat. Bank v. Shuler*, 153 N. Y. 163, 172, 47 N. E. 262.

¹⁸ G. S. 1913, §§ 7323, 7326, 8174; *Comstock v. Matthews*, 55 Minn. 111, 56 N. W. 583 (action for trespass on real estate committed by decedent); *Oswald v. Pillsbury*, 61 Minn. 520, 63 N. W. 1072 (contingent claim arising on contract not provable in probate court—claim for contribution); *Martz v. McMahon*, 114 Minn. 34, 129 N. W. 1049 (contingent claim against surety on bond of an administrator not provable in probate court). As to what causes of action survive, see §

1125. As to what claims are provable in probate court, see §§ 881-935.

¹⁹ G. S. 1913, § 7326. See § 883. As to what claims must be presented to the probate court, see §§ 881-935. As to what claims or causes of action survive, see § 1125.

²⁰ *Martz v. McMahon*, 114 Minn. 34, 129 N. W. 1049.

²¹ *Wilkinson v. Estate of Winne*, 15 Minn. 159 (123); *Commercial Bank v. Slater*, 21 Minn. 172; *Id.*, 21 Minn. 174; *Bunnell v. Post*, 25 Minn. 376, 380; *Cummings v. Halsted*, 26 Minn. 151, 1 N. W. 1052; *Fern v. Leuthold*, 39 Minn. 212, 39 N. W. 309.

a court of general jurisdiction.²² Where the maker of a note made a payment thereon to an agent of the payee who was not authorized to receive it and who was thereafter made administrator of the estate of the payee, it was held that the maker, to whom the note was given by the will of the payee, might recover the amount paid in an action against the representative.²³ Where a party to an action dies after verdict against him and judgment is entered thereon after his death without his representative being substituted, an action will not lie on the judgment against the representative. The judgment is enforceable in the probate court.²⁴

1124. In what capacity representatives must be sued—An executor or administrator must be sued in his representative capacity on all contracts made or obligations incurred, or torts committed by the decedent.²⁵ An executor or administrator must be sued in his individual capacity on all contracts in relation to the estate made by him upon a new consideration though he purported to make them in his representative capacity.²⁶ It is the general rule that an executor or administrator must be sued in his individual capacity for all torts committed by him, though they are committed in relation to the estate and it is benefited thereby.²⁷ But where a representative wrongfully takes and treats as assets property which does not belong to the estate, he may probably be sued therefor in his representative capacity by the true owner.²⁸ Where a representative takes possession of realty of the decedent under the statute ejectment will lie against him in his representative capacity.²⁹ An executor cannot be sued personally on a judgment recovered against him as executor in an action by a creditor of the testator.³⁰ Replevin will lie against a representative in his individual capacity though he claims the property in his official capacity.³¹ In an action by a distributee for his distributive share, after final distribution, the representative should be sued in his individual capacity.³² An action will lie against a representative personally on a claim for funeral expenses if he has assets to pay it and refuses to pay it upon demand.³³ An action will lie against a representative in his official capacity to establish a claim for funeral expenses, though they were not incurred by

²² *State v. Probate Court*, 103 Minn. 325, 330, 115 N. W. 173.

²³ *Braithwaite v. Bain*, 66 Minn. 325, 69 N. W. 4.

²⁴ *Berkey v. Judd*, 27 Minn. 475, 8 N. W. 383.

²⁵ 18 Cyc. 881; 24 C. J. 732.

²⁶ 18 Cyc. 881; 24 C. J. 739. See cases under § 733.

²⁷ *Fritz v. McGill*, 31 Minn. 536, 18 N. W. 753; 18 Cyc. 883. See cases under § 765.

²⁸ See § 705.

²⁹ *Pabst Brewing Co. v. Small*, 83 Minn. 445, 86 N. W. 450.

³⁰ *Jenkins v. Wood*, 140 Mass. 66, 2 N. E. 780.

³¹ *Veader v. Veader*, 89 N. J. L. 727, 99 Atl. 309. See 18 Cyc. 884.

³² *Malone v. Davis*, 67 Cal. 279, 7 Pac. 703; *St. Mary's Hospital v. Perry*, 152 Cal. 338, 92 Pac. 864. See 13 Ency. Pl. & Pr. 10; 18 Cyc. 884.

³³ *Dampier v. St. Paul Trust Co.*, 46 Minn. 526, 49 N. W. 286; *Barrett v. Heim* (Minn.) 188 N. W. 207.

him.⁸⁴ An action cannot be maintained against a representative personally and also in his representative capacity. If such an action is brought the plaintiff may be required to elect on which cause of action he will proceed.⁸⁵

1125. What causes of action survive—In determining whether a cause of action for a tort survives the statutes in force at the time of the death of the wrongdoer control rather than those at the time of the injury.⁸⁶ A cause of action for trespass to real estate survives.⁸⁷ A cause of action for malicious attachment of property survives.⁸⁸ A cause of action for damages sustained by fraud or deceit is one for injury to property and survives.⁸⁹ A cause of action for fraud and deceit in the exchange of property survives.⁹⁰ A cause of action for a personal tort survives if it passed into a verdict for the decedent before his death.⁹¹ A cause of action for a personal tort which has passed into judgment in favor of the injured party survives.⁹² A liability for a nuisance survives.⁹³ A right to a mechanic's lien survives.⁹⁴ A cause of action on a contract guaranteeing the payment of a note survives.⁹⁵ A liability of a stockholder in a corporation to creditors of the corporation survives.⁹⁶ The right of a ward to recover land belonging to him which has been illegally sold by his guardian survives.⁹⁷ A cause of action for damages for the destruction of personal property by fire through negligence survives.⁹⁸ A cause of action for breach of a covenant against incumbrances survives.⁹⁹ A cause of action for the breach of a contract for

⁸⁴ *Golden Gate Undertaking Co. v. Taylor*, 168 Cal. 94, 141 Pac. 922. See Ann. Cas. 1915D, 746; 14 Col. L. Rev. 685.

⁸⁵ *Fritz v. McGill*, 31 Minn. 536, 18 N. W. 753. See *Whitney v. Pinney*, 51 Minn. 146, 53 N. W. 198; *Braithwait v. Bain*, 66 Minn. 325, 69 N. W. 4; *Pabst Brewing Co. v. Small*, 83 Minn. 445, 86 N. W. 450; *Fischer v. Hintz*, 145 Minn. 161, 176 N. W. 177; *Ency. Pl. & Pr.* 681; 18 Cyc. 975; 24 C. J. 819.

⁸⁶ *Gorlitzer v. Wolffberg*, 208 N. Y. 475, 102 N. E. 528.

⁸⁷ *Comstock v. Matthews*, 55 Minn. 111, 56 N. W. 583.

⁸⁸ *Hansen Mercantile Co. v. Wyman, Partridge & Co.*, 105 Minn. 491, 117 N. W. 928.

⁸⁹ *Guggisberg v. Boettger*, 139 Minn. 226, 166 N. W. 177.

⁹⁰ *Billson v. Linderberg*, 66 Minn. 66, 68 N. W. 771. See *Cornell v. Upper Michigan Land Co.*, 131 Minn. 337, 155 N. W. 99.

⁹¹ *Cooper v. St. Paul City Ry. Co.*, 55

Minn. 134, 56 N. W. 588; *Kent v. Chapel*, 67 Minn. 420, 70 N. W. 2.

⁹² See *Hunt v. Conrad*, 47 Minn. 557, 50 N. W. 614; *Cooper v. St. Paul City Ry. Co.*, 55 Minn. 134, 56 N. W. 588; *Kent v. Chapel*, 67 Minn. 420, 70 N. W. 2; *Boogren v. St. Paul City Ry. Co.*, 97 Minn. 51, 54, 106 N. W. 104.

⁹³ *Slogg v. Dilworth*, 38 Minn. 179, 36 N. W. 451. See *Warsaw v. Bakken*, 133 Minn. 128, 156 N. W. 7, 157 N. W. 1089.

⁹⁴ *Tuttle v. Howe*, 14 Minn. 145 (113); *Kinney v. Duluth Ore Co.*, 58 Minn. 455, 60 N. W. 23.

⁹⁵ *Harbord v. Cooper*, 43 Minn. 466, 45 N. W. 860; *Phelps v. Sargent*, 69 Minn. 118, 71 N. W. 927; *Wood v. Bragg*, 75 Minn. 527, 78 N. W. 93.

⁹⁶ *Willoughby v. St. Paul German Ins. Co.*, 80 Minn. 432, 83 N. W. 377.

⁹⁷ *Jordan v. Secombe*, 33 Minn. 220, 22 N. W. 383.

⁹⁸ *Babcock v. Canadian Northern Ry. Co.*, 117 Minn. 434, 136 N. W. 275.

⁹⁹ *Randall v. Macbeth*, 81 Minn. 376, 84 N. W. 119.

the purchase of land survives, including the right to have the contract rescinded for fraud.⁵⁰ A cause of action for the breach of a saloon-keeper's bond survives.⁵¹ A claim for compensation for services survives.⁵² A claim for refundment upon the revocation of a liquor license survives.⁵³ A claim against a life tenant for waste survives.⁵⁴ A claim for arrears of alimony survives.⁵⁵ A cause of action against a carrier for breach of contract to carry safely survives though the breach consists in a personal injury.⁵⁶ An action to restrain defendant from obstructing a roadway through his land and to abate the nuisance caused by its obstruction, the issue being whether under an agreement relative to the opening of the roadway and what was done pursuant to it the roadway became a town road, affects interests in land and does not abate upon the death of a party.⁵⁷ An action brought during the lifetime of the insured to cancel a certificate of membership in a mutual benefit society does not abate by reason of the death of the insured, nor does it abate because the plaintiff now has an adequate remedy at law.⁵⁸ A cause of action for libel, slander, malicious prosecution and the like does not survive.⁵⁹ A cause of action for injury to the person does not survive.⁶⁰ A cause of action for false imprisonment does not survive.⁶¹ A cause of action for personal injury resulting from negligence does not survive.⁶² A cause of action for an assault does not survive.⁶³ A cause of action for breach of promise of marriage does not survive, at least where there is no special damage.⁶⁴ A right to exemption from taxation does not survive.⁶⁵ A cause of action for a tort resulting in death does not survive except as provided by G. S. 1913, § 8175.⁶⁶

⁵⁰ *Cornell v. Upper Michigan Land Co.*, 131 Minn. 337, 155 N. W. 99.

⁵¹ *Koski v. Pakkala*, 121 Minn. 450, 140 N. W. 793.

⁵² *Leonard v. Farrington*, 124 Minn. 160, 144 N. W. 763. See *Dunnell*, Minn. Digest and Supplements, § 566.

⁵³ *Hillsdale Distillery Co. v. Briant*, 129 Minn. 223, 152 N. W. 265.

⁵⁴ *In re Oertle's Estate*, 34 Minn. 173, 182, 24 N. W. 924.

⁵⁵ *Van Ness v. Ransom*, 215 N. Y. 557, 109 N. E. 593.

⁵⁶ *Kelley v. Union Pacific Ry. Co.*, 16 Colo. 455.

⁵⁷ *Warsaw v. Bakken*, 133 Minn. 128, 156 N. W. 7, 157 N. W. 1089.

⁵⁸ *National Council v. Weisler*, 131 Minn. 365, 155 N. W. 396; *Kanevsky v. National Council*, 132 Minn. 422, 157 N. W. 646; *National Council v. Schelber*, 137 Minn. 423, 163 N. W. 781.

⁵⁹ *Bryant v. American Surety Co.*, 69 Minn. 30, 71 N. W. 826.

⁶⁰ *Gilman v. Maxwell*, 79 Minn. 377, 82 N. W. 669.

⁶¹ *Hunt v. Conrad*, 47 Minn. 557, 50 N. W. 614.

⁶² *Boogren v. St. Paul City Ry. Co.*, 97 Minn. 51, 106 N. W. 104; *Anderson v. Fielding*, 92 Minn. 42, 99 N. W. 357.

⁶³ *Hammons v. Great Northern Ry. Co.*, 53 Minn. 249, 54 N. W. 1108.

⁶⁴ *Chase v. Fitz*, 132 Mass. 359; *Hovey v. Page*, 55 Me. 142; *Wade v. Kalbfleisch*, 58 N. Y. 282. See *Kennedy v. Rogan*, 52 Mont. 242, 156 Pac. 1078; *Woerner*, Am. Law of Adm. (2 ed.) § 294.

⁶⁵ *State v. Great Northern Ry. Co.*, 106 Minn. 303, 327, 119 N. W. 202.

⁶⁶ *Green v. Thompson*, 26 Minn. 500, 5 N. W. 376; *Scheffler v. Minneapolis & St. Louis Ry. Co.*, 32 Minn. 125, 19 N. W. 656; *Anderson v. Fielding*, 92 Minn. 42, 99 N. W. 357; *Weber v. St. Paul City Ry. Co.*, 97 Fed. 140.

1126. Substitution of representatives as parties to actions—Statute— No action shall abate by reason of the death or disability of a party, or the transfer of his interest, if the cause of action continues or survives. In such cases the court, on motion, may substitute the representative or successor in interest, or, in cases of transfer of interest, may allow the action to proceed in the name of the original party. And after a verdict, decision, or report of a referee, fixing the amount of damages for a wrong, such action shall not abate by the death of any party thereto.⁶⁷ The remedy by motion is exclusive. It is a substitute for the former bill of revivor and original bill in the nature of revivor. The facts upon which the motion is based may be contested.⁶⁸ Though the statute is in terms permissive, and not mandatory, the court is not at liberty to exercise an arbitrary discretion, but in case of death, at least of the plaintiff, where the action cannot otherwise proceed, substitution should always be allowed unless good cause is shown to the contrary.⁶⁹ The word "representative" as used in the statute is not limited to executors and administrators, but includes all who occupy the position held by the decedent, succeeding to his rights and liabilities.⁷⁰ In the case of the death of a plaintiff his executor or administrator is ordinarily substituted as a matter of course, but not invariably, as he may not be the "successor in interest" of the subject-matter of the action.⁷¹ A foreign representative may be substituted under the statute, but if there is a domestic representative he will be preferred.⁷² The fact that the pleading may have to be changed does not affect the right to substitution. The court may order proper issues to be framed according to the facts of the particular case. It is no objection to substitution of a defendant that the original complaint does not state a cause of action against him.⁷³ In an action on a joint and several contract, if one of the defendants dies, the action may be continued against the survivor without joining the representative of the deceased defendant.⁷⁴ Where one of two joint parties on the same side of a contract dies, the survivor may maintain an action without having the representatives of the de-

⁶⁷ G. S. 1913, § 7685.

⁶⁸ *Landis v. Olds*, 9 Minn. 90 (79); *Lough v. Pitman*, 25 Minn. 120; *Willoughby v. St. Paul German Ins. Co.*, 80 Minn. 432, 83 N. W. 377. See, under former statute, *Lee v. O'Shaughnessy*, 20 Minn. 173 (157).

⁶⁹ *Landis v. Olds*, 9 Minn. 90 (79). See under G. S. 1913, § 8175; *Wilson v. Anderson*, 145 Minn. 274, 177 N. W. 130.

⁷⁰ *Willoughby v. St. Paul German Ins. Co.*, 80 Minn. 432, 83 N. W. 377; *National Council v. Weisler*, 131 Minn. 365, 155 N. W. 396; *Kanevsky v. National Council*, 132 Minn. 422, 157 N. W. 646. See

Waite v. Coaracy, 45 Minn. 159, 47 N. W. 537; *Warsaw v. Bakken*, 133 Minn. 128, 156 N. W. 7, 157 N. W. 1089.

⁷¹ *Landis v. Olds*, 9 Minn. 90 (79); *Stocking v. Hanson*, 22 Minn. 542; *Jordan v. Secombe*, 33 Minn. 220, 224, 22 N. W. 383; *Brown v. Brown*, 35 Minn. 191, 28 N. W. 238; *Cooper v. St. Paul etc. Ry. Co.*, 55 Minn. 134, 56 N. W. 588.

⁷² *Brown v. Brown*, 35 Minn. 191, 28 N. W. 238. See § 1190.

⁷³ *National Council v. Weisler*, 131 Minn. 365, 155 N. W. 396.

⁷⁴ *Lanier v. Irvine*, 24 Minn. 116.

cedent substituted.⁷⁵ An order vacating a prior order bringing in certain parties as defendants under G. S. 1913, § 7690, has been held not a bar to a subsequent application to substitute the same parties as defendants in place of a deceased defendant under the above statute.⁷⁶ Whether a motion for substitution is made within a reasonable time is a question for the trial court, and its determination will rarely be reversed on appeal.⁷⁷ A stranger to an action cannot object to a substitution of parties.⁷⁸ A general administrator is entitled to be substituted as plaintiff in an action begun by a special administrator.⁷⁹

1127. Limitation of actions—Statute—The time which elapses between the death of a person and the granting of letters testamentary or of administration on his estate, not exceeding six months, and a period of six months after the granting of such letters, are not to be deemed any part of the time limited for the commencement of actions by executors or administrators. If the death occur within the last year of the period of limitation, the action may be commenced by the personal representative at any time within one year after such death. And if a cause of action survive against a decedent, which is not required by law to be presented to the probate court, an action may be brought thereon against the personal representative of such decedent at any time within one year after the granting of letters testamentary or of administration.⁸⁰ If a representative is absent from the state the statute does not run in his favor during his absence.⁸¹ This statute is inapplicable to a statutory action for death by wrongful act.⁸² It is inapplicable to an action to foreclose a mortgage.⁸³ If a representative is appointed within six months of the death of the decedent he is entitled to one year from the death in which to bring an action, the death occurring within the last year of the period of limitation.⁸⁴ If the death of the decedent does not occur within the last year of the period of limitation the running of the statute of limitation is suspended for six months after the appointment of an executor or administrator, plus the time elapsing between the

⁷⁵ Hedderly v. Downs, 31 Minn. 183, 17 N. W. 274; Northness v. Hillestad, 87 Minn. 304, 91 N. W. 1112.

⁷⁶ National Council v. Weisler, 131 Minn. 365, 155 N. W. 396.

⁷⁷ Hunt v. O'Leary, 78 Minn. 281, 80 N. W. 1120; Willoughby v. St. Paul German Ins. Co., 80 Minn. 432, 83 N. W. 377; St. Paul, etc. Ry. Co. v. Eckel, 82 Minn. 278, 84 N. W. 1008. See Lee v. O'Shaughnessy, 20 Minn. 173 (157); Stocking v. Hanson, 22 Minn. 542; Boeing v. McKinley, 44 Minn. 392, 46 N. W. 766; Walte v. Coaracy, 45 Minn. 159, 47 N. W. 537; Kanevsky v. National Council, 132 Minn. 422, 157 N. W. 646.

⁷⁸ Hunt v. O'Leary, 78 Minn. 281, 80 N. W. 1120.

⁷⁹ Ruls v. Santa Barbara Gas, etc. Co., 164 Cal. 188, 128 Pac. 330.

⁸⁰ G. S. 1913, § 7711. See Palmer v. O'Rourke, 130 Wis. 507, 110 N. W. 389; Order of St. Benedict v. Steinhauser, 179 Fed. 137; 18 Cyc. 919; 24 C. J. 772.

⁸¹ Wilkinson v. Estate of Winne, 15 Minn. 159 (123).

⁸² Rugland v. Anderson, 30 Minn. 386, 15 N. W. 676.

⁸³ Hill v. Townley, 45 Minn. 167, 47 N. W. 653.

⁸⁴ St. Paul Trust Co. v. Sargent, 44 Minn. 449, 47 N. W. 51.

death and the time of such appointment, not exceeding six months.⁸⁵ The statute contemplates that the time after six months from the death of the decedent shall be computed in determining the time within which an action must be brought, whether a representative is appointed within such time or not.⁸⁶ In an action by an administrator to recover the value of land conveyed by the decedent, on the ground that the deed was procured by fraud or undue influence, where the facts alleged to constitute the fraud or undue influence are discovered by the heirs of the grantor, and the administrator is appointed and the action commenced more than seven years after such discovery, the action is barred by the statute of limitations.⁸⁷

1128. Venue—Representatives have no official residence and may be sued in transitory actions where they reside.⁸⁸

1129. Pleading—It is no longer necessary to make proof of letters testamentary or of administration. But one who sues as an executor or administrator must allege, in a direct and issuable form, that he is such. This is properly done by alleging that he is executor or administrator by virtue of letters issued by a probate court of a specified county at a specified time.⁸⁹ Where an action is tried on the theory that it is by or against an executor or administrator in his representative capacity the absence of proper allegations in that regard will be disregarded.⁹⁰ Where the averments of a complaint show that the plaintiff sues solely as executor the omission in the title to the action of the word "as" is immaterial.⁹¹ In an action by an administrator de bonis non the name of the original administrator should be given and it should be alleged that he is dead, or has resigned, or has been discharged, or his letters revoked, as the case may be.⁹² In an action purporting to be brought by plaintiff as a foreign administrator, allegations in the complaint to the effect that plaintiff has been duly appointed such foreign administrator, and has duly filed in the proper probate court of this state a duly authenticated copy of his appointment, are put in issue by an answer denying the complaint, and "each and every part and portion thereof."⁹³ In an action by heirs against a representative for negligence in his administration the complaint must allege negligence.⁹⁴ In an action of

⁸⁵ Wood v. Bragg, 75 Minn. 527, 78 N. W. 93. See 18 Cyc. 919.

⁸⁶ Howard v. Farr, 115 Minn. 86, 131 N. W. 1071.

⁸⁷ Howard v. Farr, 115 Minn. 86, 131 N. W. 1071.

⁸⁸ Thompson v. Wood, 115 Cal. 301, 47 Pac. 50. See 18 Cyc. 911; 24 C. J. 768.

⁸⁹ Chamberlain v. Tiner, 31 Minn. 371, 18 N. W. 97; Perkins v. Merrill, 37 Minn. 40, 33 N. W. 3; Hamilton v. McIndoo, 81 Minn. 324, 84 N. W. 118; Cohn v. Huson, 113 N. Y. 662, 21 N. E. 703. See

Hughes v. Meehan, 84 Minn. 226, 87 N. W. 768 (allegation of appointment in "said county"—admission of due appointment in answer). For forms see, Dunning, Minn. Pl. (2 ed.) §§ 1314-1325.

⁹⁰ Parker v. Maxwell, 45 Minn. 1, 47 N. W. 161.

⁹¹ Beers v. Shannon, 73 N. Y. 292.

⁹² Hamilton v. McIndoo, 81 Minn. 324, 84 N. W. 118.

⁹³ Fogle v. Schaeffer, 23 Minn. 304.

⁹⁴ Winters v. Ellefson, 138 Minn. 3, 150 N. W. 171.

ejectment by an administrator no presumption arises on the complaint, from the allegation of the title in the intestate prior to his death, that the title is in his estate at the commencement of the action.⁹⁵ Under a denial that a representative was appointed the invalidity of a pretended appointment may be shown.⁹⁶ The words "as administrator" in a complaint may show that the action was brought by the administrator in his representative capacity, and that a judgment in the action against him does not bind him personally.⁹⁷ Where, in the title of an action, the plaintiff's name is followed by "executor of the last will and testament of A, deceased," and the complaint shows no liability to plaintiff except in his individual capacity, the quoted words may be rejected as surplusage.⁹⁸

1130. Setoff—Statute—In an action by a representative for the recovery of a debt or claim of the estate the defendant "may set off any claim he has against the estate, instead of presenting the same to the probate court, and, if the final judgment be in his favor, the same shall be certified by the court rendering it to the probate court and shall be considered the true balance."⁹⁹ A cause of action arising out of a contract with the representative cannot be set off, except possibly in a few exceptional cases where the contract gives rise to a claim against the estate. It is to be noted that our statute is broader than the statutes of some states.¹ Immature claims may doubtless be set off if the estate is insolvent.² Debts of the decedent owing at the time of his death, but not maturing until thereafter, may be set off.³ A defendant may set off a claim without having presented it to the probate court.⁴ It is immaterial that the time for filing claims against the estate has expired and the setoff may be made though the estate has been distributed.⁵ A note of the decedent maturing after his death and before the commencement of the action may be interposed as a setoff.⁶ The statute does not au-

⁹⁵ *Miller v. Hoberg*, 22 Minn. 249.

⁹⁶ *Bombolis v. Minneapolis & St. L. R. Co.*, 128 Minn. 106, 150 N. W. 387.

⁹⁷ *Whitney v. Pinney*, 51 Minn. 146, 53 N. W. 198.

⁹⁸ *Litchfield v. Flint*, 104 N. Y. 543, 11 N. E. 58. See § 1122.

⁹⁹ G. S. 1913, § 7330. (See § 884, *supra*.) See also G. S. 1913, § 7323; 18 Cyc. 894; 24 C. J. 754; 11 R. C. L. 264; L. R. A. 1915A, 229.

¹ *McLaughlin v. Winner*, 63 Wis. 120, 23 N. W. 402; *Thompson v. Whitmarsh*, 100 N. Y. 35, 2 N. E. 273. See 18 Cyc. 895; L. R. A. 1915A, 299. Claims for funeral expenses are exceptional and are claims against the estate though contracted for by the representative. They may undoubtedly be set off. *Adams v.*

Betts, 16 Pick. 343; *Barbee v. Green*, 86 N. C. 159; *Farrell v. Bruce*, 190 Ill. App. 309.

² *Conquest v. Broadway Nat. Bank*, 134 Tenn. 17, 183 S. W. 160.

³ *Boyden v. Mass. Mut. Life Ins. Co.*, 153 Mass. 544, 27 N. E. 669.

⁴ *Martin County Nat. Bank v. Bird*, 92 Minn. 110, 99 N. W. 780. See 7 Ann. Cas. 850; Ann. Cas. 1914D, 224.

⁵ *Gerdtsen v. Cockrell*, 52 Minn. 501, 55 N. W. 58; *Talty v. Torling*, 79 Minn. 386, 82 N. W. 632. See 7 Ann. Cas. 850; Ann. Cas. 1914D, 224.

⁶ *Ainsworth v. Bank of California*, 119 Cal. 470, 51 Pac. 952; *Fishburne v. Merchants' Bank*, 42 Wash. 473, 85 Pac. 38. See 18 Cyc. 897n.

thorize a bank to set off debts due it from the decedent against a claim of a representative for funds of the estate deposited by him with the bank.⁷ A debtor to an insolvent estate cannot purchase a claim against the decedent and set it off against his debt.⁸ An action may be maintained by the owner of a judgment to have it set off pro tanto against a judgment for an administrator rendered in an action against his intestate, and continued after his death in the name of the representative. It is not necessary that the judgment sought to be set off against the judgment in favor of the administrator should be first proved and allowed in the probate court.⁹

1131. Admissions by representative—In actions to which a representative is a party he may probably make admissions binding upon the estate, even to the extent of confessing judgment.¹⁰

1132. Evidence—Conversations with decedent—In actions by or against representatives the general statute against the admission of evidence of conversations or admissions of persons since deceased applies. No exception is made in favor of the estates of deceased persons.¹¹

1133. Damages—Amount recoverable—In an action by a representative for injury to property of the estate he is entitled to recover the full amount of the damages resulting from the injury and holds the amount recovered as assets to be administered according to law.¹²

1134. Attachment—The property of a decedent in the course of administration is not subject to attachment at the instance of a creditor of the decedent. It is in custodia legis.¹³ Of course after a decree of final distribution by the probate court the property is subject to attachment as the property of the person to whom it is assigned.¹⁴ The interest of an heir, legatee or devisee in an estate of a decedent may be reached by attachment, at the instance of a creditor of the beneficiary, even prior to a final decree of distribution, but the attachment is subject to the administration proceedings.¹⁵

⁷ *Laighton v. Brookline Trust Co.*, 225 Mass. 458, 114 N. E. 671.

⁸ *Union Nat. Bank v. Hicks*, 67 Wis. 189, 30 N. W. 234. See 18 Cyc. 899.

⁹ *Martin County Nat. Bank v. Bird*, 92 Minn. 110, 99 N. W. 780.

¹⁰ See *Johanson v. Hoff*, 63 Minn. 296, 299, 65 N. W. 464.

¹¹ *Parker v. Maxwell*, 45 Minn. 1, 47 N. W. 161; *Pitzl v. Winter*, 96 Minn. 499, 105 N. W. 673. See *Dunnell*, Minn. Digest and Supplements, § 10316.

¹² *Noon v. Finnegan*, 32 Minn. 81, 19 N. W. 391.

¹³ *Byers v. McAuley*, 149 U. S. 608; *Griggs v. Nadeau*, 221 Fed. 381; *Woerner*, Am. Law, of Adm. (2 ed.) § 392; 6 C. J. 210; 4 Probate Reports Ann. 182. See G. S. 1878, c. 53 § 53.

¹⁴ *Harrington v. La Rocque*, 13 Or. 344, 10 Pac. 498.

¹⁵ *Merriam v. Wagener*, 74 Minn. 215, 77 N. W. 44; *Watkins v. Bigelow*, 93 Minn. 361, 368, 101 N. W. 497; *Kolars v. Brown*, 108 Minn. 60, 121 N. W. 229; *Greenman v. McVey*, 126 Minn. 21, 30, 147 N. W. 812; 4 Probate Reports Ann. 182.

1135. Garnishment—It is provided by statute that all moneys and other personal property, including such property of any kind due from or in the hands of an executor or administrator, may be attached by garnishment.¹⁶ It is generally held that a legacy or distributive share cannot be reached by garnishment until there has been a decree of the probate court assigning it to the legatee or heir.¹⁷ In this state a legacy or distributive share may be reached by garnishment even before a final decree of distribution.¹⁸ When a representative has in his hands funds belonging to the estate he may pay them over to the party entitled thereto, as heir at law, without an order of court; and, if such payment is made in good faith, he is not liable, and cannot be held as a garnishee of the party to whom payment has been made prior to the commencement of the garnishment proceedings.¹⁹ Where a will has been duly proved and allowed in the probate court of the proper county, and proceedings involving its construction and legal effect are therein pending, the district court is not authorized to construe the instrument upon a disclosure of an executor as garnishee. The proper practice in such a case is for the court taking the disclosure to stay all proceedings pending a construction of the will and a determination of its legal effect in the probate court.²⁰

1136. Judgment—If a judgment against a representative is binding on the estate a duly authenticated copy thereof may be filed in the probate court wherein administration is pending and is then payable therein.²¹ Where the judgment is against a representative as such it should be made payable out of the assets of the estate in due course of administration.²² A judgment has been held against a representative as such and not personally.²³

1137. Judgment against representative not lien on realty—Default judgment—Statute—Whenever a judgment is taken against an executor or administrator upon failure to answer, it shall not be deemed evidence

¹⁶ G. S. 1913, § 7863. See *Kolars v. Brown*, 108 Minn. 60, 121 N. W. 229; *Greenman v. McVey*, 126 Minn. 21, 30, 147 N. W. 812; *Cheshire Nat. Bank v. Jaynes*, 226 Mass. 432, 114 N. E. 727; 20 Cyc. 998; *Woerner, Am. Law of Adm.* (2 ed.) § 177; 47 L. R. A. 345; 4 Probate Reports Ann. 182.

¹⁷ *J. I. Case Threshing Machine Co. v. Miracle*, 54 Wis. 295, 11 N. W. 580; *Hudson v. Wilber*, 114 Mich. 116, 72 N. W. 162; *Baldwin v. Percival*, 88 Vt. 211, 92 Atl. 101; *Orlopp v. Schueller*, 72 Ohio St. 41, 73 N. E. 1012; *Harrington v. La Rocque*, 13 Or. 344, 10 Pac. 498; 18 Cyc. 998, 100; *Woerner, Am. Law of Adm.* (2 ed.) § 177.

¹⁸ G. S. 1913, § 7863. See *Merriam v. Wagener*, 74 Minn. 215, 77 N. W. 44; *Watkins v. Bigelow*, 93 Minn. 361, 368, 101 N. W. 497; *Kolars v. Brown*, 108 Minn. 60, 121 N. W. 229; *Greenman v. McVey*, 126 Minn. 21, 30, 147 N. W. 812.

¹⁹ *Kraus v. Kraus*, 81 Minn. 494, 84 N. W. 332.

²⁰ *Duxbury v. Shanahan*, 84 Minn. 353, 87 N. W. 944.

²¹ See §§ 871, 879, 884, 899, 936.

²² *Reed v. Reed*, 178 Cal. 187, 172 Pac. 600; 8 Ency. Pl. & Pr. 689.

²³ *Whitney v. Pinney*, 51 Minn. 146, 53 N. W. 198.

of assets in his hands, unless the complaint alleged assets and was personally served on him. No judgment against any executor or administrator shall bind or in any way affect the real property which belonged to the decedent, nor shall the same be liable upon execution issued upon such judgment.²⁴ A judgment against an heir, legatee or devisee of the decedent, duly docketed, is a lien on his interest in the real estate of the decedent, subject to administration proceedings.²⁵

1138. Judgment as estoppel—Estate and heirs bound—A judgment in an action by a representative to recover an asset of the estate binds the estate and all persons interested therein, including heirs.²⁶

1139. Costs and disbursements—Statutes—In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or person expressly authorized by statute, costs and disbursements may be recovered as in an action by and against a person prosecuting or defending in his own right. But the same shall be made chargeable only upon the estate, fund, or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally, for mismanagement or bad faith in the action; but no costs or disbursements are recoverable against an executor or administrator unless it appears that the demand was first presented to him, verified by oath, and payment demanded.²⁷ When costs are allowed against an executor or administrator in any proceedings in any court, he shall pay the same out of the estate, as an expense of administration, and the same shall be allowed to him in his administration account. Provided, that costs and attorney's fees paid or incurred in actions or proceedings in court shall not be allowed if it appear that such actions or proceedings were prosecuted or resisted without just cause.²⁸ No execution for costs in an action by or against a representative can issue against the estate, but it may issue against the property of the representative if the court so directs. If the costs are made chargeable against the estate the judgment should not direct execution, but should simply direct that they be paid in due course of administration.²⁹ On appeal to the district court by an administrator from an order of the probate court disallowing certain items of his account, held, that he was the prevailing party and entitled to his disbursements at least.³⁰

²⁴ G. S. 1913, § 8176. See 24 C. J. 894.

²⁵ In re Langevin's Will, 45 Minn. 429, 47 N. W. 1133; Kolars v. Brown, 108 Minn. 60, 121 N. W. 229; Greenman v. McVey, 126 Minn. 21, 30, 147 N. W. 812. See § 1070.

²⁶ Connolly v. Connolly, 26 Minn. 350, 4 N. W. 233.

²⁷ G. S. 1913, § 7085. See § 72; 18

Cyc. 1085; 24 C. J. 912; 8 Ency. Pl. & Pr. 731.

²⁸ G. S. 1913, § 7298.

²⁹ Lough v. Flaherty, 29 Minn. 295, 13 N. W. 131 (a judgment for costs held to be against an administrator personally to be enforced by execution against his property).

³⁰ Gilman v. Maxwell, 79 Minn. 377, 82 N. W. 669.

1140. Execution—Our statutes with reference to the issue of execution on judgments affecting estates of decedents are in an unsatisfactory condition. It is clear, however, that no execution can issue against the property of an estate in the hands of a representative on a judgment in an action brought against a representative. The remedy of the judgment creditor is to file an authenticated copy of the judgment in the probate court where the estate is being administered. It is then the duty of the representative to pay the judgment without any order of court. This is the proper course even though there is no statute providing for certifying the particular form of judgment to the probate court for payment. No creditor of an estate can secure a preference over other creditors by suing the representative and obtaining a judgment. Judgment creditors stand on the same footing as creditors whose claims are allowed in the probate court, except where a lien on realty has attached prior to the death of the decedent. If execution were allowed on a judgment recovered against a representative the judgment creditor could secure a preference over other creditors contrary to the policy of our statutes governing the administration of estates.³¹ No execution can issue against the property of an estate in the hands of a representative for costs and disbursements. They are payable as an adjudicated claim against the estate or as an expense of administration.³² Execution against real or personal property in the hands of personal representatives must require the officer to satisfy the judgment, with interest, out of such property.³³ No execution can issue on a judgment against a representative in an action pending against the decedent at the time of his death, and in which the representative is substituted as defendant. The judgment must be certified to the probate court for payment in the same manner as other claims against the estate.³⁴ No execution can issue against real property of a decedent on a judgment against his personal representative.³⁵ Where a defendant in an action by a representative recovers a judgment in his favor no execution can issue thereon, but it must be certified to the probate court for payment in the same manner as other claims against the estate.³⁶ Execution may issue against the real property of an estate upon a judgment against the decedent, but only after the expiration of one year from his death, and only when the judgment had become a lien on such property prior to such death.³⁷ No execution can issue against the personal property of an estate on a

³¹ See §§ 909, 936, 941, 1136; *Lough v. Flaherty*, 29 Minn. 295, 13 N. W. 131; *Fowler v. Mickley*, 39 Minn. 28, 38 N. W. 634; *Oswald v. Pillsbury*, 61 Minn. 520, 525, 63 N. W. 1072; *Byrnes v. Sexton*, 62 Minn. 135, 64 N. W. 155; 18 Cyc. 1067; 24 C. J. 897; G. S. 1878, c. 53, § 53.

³² See §§ 72, 1139.

³³ G. S. 1913, § 7924 (3). See *Lough v. Flaherty*, 29 Minn. 295, 13 N. W. 131; *Nelson Theatre Co. v. Nelson*, 216 Mass. 30, 102 N. E. 926; 18 Cyc. 1068; 24 C. J. 904; 8 Ency. Pl. & Pr. 424.

³⁴ G. S. 1913, § 7329. See § 909.

³⁵ See § 1137.

³⁶ G. S. 1913, § 7330. See § 1130.

³⁷ G. S. 1913, § 7926. See § 909.

judgment against the decedent. The judgment creditor must present his claim to the probate court for allowance and payment in the due course of administration.³⁸ While execution cannot, as a general rule, issue against the estate of a deceased person, it may issue against the interest of an heir, devisee or legatee therein, even before a final decree of distribution, subject to administrative proceedings.³⁹ A representative may have execution on a judgment recovered in the name of a special administrator.⁴⁰

RESIGNATION AND REMOVAL OF REPRESENTATIVES

1141. Resignation of representatives—Account—Statute—A representative may resign his trust at any time, but such resignation shall not be effectual for any purpose until the court shall have examined and allowed his final account, and made an order accepting such resignation.⁴¹ Prior to the enactment of this statute it was held that a representative could not resign his trust as a matter of right, but that the court might accept his resignation for good cause and revoke his letters.⁴²

1142. Grounds for removal—Statute—Whenever a representative becomes insane or otherwise incapable of discharging his trust or unsuitable therefor, or has mismanaged the estate, or has failed to file an inventory of his account, or to perform any order or decree of the probate court, or has absconded, the court may remove him.⁴³ A representative is "unsuitable" if he has any personal interests which prevent him from discharging his duties impartially.⁴⁴ A representative may be removed on the ground that he has not proceeded in the settlement of the estate with due diligence.⁴⁵ The fact that a representative's personal interests are such that he is not fitted to pass upon the expediency

³⁸ See § 909.

³⁹ *Farmers Nat. Bank v. Moran*, 30 Minn. 165, 14 N. W. 805; *In re Langevin's Will*, 45 Minn. 429, 47 N. W. 1133; *Byrnes v. Sexton*, 62 Minn. 135, 139, 64 N. W. 155; *Merriam v. Wagener*, 74 Minn. 215, 77 N. W. 44; *Watkins v. Bigelow*, 93 Minn. 361, 368, 101 N. W. 497; *Kolars v. Brown*, 108 Minn. 60, 121 N. W. 229; *Greenman v. McVey*, 126 Minn. 21, 30, 147 N. W. 812. See G. S. 1913, § 7924 (3).

⁴⁰ See § 1148.

⁴¹ G. S. 1913, § 7299. See 11 A. & E. Ency. of Law (2 ed.) 754, 811; 18 Cyc. 80, 148; 23 C. J. 1097; 13 L. R. A. (N. S.) 438; 13 Prob. Rep. Ann. 325; 8 A. L. R. 175.

⁴² *Balch v. Hooper*, 32 Minn. 158, 20 N. W. 124. See *Simpson v. Cook*, 24

Minn. 180, 183; *Rumrill v. First Nat. Bank*, 28 Minn. 202, 9 N. W. 731.

⁴³ G. S. 1913, § 7300. See 11 A. & E. Ency. of Law (2 ed.) 815; 18 Cyc. 159; 23 C. J. 1110; *Woerner*, Am. Law of Adm. (2 ed.) §§ 266-274; *Church*, Probate Law, 494; 138 Am. St. Rep. 525; Ann. Cas. 1914C, 609; 1915D, 284; 8 A. L. R. 175 (what effects removal).

⁴⁴ *First Nat. Bank v. Towle*, 118 Minn. 514, 137 N. W. 291; *Corey v. Corey*, 120 Minn. 304, 139 N. W. 509; *Putney v. Fletcher*, 148 Mass. 247, 19 N. E. 370; *In re Mill's Estate*, 22 Or. 210, 29 Pac. 443; *In re McCluskey*, 116 Me. 212, 100 Atl. 977.

⁴⁵ *First Nat. Bank v. Towle*, 118 Minn. 514, 137 N. W. 291; *Willson v. District Court*, 166 Iowa 352, 147 N. W. 766;

of bringing an action to set aside transfers of the decedent and to prosecute the same is a ground for his removal. The fact that the person seeking the removal might bring an action is no reason for not making the removal.⁴⁶ Evidence held to be such as to require the removal of an administrator because he had become "unsuitable" for the discharge of his trust on account of personal interests conflicting with his representative duties and because of his failure to perform the duties of his office with reasonable diligence.⁴⁷ A representative may undoubtedly be removed for a failure or refusal to obey an order of the probate court.⁴⁸ A representative appointed to prosecute an action under the statute for death by wrongful act may be removed by the probate court for failure to make proper distribution of the damages recovered.⁴⁹ Upon a petition by a widow, who had renounced her husband's will, to remove the executor named by the will, on the ground of his personal interest in certain transfers made by the testator in his lifetime and alleged by the petitioner to be invalid, held, under the facts, that the establishment of the invalidity of such transfers was not essential to the granting of the relief sought. The fact that the petitioner was the only person who would be benefited by a restoration of the property so transferred held not to bar her right to have the matter passed upon by an impartial representative in the first instance, and to have such a person in charge of the estate so long as such matter is in controversy.⁵⁰ An administrator filed his account in the probate court, with his petition, setting forth that from ill-health and advanced age he was unfit longer to serve, and praying that his account be allowed and settled, and that he be allowed to resign his trust, and that some suitable person be appointed in his place. Held, that an acceptance of his resignation by the court, upon a hearing had upon notice, made and entered of record in the form of an order, had the effect of a revocation of his letters.⁵¹ When a probate court legally probates a will, or appoints a first administrator, it thereby acquires jurisdiction to direct and control the administration; and such jurisdiction continues over the administration, as one proceeding, till its close; and all the court does in the course and for the purpose of the administration, including the removal or discharge of administrators, and the appointment of others, is sustained by the jurisdiction thus acquired.⁵² A decree removing a representative is not

Ford v. Ford, 88 Wis. 122, 59 N. W. 464; In re Moore, 83 Cal. 583, 23 Pac. 795.

⁴⁶ First Nat. Bank v. Towle, 118 Minn. 514, 137 N. W. 291; Corey v. Corey, 120 Minn. 304, 139 N. W. 509; Marks v. Coats, 37 Or. 609, 62 Pac. 488; In re McCluskey, 116 Me. 212, 100 Atl. 977.

⁴⁷ First Nat. Bank v. Towle, 118 Minn. 514, 137 N. W. 291.

⁴⁸ State v. Probate Court, 66 Minn.

246, 68 N. W. 1063; 11 A. & E. Ency. of Law (2 ed.) 820; 18 Cyc. 164.

⁴⁹ Vukmirovich v. Nickolich, 123 Minn. 165, 168, 143 N. W. 255.

⁵⁰ Corey v. Corey, 120 Minn. 304, 139 N. W. 509.

⁵¹ Balch v. Hooper, 32 Minn. 158, 20 N. W. 124.

⁵² Culver v. Hardenbergh, 87 Minn. 225, 33 N. W. 792.

res judicata in another action as to matters incidentally involved in the proceedings for removal.⁵³ During an appeal from an order removing a representative a receiver was appointed to collect the rents and take charge of the property. The order appealed from was reversed and judgment to that effect was entered in the district court. Held, that entry of the judgment did not ipso facto discharge the receiver.⁵⁴ A decree of the probate court having jurisdiction of the estate, discharging a representative, cannot be questioned collaterally, even though the decree states a reason for the discharge, which is not, under the statute, a cause for discharge.⁵⁵ A representative should not be removed without cause shown upon due hearing and upon evidence other than the petition.⁵⁶ A representative may be removed on the ground that he has become a non-resident.⁵⁷ The fact that a representative is indebted to the estate is not a ground for removing him but is a matter for the accounting.⁵⁸

1143. Notice for removal—Statute—The probate court on its own motion may, and on petition of any person interested in the estate shall, cite the representative to appear and show cause why he should not be removed. Whenever such representative resides in the county, such citation shall be served upon him personally or by leaving a copy at his last usual place of abode with some person of suitable age and discretion then resident therein; when he resides out of the county and his residence is known, by mail; and when unknown, by publication.⁵⁹ A representative cannot be summarily removed without notice to him of the time and place of hearing on the matter of his removal, unless his residence is unknown.⁶⁰

DISCHARGE OF REPRESENTATIVES

1144. Statutes—Whenever the probate court shall find, upon petition, that any executor, administrator, or guardian has fully executed his trust, and has paid over to the persons entitled thereto all money and other property in his hands as such, said court may enter an order finally discharging him and his bondsmen from further liability.⁶¹ Whenever an executor or administrator shall have fully complied with

⁵³ *Marvin v. Dutcher*, 26 Minn. 391, 4 N. W. 685.

⁵⁴ *Ellis v. Warshauer*, 92 Minn. 444, 100 N. W. 214.

⁵⁵ *Simpson v. Cook*, 24 Minn. 180.

⁵⁶ *In re Bagnola's Estate*, 178 Iowa 757, 154 N. W. 461, 160 N. W. 830; 11 A. & E. Ency. of Law (2 ed.) 816; 18 Cyc. 157; 26 C. J. 1121.

⁵⁷ *In re Rice's Estate*, 158 Mich. 53, 122 N. W. 212.

⁵⁸ *In re Powers' Estate*, 166 N. Y. S. 1007.

⁵⁹ G. S. 1913, § 7234; *Chadwick v. Dunham*, 83 Minn. 366, 368, 86 N. W. 351; *First Nat. Bank v. Towle*, 118 Minn. 514, 523, 137 N. W. 291.

⁶⁰ *McCloskey v. Plantz*, 76 Minn. 323, 79 N. W. 176. See *In re Bagnola's Estate*, 178 Iowa 757, 154 N. W. 461, 160 N. W. 830.

⁶¹ G. S. 1913, § 7399.

all the terms and conditions of the final decree of distribution and of all other decrees and orders of the probate court appointing him, and shall have paid over to the distributees named in such final decree of distribution of the said court, all moneys and funds and property to them awarded by such final decree, and when such executor shall have in all other respects fully complied with the terms and conditions of said final decree, and have fully complied with all the orders and decrees of the said court, and when it shall appear to the court that the executor or administrator has paid over all moneys to the proper parties, and that he has in all things complied with the orders of the court and the terms of the final decree in said estate, and that he has in all things, well, faithfully and fully administered his trust as such executor or administrator, the court shall enter an order and decree fully discharging the said executor or administrator and the sureties on his bond from all further liability, and from all liability by reason of said trust and by reason of said administration.⁶² Prior to Laws 1903, c. 195, there was no statutory provision for an order discharging a representative and it was held that the final decree of distribution ipso facto discharged him.⁶³ A discharge of one of two representatives on his sole petition has been held irregular but not void.⁶⁴ The authority of a representative to collect assets continues until he is discharged.⁶⁵ The order discharging a representative is the final order in the administration proceedings and terminates the jurisdiction of the probate court over the estate. So long as the order remains in force the court has no more jurisdiction over the estate or the property belonging to it than if there had never been any administration or attempt to institute one.⁶⁶ A representative is not entitled to a discharge until it appears that he has in all things well, faithfully and fully administered his trust.⁶⁷ An order of discharge is not subject to collateral attack for error or irregularity.⁶⁸ It is not subject to collateral attack though it states a reason for the discharge which is not, under the statute, cause for discharge.⁶⁹ An order of discharge is necessary to close the administration and to relieve the representative and his bondsmen of further liability. A discharge, at least if not vacated, bars an action against a representative and his bondsmen for breach of trust.⁷⁰ A representative is not enti-

⁶² G. S. 1913, § 7400. See 11 A. & E. Ency. of Law (2 ed.) 810; 18 Cyc. 145; 23 C. J. 1092; Woerner, Am. Law of Adm. (2 ed.) § 573; Church, Probate Law, 1423.

⁶³ State v. Probate Court, 84 Minn. 289, 87 N. W. 783.

⁶⁴ State v. Probate Court, 40 Minn. 296, 41 N. W. 1033.

⁶⁵ Lowry v. Tilleny, 31 Minn. 500, 18 N. W. 452.

⁶⁶ State v. Probate Court, 33 Minn. 94, 22 N. W. 10.

⁶⁷ Vukmirovich v. Nickolich, 123 Minn. 165, 143 N. W. 255.

⁶⁸ Simpson v. Cook, 24 Minn. 180; Winters v. Ellefson, 128 Minn. 3, 150 N. W. 171.

⁶⁹ Simpson v. Cook, 24 Minn. 180.

⁷⁰ In re Scheffer's Estate, 58 Minn. 29, 59 N. W. 956; Winters v. Ellefson, 128 Minn. 3, 150 N. W. 171; Veysey v. Vey-

tled to a discharge unless it appears that he has paid all taxes on the estate, including all inheritance taxes.⁷¹ A representative may be discharged though the time for appealing from the final decree has not expired.⁷² An order allowing the account of an executor held not an order closing the estate, discharging an executor and changing his possession from that of executor to that of testamentary trustee.⁷³ An order of discharge obtained by the fraud of the administrator does not relieve the sureties on his bond from liability, and where the discharge is set aside the sureties cannot rely on the discharge, for the discharge only operated to prevent an action on the bond pending equitable proceedings to vacate it. The sureties on an administrator's bond are in privity with the administrator, and the fact that they were not served with notice of proceedings to vacate the order approving the final report of the administrator does not affect their liability on the order being vacated, since they are presumed to have knowledge of all orders regularly entered in the matter of settling the estate.⁷⁴

SPECIAL ADMINISTRATORS

1145. Definition—A special administrator is a representative of a decedent appointed by the probate court to care for and preserve his estate until an executor or general administrator is appointed.⁷⁵

1146. When appointed—No appeal from appointment—Statute—Whenever the appointment of an executor or administrator is necessarily delayed, or for any reason the probate judge determines that it is necessary or expedient, he may, with or without notice, appoint a special administrator, to take charge of the estate so long as such judge deems it necessary, and no appeal shall be allowed from the appointment of such administrator.⁷⁶ It conclusively appeared that no petition was presented to the probate court for the appointment of a special administrator. Such petition is jurisdictional, and, without it, the probate court has no jurisdiction to appoint such administrator, to approve his bond or to issue letters of administration. Such orders are nullities, and a settlement made by the special administrator so attempted to be appointed, in no way binds the next of kin of deceased dependent upon him for support.⁷⁷ There can be no special administration while

sey, 86 Wash. 553, 151 Pac. 39; 11 A. & E. Ency. of Law (2 ed.) 896; 18 Cyc. 1262; 23 C. J. 1093.

⁷¹ G. S. 1913, §§ 2274, 2276, 2290, 7390; State v. Probate Court, 112 Minn. 279, 128 N. W. 18; Winters v. Ellefson, 128 Minn. 3, 150 N. W. 171.

⁷² Nason v. Superior Court (Cal.) 179 Pac. 454.

⁷³ In re Scheffer's Estate, 58 Minn. 29, 59 N. W. 956.

⁷⁴ Tucker v. Stewart, 147 Iowa 294, 126 N. E. 183.

⁷⁵ Jones v. Minnesota Transfer Ry. Co., 108 Minn. 129, 121 N. W. 606.

⁷⁶ G. S. 1913, § 7293. See Church, Probate Law, 460; 24 C. J. 1169.

⁷⁷ Bombolis v. Minneapolis & St. Louis R. Co., 128 Minn. 112, 150 N. W. 385.

there is a general administration.⁷⁸ The court may appoint any disinterested person and is not restricted to those who are interested in the estate.⁷⁹ Application for the appointment of a special administrator must be made to the probate court authorized to appoint a general administrator.⁸⁰ The appointment may be made "with or without notice."⁸¹ The appointment is complete when the order therefor is signed though there is no entry thereof in the minutes.⁸² A delay caused by an appeal from an order allowing a will is a proper ground for appointing a special administrator.⁸³ Until the validity of a contested will is finally determined the court in which the estate is being administered cannot proceed with the administration except under the statute authorizing the appointment of special administrators.⁸⁴ There are many causes justifying a delay in granting letters testamentary or of administration and an appointment of a special administrator during the delay. There is no reason why a judge of probate may not delay an appointment in exercising a sound discretion upon the circumstances of a particular case—for instance, in the case of a will contested upon the ground that it is forged or invalid. On some other accounts very grave practical reasons may exist why (notwithstanding his allowance of the will) a judge of probate should hesitate to commission the person named as executor, or an administrator with the will annexed, until the appeal from his allowance is determined. The case may involve large interests; it may be one as to which the judge entertains great doubt, notwithstanding his determination—a case involving a great deal of feeling on the part of opposing parties, and a case in which, as respects the speedy and unembarrassed settlement of an estate, the question as to whether one person or another shall administer is of considerable practical importance. Like considerations are applicable to the granting of letters of administration upon an intestate estate. Instances of delay in granting letters, "from any other cause" than appeal from the allowance or disallowance of a will, may be found in cases in which the delay is occasioned by the illness of the judge, or some other person whose presence or testimony cannot well be dispensed with.⁸⁵ Delay caused by a contest over the probate of a will is a common ground for appointing a special administrator. In such a case the question is not

⁷⁸ *Schroeder v. Superior Court*, 70 Cal. 343, 11 Pac. 651.

⁷⁹ *In re Ellenberger's Estate*, 171 Iowa 225, 153 N. W. 1036; *Arendale v. Johnson* (Ala.) 89 So. 603.

⁸⁰ *Cadman v. Richards*, 13 Neb. 383, 14 N. W. 159.

⁸¹ *Hanson v. Nygaard*, 105 Minn. 30, 34, 117 N. W. 235; *Portz v. Schantz*, 70 Wis. 497, 36 N. W. 249.

⁸² *McNeil v. Morgan*, 157 Cal. 373, 108 Pac. 69.

⁸³ *Dutcher v. Culver*, 23 Minn. 415; *Foster v. Gordon*, 96 Minn. 142, 104 N. W. 765.

⁸⁴ *Poffinbarger v. Sumner* (Ind.) 117 N. E. 646.

⁸⁵ *Dutcher v. Culver*, 23 Minn. 415; *In re Edward's Estate*, 154 Cal. 91, 97 Pac. 23 (during pendency of proceedings to determine validity of will).

whether the evidence would warrant setting aside the will, but whether there is substantial evidence of danger of loss and of the invalidity of the will.⁸⁶ Pending an appeal from an order allowing or disallowing a will none but a special administrator can be appointed.⁸⁷ The usual delay caused by taking the statutory step for the appointment of a general administrator is a "delay" within the meaning of the statute.⁸⁸ If the order appointing an executor or general administrator is appealed from, and his authority thereby suspended, a special administrator may be appointed.⁸⁹ A special administrator may be appointed pending an appeal from an order removing an executor.⁹⁰ A special administrator may be appointed in case of the disability of a general administrator.⁹¹ An appeal by an executor from an order revoking the probate of a will does not continue the powers of the executor pending the appeal and the probate court may appoint a special administrator.⁹² The appointment of a special administrator has been held proper where the delay due to the probate of a will would seriously interfere with the renting of a farm and might deprive the estate of the entire income from the farm for a year.⁹³ Where there is property or a fund or right of action which cannot otherwise be made available, it is competent for the probate court to appoint an administrator for the sole purpose of collecting and receiving assets which will not be general assets of the estate of the intestate, or liable for his debts, but which will belong to persons who by law or by contract with the deceased will be entitled thereto, and the court may settle the account of such an administrator.⁹⁴ Though there is no property belonging to an estate except a cause of action and general administration has been applied for, a special administrator may be appointed, where an immediate settlement of the cause of action could be made and there is a delay in granting a general administration.⁹⁵ A special administration should not be continued longer than is reasonably necessary to secure the appointment of a general administrator.⁹⁶ The appointment cannot be collaterally attacked for mere error or irregularity, but it may be so attacked for jurisdictional defects.⁹⁷

⁸⁶ *In re Ellenberger's Estate*, 171 Iowa 225, 153 N. W. 1036.

⁸⁷ *In re Fisher*, 15 Wis. 511.

⁸⁸ *Keegan's Estate v. Welch*, 83 Neb. 166, 119 N. W. 252.

⁸⁹ *People v. Wayne Probate Judge*, 39 Mich. 302; *In re Heaton's Estate*, 142 Cal. 116, 75 Pac. 662. See G. S. 1913, § 7494. Formerly an appeal from an order of the probate court to the district court did not suspend the order. *Dutcher v. Culver*, 23 Minn. 415.

⁹⁰ *In re Chadbourne's Estate*, 14 Cal. App. 481, 112 Pac. 472.

⁹¹ *McNeil v. Morgan*, 157 Cal. 373, 108 Pac. 69.

⁹² *In re Crozier's Estate*, 65 Cal. 332, 4 Pac. 109.

⁹³ *Keegan's Estate v. Welch*, 83 Neb. 166, 119 N. W. 252.

⁹⁴ *Sargent v. Sargent*, 168 Mass. 420, 47 N. E. 121.

⁹⁵ *Greece v. Helm*, 91 Mich. 450, 51 N. W. 1106.

⁹⁶ *In re Chadbourne's Estate*, 14 Cal. App. 481, 112 Pac. 472.

⁹⁷ *Bombolis v. Minneapolis & St. Louis R. Co.*, 129 Minn. 279, 152 N. W. 413; *Cook v. Stevenson*, 30 Mich. 245.

No appeal lies from the appointment of a special administrator.⁸⁸ Mandamus will lie to compel the appointment of a special administrator when necessary and a proper application is made therefor.⁸⁹

1147. Powers, duties and liabilities—Statute—A special administrator may collect all personal property of the decedent, care for, gather and secure crops, and preserve all such property for the executor or administrator who may afterwards be appointed, and for that purpose may commence and maintain actions as an administrator. He may, by leave of the court, sell personal property, take charge of the real property, and lease the same for a term not exceeding one year, and do all other things necessary for the preservation of the estate. But he shall not be liable to an action by any creditor, or be called upon in any way to pay the debts of the decedent.¹ A special administrator has only such powers and duties as are prescribed by the statute and the statute must be strictly construed.² It is the general duty of a special administrator to collect the assets, conserve the estate and hold it in readiness to be paid over to the executor or general administrator when appointed and qualified.³ He has exclusive control over the estate until an executor or general administrator is appointed and qualifies.⁴ The office and duties of a special administrator are similar to those of a receiver in equity, the powers and duties of each being limited to such as are defined by statute, the order of appointment, and such further orders as may be made by the court for the administration and preservation of the estate.⁵ He is entitled to the possession of the personal property of the decedent.⁶ He may appeal from an order admitting a will to probate.⁷ He has no authority, except as expressly granted by the statute, to make contracts that will interfere with or prejudice the duties or powers of the general administrator to be thereafter appointed, or incur the rights and privileges of the heirs or beneficiaries of the estate.⁸ He cannot make contracts or incur expenses except as expressly authorized. Expenditures cannot be allowed in his final account simply because they were made in good faith and the estate was benefited thereby.⁹ He is not authorized to contract with a third party for services in

⁸⁸ *Dutcher v. Culver*, 23 Minn. 415; *In re Carpenter's Estate*, 73 Cal. 202, 14 Pac. 677.

⁸⁹ *People v. Wayne Probate Judge*, 39 Mich. 302.

¹ G. S. 1913, § 7294. See *Church*, Probate Law, 460; 11 A. & E. Ency. of Law (2 ed.) 798; 18 Cyc. 1326; 24 C. J. 1180; 11 R. C. L. 453.

² *Larson v. Johnson*, 72 Minn. 441, 75 N. W. 699; *McAlpine v. Kratka*, 92 Minn. 411, 100 N. W. 233; *In re Williams' Estate* (Mont.) 173 Pac. 790.

³ *Zimmer v. Saier*, 155 Mich. 388, 119

N. W. 433; *State v. District Court*, 18 Mont. 481, 46 Pac. 259.

⁴ *Murphy v. Nett*, 51 Mont. 82, 149 Pac. 713.

⁵ *In re Moore's Estate*, 88 Cal. 1, 25 Pac. 915.

⁶ *Mitchell v. Mitchell*, 54 Minn. 301, 55 N. W. 1134.

⁷ *Sheeran v. Sheeran*, 96 Minn. 484, 105 N. W. 677.

⁸ *McAlpine v. Kratka*, 92 Minn. 411, 100 N. W. 233.

⁹ *In re Bell's Estate*, 145 Cal. 646, 70 Pac. 358.

protecting the realty of the estate from trespassers, or to sell land, to continue for a number of years beyond the probable duration of his authority. He cannot, without the authority of the probate court and a showing of necessity to secure the personal estate, include in his account moneys paid to redeem land of the estate from taxes, and charge the same to the estate.¹⁰ He cannot be called upon in any way to pay the debts of the decedent.¹¹ He has no authority to pay claims against the estate, or to take any action in relation thereto, and the probate court cannot authorize him to do so.¹² He has no authority to submit a claim against the estate to arbitration.¹³ He has no authority to sell the realty of the estate and cannot be licensed to do so by the probate court.¹⁴ He has no authority to loan the funds of the estate without an order of court and he is therefore not chargeable with interest for letting them lie idle.¹⁵ He may compromise a claim of the estate against a debtor of the decedent.¹⁶ Whether he has authority to compromise and settle a claim for damages under the federal Employers' Liability Act for the death of his decedent, without the knowledge or consent of the beneficiaries, is an open question.¹⁷ He may intervene in an action against the decedent to have a judgment against the decedent vacated and thus obtain the release of property seized on execution.¹⁸ He has no authority to employ and pay counsel, in a contest over the probate of a will by heirs, out of the funds of the estate.¹⁹ A partial or complete distribution of the estate cannot be had while it is in the hands of a special administrator.²⁰ The probate court may authorize a special administrator to do things not specifically authorized by the statute, but it cannot thereby obliterate the distinction between special and general administrators. It can authorize only acts incident to the powers enumerated by the statute or in line with them. Our statute authorizes the probate court to grant a special administrator leave to do "all other things necessary for the preservation of the estate."²¹ His appointment does not set the statute of limitations running against the

¹⁰ *McAlpine v. Kratka*, 92 Minn. 411, 100 N. W. 233.

¹¹ G. S. 1913, § 7254; *Richmond v. Campbell*, 71 Minn. 453, 455, 73 N. W. 1099.

¹² *Ward v. Magaha*, 71 Wash. 679, 129 Pac. 396; *In re Ford's Estate*, 29 Mont. 283, 74 Pac. 735; *State v. District Court*, 18 Mont. 481, 46 Pac. 259; *In re Sackett's Estate*, 78 Cal. 300, 20 Pac. 863. See 24 C. J. 1181.

¹³ *Sullivan v. Nicoulin*, 113 Iowa 76, 84 N. W. 978.

¹⁴ *Long v. Burnett*, 13 Iowa 28.

¹⁵ *In re Williams' Estate*, 55 Mont. 63, 173 Pac. 790.

¹⁶ *Grece v. Helm*, 91 Mich. 450, 51 N. W. 1106. See 24 C. J. 1181.

¹⁷ *Bombolis v. Minneapolis & St. Louis R. Co.*, 128 Minn. 112, 150 N. W. 385.

¹⁸ *Jefferson County Bank v. Robbins*, 67 Wis. 68, 29 N. W. 209.

¹⁹ *Zimmer v. Sailer*, 155 Mich. 388, 119 N. W. 433.

²⁰ *In re Welch's Estate*, 106 Cal. 427, 39 Pac. 805; *In re Davis' Estate*, 175 Cal. 198, 165 Pac. 525.

²¹ G. S. 1913, § 7294; *In re Welch's Estate*, 106 Cal. 427, 39 Pac. 805; *State v. District Court*, 18 Mont. 481, 46 Pac. 259.

claims of creditors of the estate.²² It has been held that a special administrator did not represent the beneficiaries of a certificate in a mutual benefit society and that he was not authorized to receive payment of insurance money thereon, there being nothing in the constitution or by-laws of the society to that effect.²³

1148. Inventory—Account—Termination of authority—Statute—A special administrator shall make and return a true inventory of all the goods, chattels, rights, credits, and effects of the decedent which come to his possession or knowledge, and account for all such property received by him, whenever required by the court. Upon granting letters testamentary or of administration the power of such special administrator shall cease, and he shall forthwith deliver to the executor or administrator all the property in his hands. The executor or administrator may prosecute to final judgment any action commenced by such special administrator, and may have execution on any judgment recovered in his name.²⁴ If he is indebted to the estate he must charge himself in his account with the amount of the debt.²⁵ A special administrator should be given an opportunity to have his account settled before being required to turn over the assets of the estate to an executor or general administrator. On such accounting it is not necessary to cite the beneficiaries of the estate.²⁶ Upon the appointment of an executor or general administrator the authority of a special administrator ceases.²⁷

1149. Actions by—A special administrator has no authority to maintain actions except those specified in the statute and the statute is to be strictly construed.²⁸ He may maintain a statutory action for the death of his decedent by wrongful act or omission.²⁹ He has no authority to maintain an action to set aside a conveyance of realty made by the decedent on the ground of fraud in the grantee or the insanity of the decedent.³⁰ He has no authority to maintain an action to set aside a fraudulent transfer of personal property by the decedent, though there is a deficiency of assets to pay his debts.³¹ He may maintain an action

²² *Pickering v. Weiting*, 47 Iowa 242. See 38 L. R. A. (N. S.) 824.

²³ *Devaney v. Ancient Order etc. Ins. Fund*, 122 Minn. 221, 142 N. W. 316.

²⁴ G. S. 1913, § 7295.

²⁵ *In re Armstrong's Estate*, 69 Cal. 239, 10 Pac. 335.

²⁶ *In re Haag's Estate*, 166 N. Y. S. 621.

²⁷ *In re Haag's Estate*, 166 N. Y. S. 621; *In re Dayton's Estate*, 166 N. Y. S. 951.

²⁸ *Larson v. Johnson*, 72 Minn. 441, 75 N. W. 699.

²⁹ *Jones v. Minnesota Transfer Ry. Co.*, 108 Minn. 129, 121 N. W. 606; *Cas-*

tigliano v. Great Northern Ry. Co., 129 Minn. 279, 152 N. W. 413.

³⁰ *Larson v. Johnson*, 72 Minn. 441, 75 N. W. 699.

³¹ *Richmond v. Campbell*, 71 Minn. 453, 73 N. W. 1009. This case seems to take too narrow a view of the statute. Whether the court might have granted the special administrator leave to maintain the action was not decided. There is often the utmost urgency to commence actions to set aside fraudulent conveyances to prevent the property from passing into the hands of bona fide purchasers. See 135 Am. St. Rep. 335.

to set aside fraudulent conveyances of the decedent.³² He has no authority to maintain an action to recover realty or the title thereto alleged to be held by a third person against the right of the deceased and his heirs or devisees.³³ The probate court may authorize a special administrator to commence any action that might be maintained by an executor or general administrator.³⁴ He cannot maintain an action for insurance money on a certificate in a mutual benefit society in behalf of the beneficiaries in the absence of authority from the constitution or by-laws of the society.³⁵ The general administrator is entitled to be substituted as plaintiff in any action begun by the special administrator.³⁶

1150. Actions against—A special administrator is not liable to an action by any creditor of the estate to enforce a claim against the estate.³⁷ An action to quiet title may be brought against a special administrator.³⁸ An action will lie against him for a nuisance in the form of a private way.³⁹

1151. Costs—Costs against a special administrator are a part of the necessary expenses of administration under G. S. 1913, § 7338.⁴⁰

1152. Special administrator of certain small estates—Statute—Whenever it shall be made to appear satisfactorily to the judge of any probate court that the personal property of an intestate deceased person over the administration of whose estate said judge of probate would be entitled to jurisdiction under existing laws, consists only of such property as by existing law would be exempt from application towards the payment of debts and does not exceed in value six hundred and fifty dollars such judge may appoint a special administrator, with or without notice, who shall proceed to speedily administer said estate according to the provisions of this chapter. Before entering upon his duties such special administrator shall file in the court appointing him his bond with sufficient sureties in such sum as the court may order and his oath to faithfully and lawfully administer said estate according to law.⁴¹

³² *In re Nugent's Estate*, 77 Mich. 500, 43 N. W. 889; *Forde v. Exempt Fire Ins. Co.*, 50 Cal. 299. See, contra, *Richmond v. Campbell*, 71 Minn. 453, 73 N. W. 1009.

³³ *Union Trust Co. v. Kirchberg*, 174 Mich. 161, 140 N. W. 464.

³⁴ *Ruis v. Santa Barbara Gas etc. Co.*, 164 Cal. 188, 128 Pac. 330.

³⁵ *Devaney v. Ancient Order etc. Ins. Fund*, 122 Minn. 221, 142 N. W. 316.

³⁶ *Ruis v. Santa Barbara Gas etc. Co.*, 164 Cal. 188, 128 Pac. 330.

³⁷ G. S. 1913, § 7294; *Richmond v. Campbell*, 71 Minn. 453, 455, 72 N. W. 1099.

³⁸ *McNeill v. Morgan*, 157 Cal. 373, 108 Pac. 69.

³⁹ *Hardin v. Sin Claire*, 115 Cal. 460, 47 Pac. 363.

⁴⁰ *Ferguson v. Woods*, 124 Wis. 544, 102 N. W. 1094.

⁴¹ Laws 1917, c. 251, § 1.

1153. Same—Inventory, appraisement and statement of liabilities—Final account—Statute—When final account is to be filed—Within fourteen days following the issuance of letters to such special administrator he shall file in the probate court a duly verified inventory of the property belonging to the estate of the decedent and a statement of the liabilities of said estate so far as known, together with an appraisal by two disinterested parties, who shall be appointed by the court, of the property belonging to said estate. If from such inventory and appraisal and any further evidence before court it appears that the estate of the deceased does not exceed in valuation the amount of claims for funeral bills and last sickness, taxes, expenses of administration and statutory allowance to surviving spouse and family of deceased and any other property exempt by law from application towards the payment of debts said special administrator shall immediately file his final account of the administration of said estate.⁴²

1154. Same—Notice of hearing on final account—Statute—Upon the filing of such account the court may require personal service of notice of hearing of said account on all heirs at law and persons interested in said estate.⁴³

1155. Same—Order allowing final account—Statute—Upon the hearing of said account if it shall satisfactorily appear to the court that the estate of the deceased does not exceed in valuation the amount of claims for last sickness and funeral bills, taxes, expenses of administration, allowance to surviving spouse and family of deceased and any other property exempted by law from application towards the payment of debts of deceased the court shall enter its order adjusting and allowing said account as adjusted.⁴⁴

1156. Same—Discharge of administrator and sureties—Statute—Upon the filing in such court of vouchers for all disbursements subject to payment paid by said special administrator, the court shall enter its order discharging such special administrator and the sureties on his bond from further liability. Provided, however, that where there is a claim for the alleged wrongful death of the decedent no such special administrator or the sureties on his bond shall be discharged until he shall have filed in the probate court a certified copy of the order of the district court approving such settlement as may be made of such wrongful death claim, and also a certified copy of the order of the district court distributing the moneys received for wrongful death to the persons thereunto entitled.⁴⁵

⁴² Laws 1917, c. 251, § 2.

⁴³ Laws 1917, c. 251, § 3.

⁴⁴ Laws 1917, c. 251, § 4.

⁴⁵ Laws 1917, c. 251, § 5.

ADMINISTRATORS DE BONIS NON

1157. Definition—An administrator de bonis non is one appointed where a sole or surviving executor or administrator dies, resigns, or is removed before having fully administered the estate.⁴⁶

1158. Appointment—Grounds—Statute—If a sole or surviving executor or administrator dies, resigns, or is removed before having fully administered an estate, the probate court, with or without notice, shall grant letters of administration with the will annexed, or otherwise as the case may require, to a suitable person to administer the goods and estate of the decedent not already administered. Such administrator shall have the same power and proceed in the same manner as the original executor or administrator. He may prosecute or defend any action commenced by or against the original executor or administrator, and have execution on any judgment recovered in the name of such original executor or administrator.⁴⁷ There is no statutory limitation on the time within which an appointment may be made. It may be made whenever the estate is left unadministered in whole or in part.⁴⁸ The statute does not contemplate the appointment of an administrator de bonis non when the authority of the original representative has not terminated, but such an appointment is irregular and not void or subject to collateral attack.⁴⁹ The appointment must be made by the probate court of the same county as the original administration.⁵⁰ The court may appoint any "suitable" person and is not controlled by G. S. 1913, § 7287.⁵¹ A surety of a former administrator may be appointed.⁵² An attorney of a principal creditor of the estate may be appointed.⁵³ The appointment may be made without notice.⁵⁴ A discrepancy between the notice of the time for hearing and the order appointing an administrator de bonis non, has been held to invalidate the appointment and a

⁴⁶ See § 1158.

⁴⁷ G. S. 1913, § 7292. See 11 A. & E. Ency. of Law (2 ed.) 793; 18 Cyc. 104; 24 C. J. 1141; 11 R. C. L. 417; Woerner, Am. Law of Adm. (2 ed.) § 179; Prusa v. Everett, 78 Neb. 251, 113 N. W. 571; In re Chapman's Estate, 70 Conn. 363, 39 Atl. 734; Ellyson v. Lord, 124 Iowa 125, 99 N. W. 582.

⁴⁸ Wilkinson v. Estate of Winne, 15 Minn. 159 (123); 11 A. & E. Ency. of Law (2 ed.) 792; 18 Cyc. 107; 24 C. J. 1147; Woerner, Am. Law of Adm. (2 ed.) § 179; 108 Am. St. Rep. 417.

⁴⁹ Culver v. Hardenbergh, 37 Minn.

225, 33 N. W. 792; Hamilton v. McIndoo, 81 Minn. 324, 84 N. W. 118.

⁵⁰ Harding v. Weld, 128 Mass. 590; 11 A. & E. Ency. of Law (2 ed.) 793; 18 Cyc. 107; 24 C. J. 1147; 108 Am. St. Rep. 417.

⁵¹ Russell v. Hoar, 3 Met. (Mass.) 187; Petition of Davis (Mass.) 129 N. E. 366. See 11 A. & E. Ency. of Law (2 ed.) 796; 18 Cyc. 106; 24 C. J. 1146.

⁵² In re Mark's Estate, 81 Or. 632, 160 Pac. 540.

⁵³ In re Rice's Estate, 158 Mich. 53, 122 N. W. 212.

⁵⁴ Jenks v. Allen, 151 Wis. 625, 139 N. W. 433.

subsequent sale of realty made by him.⁵⁵ The appointment may be made before the prior representative's account is settled and he is formally discharged.⁵⁶ More than one person may be appointed at the same time.⁵⁷ Unpaid legacies are a ground for appointing an administrator de bonis non.⁵⁸ An administrator de bonis non with the will annexed cannot be appointed until the will is probated.⁵⁹ The death of one of several representatives does not justify the appointment of an administrator de bonis non.⁶⁰ A claim of the estate withheld by agreement of the interested parties has been held to justify the appointment of an administrator de bonis non.⁶¹ Absence of a representative unheard of for seven years justifies the appointment of an administrator de bonis non.⁶² Where a will created a trust it was held that the trustee might distribute the trust fund in accordance with the will, there being no known creditors, and that there was no need of appointing an administrator de bonis non, the executor having filed his account and died.⁶³ The letters of appointment need not show the reasons therefor.⁶⁴ An appointment does not follow as of course upon the filing of a petition containing the jurisdictional averment of an incomplete administration, but the petitioner may be required to make out a prima facie case by the introduction of evidence.⁶⁵

1159. Powers, duties and liabilities—An administrator de bonis non has the same powers as the original representative.⁶⁶ He is entitled to moneys collected on his predecessor's bond.⁶⁷ He has the same rights in the realty of the decedent and in the rents and profits thereof as an original representative.⁶⁸ He may maintain proceedings under G. S. 1913, § 7315, to discover property fraudulently conveyed and his appointment cannot be collaterally attacked therein.⁶⁹ It is his right and duty to collect and receive the assets of the estate remaining unadministered from the original representative. He may release, submit a

⁵⁵ *Kammerer v. Morlock*, 125 Mich. 320, 84 N. W. 319.

⁵⁶ *In re Thompson's Estate*, 183 Mich. 618, 150 N. W. 318.

⁵⁷ *Copeland v. Shapley*, 214 Mass. 132, 100 N. E. 1080.

⁵⁸ *Buss v. Buss' Estate*, 75 Mich. 163, 42 N. W. 688; *Cole v. Shaw*, 134 Mich. 499, 96 N. W. 573.

⁵⁹ *Chase v. Ross*, 36 Wis. 267.

⁶⁰ *State v. Green*, 65 Mo. 528.

⁶¹ *Spring v. Perkins*, 156 Mich. 327, 120 N. W. 807.

⁶² *Cowan v. Lindsay*, 30 Wis. 586.

⁶³ *State Street Trust Co. v. Morris*, 218 Mass. 429, 105 N. E. 992.

⁶⁴ *Oakes v. Estate of Buckley*, 49 Wis. 592.

⁶⁵ *Owen v. Ward's Estate*, 127 Mich. 693, 87 N. W. 70.

⁶⁶ *Balch v. Hooper*, 32 Minn. 158, 20 N. W. 124; *McAlpine v. Kratka*, 98 Minn. 151, 107 N. W. 961; *Vukmirovich v. Nickolich*, 123 Minn. 165, 169, 143 N. W. 255; *Ellyson v. Lord*, 124 Iowa 125, 99 N. W. 582; *Thayer v. Kinsey*, 162 Mass. 232, 38 N. E. 360; 11 A. & E. Ency. of Law (2 ed.) 1331; 18 Cyc. 1317; 24 C. J. 1156; 11 R. C. L. 420; *Woerner*, Am. Law of Adm. (2 ed.) §§ 351, 352; 108 Am. St. Rep. 424.

⁶⁷ *Palmer v. Pollock*, 26 Minn. 433, 4 N. W. 1113.

⁶⁸ *Kline v. Moulton*, 11 Mich. 370. See 18 Cyc. 1316.

⁶⁹ *Dickey v. Taft*, 175 Mass. 4, 55 N. E. 318.

claim of the estate to arbitration, or compromise a claim of the estate.⁷⁰ It is the duty of the original representative to turn over to an administrator de bonis non all the unadministered property of the estate whether in the original form or converted into money, without any order of court.⁷¹ An administrator of a deceased administrator has a right to settle the account of his intestate in the probate court before he can be called upon to deliver the assets in his hands belonging to the estate to the administrator de bonis non.⁷² On the removal of an executor the title to the property of the testator undisposed of reverts to the estate and becomes vested in the administrator de bonis non.⁷³ An administrator de bonis non with the will annexed is expressly authorized by statute to sell and convey realty of the testator where the executor is authorized to do so by the terms of the will.⁷⁴ A power given by a will to an executor to sell realty vests in an administrator de bonis non unless the will clearly indicates that the testator reposed a special confidence in the executor.⁷⁵ An administrator de bonis non with the will annexed does not execute powers and duties which lie outside the ordinary scope of an executor's functions, unless the will clearly expresses an intention that he should.⁷⁶ Where the former representative was an executor and also a trustee under the will, an administrator de bonis non with the will annexed does not succeed to the title of the trustee and cannot execute the trust except under appointment from the district court. But he may exercise administrative powers over the trust property. For example, he may sell the trust property to pay debts and expenses of administration.⁷⁷

1160. Inventory—Whether an administrator de bonis non must file an inventory has never been determined in this state. It is doubtless discretionary with the probate court to require him to do so.⁷⁸

1161. Actions by—An administrator de bonis non may prosecute any action begun by his predecessor.⁷⁹ He may sue on the bond of his predecessor.⁸⁰ He may recover by action money belonging to the es-

⁷⁰ *Thayer v. Kinsey*, 162 Mass. 232, 38 N. E. 360.

⁷¹ *Balch v. Hooper*, 32 Minn. 158, 20 N. W. 124; *McAlpine v. Kratka*, 98 Minn. 151, 107 N. W. 961. See § 1027.

⁷² *Foster v. Bailey*, 157 Mass. 160, 31 N. E. 771; *In re Wagner's Estate*, 227 Pa. 460, 76 Atl. 215.

⁷³ *Lafferty v. People's Savings Bank*, 76 Mich. 35, 43 N. W. 34.

⁷⁴ G. S. 1913, § 7291. See 11 A. & E. Ency. of Law (2 ed.) 1322; 18 Cyc. 1323; 24 C. J. 1168; *Woerner, Am. Law of Adm.* (2 ed.) § 341; 16 Ann. Cas. 330; 50 L. R. A. (N. S.) 610; 80 Am. St. Rep. 96.

⁷⁵ *In re Manning's Estate*, 85 Neb. 60, 122 N. W. 711. See § 1163; 11 A. & E. Ency. of Law (2 ed.) 1322; 18 Cyc. 1323; 24 C. J. 1168; *Woerner, Am. Law of Adm.* (2 ed.) § 341; 16 Ann. Cas. 330; 50 L. R. A. (N. S.) 610; 80 Am. St. Rep. 96.

⁷⁶ *Bennett v. Chapin*, 77 Mich. 526, 43 N. W. 893.

⁷⁷ See § 1163.

⁷⁸ See *Fay v. Muzzey*, 13 Gray (Mass.) 53; *Alexander v. Stewart*, 8 Gill & J. (Md.) 226.

⁷⁹ See § 1158.

⁸⁰ *Balch v. Hooper*, 32 Minn. 158, 20 N. W. 124; *McAlpine v. Kratka*, 98

tate collected on the bond of his predecessor.⁸¹ He may recover by action from the original representative moneys coming into his hands as proceeds of the estate, though not assets received in specie. The common-law rule to the contrary is abolished by statute.⁸² He may maintain unlawful detainer proceedings under the statute.⁸³ He may maintain an action to recover funds of the estate in the hands of an agent employed by his predecessor.⁸⁴ He may recover by action from his predecessor all the funds of the estate though they are for the payment of annuities.⁸⁵ He and not the legatees should sue for a conversion of the assets by strangers after the death of the original administrator.⁸⁶ He may sue the personal representative of a former executor for the conversion by the latter of rents and profits for which he was accountable.⁸⁷ In an action by an administrator de bonis non the complaint should state the name of the original representative and that he is dead, or has resigned, or has been discharged, or his letters revoked, as the case may be.⁸⁸

ADMINISTRATORS WITH WILL ANNEXED

1162. Appointment—Statute—In case no executor is named in a will, or the executors named therein are dead or refuse to act, or neglect to qualify, administration with the will annexed shall be granted to such person as would have been entitled thereto if the decedent had died intestate. Such administrator shall have all the powers and perform all the duties of an executor, and may sell and convey real estate where the executor is empowered so to do by the terms of the will: Provided, that if a person named in the will as executor shall qualify before such administrator is appointed, letters testamentary may be issued to him.⁸⁹ There is no authority in the probate court to require a person to act as an executor and if a person named in a will as executor refuses to act the only course for the court is to appoint an administrator with the

Minn. 151, 107 N. W. 961; Vukmirovich v. Nickolich, 123 Minn. 165, 143 N. W. 255. See Palmer v. Pollock, 26 Minn. 433, 4 N. W. 1113.

⁸¹ See Palmer v. Pollock, 26 Minn. 433, 4 N. W. 1113.

⁸² Balch v. Hooper, 32 Minn. 158, 20 N. W. 124; Marvel v. Babbitt, 143 Mass. 226, 9 N. E. 566; Denton v. Schneider, 50 Wash. 506, 142 Pac. 9; 18 Cyc. 1313. See, for common-law rule, In re Chapman's Estate, 70 Conn. 363, 39 Atl. 734; 11 A. & E. Ency. of Law (2 ed.) 1325, 18 Cyc. 1310; 24 C. J. 1152; 11 R. C. L. 426; 3 A. L. R. 1252; 108 Am. St. Rep. 427; Woerner, Am. Law of Adm. (2 ed.) § 351.

⁸³ Cunningham v. Davis, 175 Mass. 213, 56 N. E. 2.

⁸⁴ Prusa v. Everett, 78 Neb. 251, 113 N. W. 571.

⁸⁵ Ellyson v. Lord, 124 Iowa 125, 99 N. W. 582.

⁸⁶ Barlow v. Nelson, 157 Mass. 395, 32 N. E. 359. See 108 Am. St. Rep. 426.

⁸⁷ Denton v. Schneider, 50 Wash. 506, 142 Pac. 9.

⁸⁸ Hamilton v. McIndoo, 81 Minn. 324, 326, 84 N. W. 118.

⁸⁹ G. S. 1913, § 7291. See 11 A. & E. Ency. of Law (2 ed.) 789, 1320; 18 Cyc. 98, 1321; 24 C. J. 1159; 11 R. C. L. 419.

will annexed.⁹⁰ No appointment can be made until the will is probated.⁹¹ If the court denies probate to the will it has no authority to appoint an administrator with the will annexed.⁹² If no executor is named in a will an administrator with the will annexed must be appointed.⁹³ If the person named as executor in the will dies before the will is probated or letters granted to him an administrator with the will annexed is appointed as of course.⁹⁴ Where there is anything to be done, such as the payment of a legacy, and the named executor refuses to act, an administrator with the will annexed should be appointed.⁹⁵ If the probate of a will is subsequently set aside the office of administrator with the will annexed thereupon ceases.⁹⁶ The persons entitled to appointment are the same as in case of intestacy.⁹⁷ The right to appointment is not lost by opposing probate of the will.⁹⁸ An appointment is presumed to be valid. If the executor declined to qualify it will be presumed that he did so legally.⁹⁹

1163. Powers and duties—An administrator with the will annexed has all the powers and duties of an executor.¹ He has the same powers and duties as the executor named in the will whether the will is foreign or domestic.² He may sell and convey realty where the executor is empowered to do so in the will, at least for administrative purposes.³ A power to sell lands of the testator given by a foreign will to the executor named therein, the exercise of which is discretionary with him, does not vest in an administrator with the will annexed appointed in this

⁹⁰ *Cable v. Cable*, 76 Iowa 163.

⁹¹ *Chase v. Ross*, 36 Wis. 267.

⁹² *In re Bouysson's Estate*, 1 Cal. App. 657, 82 Pac. 1066.

⁹³ *Drury v. Natlick*, 10 Allen (Mass.) 174; *Newcomb v. Williams*, 9 Met. (Mass.) 533.

⁹⁴ *In re McDonald's Estate*, 118 Cal. 277, 50 Pac. 399.

⁹⁵ *Leavitt v. Leavitt*, 65 N. H. 102, 18 Atl. 920.

⁹⁶ *Smith v. Stockbridge*, 39 Md. 640; *Kilton v. Anderson*, 18 R. I. 136.

⁹⁷ G. S. 1913, § 7291; *In re Garber's Estate*, 74 Cal. 338; *In re McDonald's Estate*, 118 Cal. 277, 50 Pac. 399; *In re Meier's Estate*, 165 Cal. 456, 132 Pac. 764.

⁹⁸ *Stebbins v. Lathrop*, 4 Pick. (Mass.) 33.

⁹⁹ *Finch v. Houghton*, 19 Wis. 149; *Batchelder v. Batchelder*, 20 Wis. 452.

¹ G. S. 1913, § 7291; *Cheever v. Converse*, 35 Minn. 179, 182, 28 N. W. 217; *St. Paul Trust Co. v. Mintzer*, 65 Minn.

124, 131, 67 N. W. 657; *Sears v. Scranton Trust Co.*, 228 Pa. St. 126, 77 Atl. 423; 11 A. & E. Ency. of Law (2 ed.) 1320; 24 C. J. 1166; 18 Cyc. 1321; 11 R. C. L. 419; *Woerner*, Am. Law of Adm. (2 ed.) § 178.

² *Lees v. Wetmore*, 58 Iowa 170, 12 N. W. 238.

³ G. S. 1913, § 7291; *Cheever v. Converse*, 35 Minn. 179, 182, 28 N. W. 217; *May v. Brewster*, 187 Mass. 524, 73 N. W. 546; *In re Manning's Estate*, 85 Neb. 60, 122 N. W. 711; *Greenland v. Waddell*, 116 N. Y. 234, 22 N. E. 367; *Royce v. Adams*, 123 N. Y. 402, 25 N. E. 386; *Green v. Russell*, 103 Mich. 638, 61 N. W. 885; *Cannon v. Cannon*, 175 Mo. App. 84, 157 S. W. 860; *Kildwell v. Brummagin*, 32 Cal. 436; 11 A. & E. Ency. of Law (2 ed.) 1322; 18 Cyc. 1323; 24 C. J. 1167; *Woerner*, Am. Law of Adm. (2 ed.) §§ 339-341; 16 Ann. Cas. 330; 50 L. R. A. (N. S.) 610; 80 Am. St. Rep. 96. See § 1159.

state, so as to validate a sale of such lands made without a prior authorization of the probate court, and for a purpose not administrative. And this is so, though by the laws of the state of the domiciliary administration an administrator with the will annexed is given the same power to sell and convey real estate that the person named in the will as the executor could have had in executing the will.⁴ The death of an executor before executing the power of sale in a will directing a sale of realty for distribution among beneficiaries does not prevent a sale, but an administrator with the will annexed may exercise the power.⁵ Generally the powers and duties of an executor pass to an administrator with the will annexed, but where the power granted or duty imposed implies a personal confidence in the individual over and above that which is ordinarily implied in the selection of an executor, the power and duty are not those of executors *virtute officii*, and do not pass to the administrator with the will annexed.⁶ The trend of decision now is to construe powers vested in an executor as held *virtute officii* when it is reasonably possible to do so. To pass to the administrator with the will annexed, a power must be for administrative purposes and not to execute a collateral trust.⁷ The duties of an executor and of a trustee under a will are distinct and an administrator with the will annexed does not succeed to the powers of an executor as a testamentary trustee. He is, however, authorized to exercise power over the trust property so far as is necessary for administrative purposes, as, for example, to sell it for the payment of the decedent's debts or the charges and expenses of administration. But to act as trustee under the will he must be appointed by the district court.⁸ An administration with the will annexed extends to all the estate of the decedent and is not limited to the portion disposed of by the will.⁹

EXECUTORS DE SON TORT

1164. Definition—An executor de son tort (of his own wrong) is one who assumes to act as an executor or administrator without lawful authority or wrongfully intermeddles in any way with the estate of a deceased person.¹⁰

⁴ *Crouse v. Peterson*, 130 Cal. 169, 62 Pac. 475 (domiciliary administration in Minnesota).

⁵ *Williams v. Williams*, 136 N. Y. S. 990.

⁶ *Mott v. Ackerman*, 92 N. Y. 553; *Greenland v. Waddell*, 116 N. Y. 234, 22 N. E. 367; *Greenough v. Welles*, 11 Cush. (Mass.) 571; 11 A. & E. Ency. of Law (2 ed.) 1321; 24 C. J. 1167; 18 Cyc. 1322; 11 R. C. L. 423; 21 Id. 790; *Woerner, Am. Law of Adm.* (2 ed.) § 341; 80 Am. St. Rep. 110. See § 1159.

⁷ *Crouse v. Peterson*, 130 Cal. 169, 62 Pac. 475. See 18 Cyc. 1325n.

⁸ *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497; *In re Quimby's Estate*, 84 N. J. Eq. 1, 92 Atl. 56; *Kelsey v. MacTigue*, 157 N. Y. S. 730. See 80 Am. St. Rep. 115.

⁹ *Landers v. Stone*, 45 Ind. 404; 11 A. & E. Ency. of Law (2 ed.) 1325; 18 Cyc. 1322; 24 C. J. 1167; *Woerner, Am. Law of Adm.* (2 ed.) § 178.

¹⁰ *Noon v. Finnegan*, 29 Minn. 418, 13 N. W. 197. See 24 C. J. 1211.

1165. Statute—No person shall be liable to an action, as executor of his own wrong, for having taken, received, or interfered with the property of a deceased person, but shall be responsible to the executor, or general or special administrator, of such decedent, for the value of all property so taken or received, and for all damages caused by his acts to the estate.¹¹ We inherited this statute from the territory of Wisconsin, which, doubtless, copied it from New York, where it is first found in the Revised Statutes of 1830. The only subject of which it treats is the liability of executors in their own wrong, or executors *de son tort*, as they are usually called. An executor *de son tort* is one who, being neither executor nor administrator, interferes with the goods of the deceased; or, as defined by one author, "one who takes upon himself the office of executor by intrusion, not being so constituted by the deceased, nor, for want of such constitution, substituted by the court to administer." Such an intermeddler was, at common law, held subject to all the liabilities of an executor, and estopped by his own acts from denying that he was executor in fact. No intermeddling with the lands of the deceased would charge a person as executor of his own wrong, such interference being a wrong only to the heir or devisee. At common law, when a person had so intermeddled with the personal estate of the deceased as to become an executor *de son tort*, he thereby became liable, not only to an action by the rightful executor or administrator, but also to be sued by any creditor or legatee. The judgment rendered against him in such action was that plaintiff do recover his debt and costs, to be levied out of the assets of the testator, if the defendant had so much, but, if not, out of the defendant's own goods. The judgment, when collected, was exclusively for the benefit of the creditor or legatee who brought the action. These, and other illustrations that might be cited, show that the common-law doctrines of executors *de son tort* were inconsistent with the general principles and policy of the statutes of most of the American states regulating the administration and settlement of the estates of deceased persons, which are usually to the effect that all the assets of the estates shall be controlled exclusively by the personal representative, and by him distributed among all the creditors and legatees or distributees equally, in the order of their priority as fixed by statute. Hence, in some states, the courts, even in the absence of statute, refused to recognize the office of executor in his own wrong. Other states, like our own, have abolished it by statute. This was the sole purpose of this or similar statutes. They abolish the office of executor of his own wrong, if it can be called an office, and place such an intermeddler with the goods of a deceased person upon a level with any ordinary trespasser. The statute simply takes away the right of action which the creditor or legatee previously would have had against the trespasser, and vests it exclusively in the

¹¹ G. S. 1913, § 8177. See 13 Kinney's Consol. Laws, N. Y. § 112; 24 C. J. 1211.

personal representative, so that the damages, when recovered, may be by him administered like any other assets of the estate. It was never designed to give to the personal representative a right of action for any acts for which, previously, neither he, nor a creditor, nor a legatee could have maintained an action.¹² The statute abolishes the common-law right of a creditor or legatee to sue an executor de son tort for his wrongful acts.¹³ Except as modified by statute the common-law rules respecting the liability of executors de son tort are perhaps in force in this state.¹⁴ If an executor de son tort is appointed administrator his prior wrongful acts in relation to the estate are thereby validated and he is bound by them.¹⁵

1166. Defences.—Though an executor de son tort cannot be benefited by his wrongful acts he may plead in defence that the estate has suffered no damage from his acts. He may plead in defence that assets collected by him were applied in satisfaction of claims against the estate which it would have been the duty of the lawful representative to have satisfied.¹⁶ He may show that there are no outstanding claims against the estate and that he has applied the assets for the use and benefit of the distributees, as they must have been applied in due course of administration.¹⁷ One sued by an administrator for conversion of property of the estate may show that he acted in pursuance of the orders of the administrator before his appointment and applied the proceeds in payment of the debts of the decedent.¹⁸ The true representative is bound by those acts of an executor de son tort which are lawful and such as the true representative would be bound to perform in the due course of administration.¹⁹

¹² *Noon v. Finnegan*, 29 Minn. 418, 13 N. W. 197. See 11 A. & E. Ency. of Law (2 ed.) 1342; 18 Cyc. 1354; 24 C. J. 1211; Woerner, Am. Law of Adm. (2 ed.) §§ 188-198; 11 R. C. L. 456; 98 Am. St. Rep. 193; Ann. Cas. 1917E, 3; 32 Harv. L. Rev. 315.

¹³ *Noon v. Finnegan*, 29 Minn. 418, 13 N. W. 197; *Fox v. Van Norman*, 11 Kan. 214; *Bowden v. Pierce*, 73 Cal. 459, 14 Pac. 302; *Rutherford v. Thompson*, 14 Or. 236, 12 Pac. 382; *Rozell v. Harmon*, 29 Mo. App. 569; *Barasien v. Odum*, 17 Ark. 122; *Merrill v. Comstock*, 154 Wis. 434, 143 N. W. 313; 11 A. & E. Ency. of Law (2 ed.) 1344; 18 Cyc. 1361; 24 C. J. 1218; Woerner, Am. Law of Adm. (2 ed.) § 198; Ann. Cas. 1917E, 3; 32 Harv. L. Rev. 317.

¹⁴ See *Merrill v. Comstock*, 154 Wis. 434, 143 N. W. 313; 24 C. J. 1211.

¹⁵ *Shawnee Nat. Bank v. Van Zant* (Okl.) 202 Pac. 285.

¹⁶ *Lenderink v. Sawyer*, 92 Neb. 587, 138 N. W. 744 (payment of funeral expenses by coroner); *Merrill v. Comstock*, 154 Wis. 434, 143 N. W. 313 (payment of expenses of last sickness and funeral by widow—failure of widow to file claim against estate held not to prevent her from pleading payment in action against her by representative); 11 A. & E. Ency. of Law (2 ed.) 1352; 18 Cyc. 1363; 24 C. J. 1220.

¹⁷ *Brown v. Walter*, 58 Ala. 310.

¹⁸ *Rutherford v. Thompson*, 14 Or. 236, 12 Pac. 382.

¹⁹ *Lenderink v. Sawyer*, 92 Neb. 587, 138 N. W. 744.

1167. Estoppel—Accounting—At common law an executor de son tort is estopped by his own acts from denying that he was executor in fact.²⁰ Persons who have presumed, without authority, to administer an estate, and who claim to have fully administered it, are estopped, in a proceeding for an accounting, from denying their representative capacity or their liability to account accordingly.²¹

SUMMARY ADMINISTRATION

1168. Summary administration of certain small estates—Probate of will—Distribution of residue—Statute—Whenever any person dies leaving real or personal property within this state and all of the property and assets of said deceased are exempt from the payment of debts, and do not exceed in value six hundred and fifty dollars, any person entitled to apply for letters of administration or for the allowance of a will to probate may petition the probate court of the proper county that the will, if the deceased died testate, be admitted to probate, or if intestate for letters of administration, and in any event that the whole estate be closed forthwith and distribution thereof made.²²

1169. Same—Petition—Statute—Such petition shall in addition to the jurisdictional facts contain a description of all the property of said deceased, both real and personal, itemizing the same together with the facts by reason of which the same is claimed to be exempt, and the names and addresses so far as known, of the creditors, and shall pray the judgment of the probate court for a distribution of said property forthwith.²³

1170. Same—Citation for hearing on petition—Statute—The court shall thereupon issue its citation for a hearing thereon and cause the same to be published in the manner prescribed by law. Said citation shall contain a general description of all the property of said deceased and a true copy of said citation shall be mailed to each of the heirs and to each of the creditors of said deceased so far as the same can be ascertained, at least fourteen days prior to the date of hearing.²⁴

1171. Same—Admission of will to probate—Final decree of distribution—Expenses of administration—Statute—If upon the date set for the hearing it shall appear to the probate court that all of the property left by said deceased is exempt, the probate court may in case there be a will admit the same to probate, and may order an order and decree distributing said property to the heirs or legatees and devisees of said deceased, and such further order providing for the payment of the expenses of administration as may be necessary in the premises.²⁵

²⁰ Noon v. Finnegan, 29 Minn. 418, 13 N. W. 197.

²¹ Damouth v. Klock, 29 Mich. 289.

²² Laws 1917, c. 289, § 1.

²³ Laws 1917, c. 289, § 2.

²⁴ Laws 1917, c. 289, § 3.

²⁵ Laws 1917, c. 289, § 4.

FOREIGN EXECUTORS AND ADMINISTRATORS

1172. Right to letters in this state—When a foreign will has been probated in this state as provided by statute the executor therein named is entitled to letters testamentary unless there are special reasons to the contrary.²⁶ A resident executor named in the will is entitled to letters, if duly qualified, though letters were not issued to him by the court where the will was originally probated.²⁷

1173. Appointment at domicil—Presumption of regularity—Where the appointment of a foreign representative by a court with jurisdiction at the domicil of the decedent is shown it will be presumed that it was regularly made.²⁸

1174. Not judicially noticed—The courts of this state do not take judicial notice of a foreign administration.²⁹

1175. Control of local courts—Service of summons—Where, upon the petition of non-residents, they have been appointed executors or administrators by a probate court of this state, such court has the power to order that they submit to the service of summons in a civil action brought in this state for the purpose of determining the liability of the estate they represent on a claim or demand not provable in the probate court in the due course of administration.³⁰ Courts of the ancillary jurisdiction cannot control the administration of personal assets of the estate collected by the representative in the domiciliary jurisdiction.³¹

1176. Powers—In general—Letters testamentary and of administration have no force at common law out of the jurisdiction in which they are granted. It is the general rule that an executor or administrator can do no official act in a foreign jurisdiction involving an appeal to the authority thereof, in the absence of special authority granted therein. If there are assets belonging to the estate in a foreign state or country letters must be taken out there before legal process can be resorted to there for their recovery or protection. The several states of this country are foreign to each other within this rule.³² A foreign rep-

²⁶ *Hardin v. Jamison*, 60 Minn. 112, 61 N. W. 1018; *Babcock v. Collins*, 60 Minn. 73, 61 N. W. 1020. See 48 L. R. A. (N. S.) 858.

²⁷ *Bloor v. Myerscaugh*, 45 Minn. 29, 47 N. W. 311.

²⁸ *Drake v. Signafoos*, 39 Minn. 367, 40 N. W. 257 (appointment by clerk of court in vacation under Iowa statute presumed regular).

²⁹ *Holcombe v. Richards*, 38 Minn. 38, 42, 35 N. W. 714.

³⁰ *State v. Probate Court*, 66 Minn. 246, 63 N. W. 1063.

³¹ *Norton v. Palmer*, 7 Cush. (Mass.) 523; *Wirgman v. Provident Life & Trust Co.*, 79 W. Va. 526, 92 S. E. 415.

³² *Pott v. Pennington*, 16 Minn. 509 (460); *Fogle v. Schaeffer*, 23 Minn. 304; *Holcombe v. Richards*, 38 Minn. 34, 42, 35 N. W. 714; *Putnam v. Pitney*, 45 Minn. 242, 47 N. W. 790; *In re Rawitzer's Estate*, 175 Cal. 585, 166 Pac. 581; *Reynolds v. McMullen*, 55 Mich. 568, 22

representative cannot collect or receive assets in a foreign state after the appointment of an ancillary administrator there.⁸³ Where a foreign executor is also a trustee under the will and invested with title to property devised, he may protect his property right as trustee in a foreign jurisdiction without taking out letters as executor there.⁸⁴

1177. Sale of realty—In general—A foreign representative cannot convey land in this state by virtue of letters or an order of sale obtained in another state.⁸⁵ In some states there are statutes authorizing a foreign representative to convey realty upon filing a copy of the will and its probate in the proper county.⁸⁶

1178. Sale of realty under a power in a will—A foreign representative is not authorized to convey realty situated in this state under a power in a will until the will is probated here, but a subsequent probate of the will here will relate back and cure the defective execution of the power.⁸⁷

1179. Sale or mortgage of realty under license from probate court—Statute—In all cases where no executor, administrator, or guardian has been appointed in this state, a foreign executor, administrator, or guardian may file an authenticated copy of his letters in the probate court of any county in this state in which there is real estate of such decedent or ward, after which he may be licensed by such court to sell or mortgage real estate, as in the case of resident representatives; and such foreign representatives may act by resident attorney in fact, duly appointed for that purpose.⁸⁸ The sale may be conducted by a resident attorney in fact and he may make the oath required before fixing the time and place of sale.⁸⁹ A delay of six years by a foreign representative in petitioning for a sale of land to pay debts is not unreasonable where it is occasioned by the pendency of litigation conducted in good faith to determine the validity and amount of such indebtedness.⁹⁰ The statute may not authorize a license to a representative appointed in an-

N. W. 41; *Brown v. Smith*, 101 Me. 545, 64 Atl. 915; *Equitable Trust Co. v. Plume*, 92 Conn. 649, 103 Atl. 940; *Baker v. Baker, Eccles & Co.*, 242 U. S. 394; 13 A. & E. Ency. of Law (2 ed.) 916; 18 Cyc. 1221; 24 C. J. 1109; 11 R. C. L. 432; *Woerner*, Am. Law of Adm. (2 ed.) §§ 157, 158, 160.

⁸³ See §§ 1181, 1188.

⁸⁴ *In re Rawitzer's Estate*, 175 Cal. 585, 166 Pac. 581.

⁸⁵ *Sheldon v. Rice's Estate*, 30 Mich. 296; 13 A. & E. Ency. of Law (2 ed.) 944; 18 Cyc. 1231; 24 C. J. 1122. See § 1178.

⁸⁶ See *Illinois Steel Co. v. Konkell*, 146

Wis. 556, 131 N. W. 842; *Galley v. Brown*, 169 Wis. 444, 171 N. W. 945.

⁸⁷ *Babcock v. Collins*, 60 Minn. 73, 61 N. W. 1020. See 13 A. & E. Ency. of Law (2 ed.) 944; 18 Cyc. 1232; 24 C. J. 1123.

⁸⁸ G. S. 1913, § 7304; *Townsend v. Kendall*, 4 Minn. 412 (315, 324); *Jordan v. Secombe*, 33 Minn. 220, 22 N. W. 383; *Menage v. Jones*, 40 Minn. 254, 41 N. W. 972; 18 Cyc. 1232; 24 C. J. 1123; L. R. A. 1915D, 754. See § 1347.

⁸⁹ *Jordan v. Secombe*, 33 Minn. 220, 22 N. W. 383.

⁹⁰ *In re Jones' Estate*, 80 Kan. 632, 103 Pac. 772.

other state when the decedent had a domicile here at the time of his death.⁴¹

1180. Powers as to mortgages, judgments or other liens—Statute— An executor, administrator, or guardian appointed in another state or country, upon filing for record with the register of deeds of the proper county an authenticated copy of his letters or other record of his appointment, may assign, release, satisfy, or foreclose any mortgage, judgment, or lien, belonging to the estate represented by him, on real or personal property, in the same manner as such representative appointed in this state could do. Such foreign representative may act by his attorney in fact, appointed by power executed in the manner required by law for a conveyance, and filed for record with the register of the county where such act is performed.⁴² This statute, so far as it concerns the foreclosure of mortgages under a power therein, is a regulation rather than a grant of authority. It makes the filing of letters of appointment a condition precedent to the exercise of the authority created by the contract of the parties.⁴³ An assignee of a foreign executor may foreclose a mortgage containing a power of sale which runs to the assigns of the executor without first filing the letters of the executor. The statute is limited to the exercise of the power by the executor himself.⁴⁴ Independent of statute a foreign representative possibly cannot assign a mortgage of land in this state, so as to enable the assignee to enforce payment thereof by action, without taking out ancillary letters.⁴⁵ A foreign representative has authority to receive a voluntary payment of the amount due on a mortgage on land in this state without first complying with this statute.⁴⁶ Where a mortgage on realty in this state belongs to a person who dies in another state and whose estate is in course of administration here, no foreign representative can sell the mortgage to strangers. The title to the mortgage is in the local representative for purposes of administration and only he can sue on it or assign or discharge it of record.⁴⁷

1181. Possession and sale of personalty—A domiciliary representative succeeds to the legal title of the personalty of the decedent wherever situated and by virtue of this title he may, if it is possible to do so peaceably and without resorting to local legal process, take possession and remove or sell such property in a foreign jurisdiction, provided no ancillary administration has been granted there.⁴⁸ The rule that a dom-

⁴¹ See *McAnulty v. McClay*, 16 Neb. 418, 20 N. W. 266.

⁴² G. S. 1913, § 7302. See §§ 740-742.

⁴³ *Holcombe v. Richards*, 38 Minn. 38, 35 N. W. 714; *Cone v. Nimocks*, 78 Minn. 249, 80 N. W. 1056.

⁴⁴ *Cone v. Nimocks*, 78 Minn. 249, 80 N. W. 1056.

⁴⁵ See § 1183.

⁴⁶ *Dexter v. Berge*, 76 Minn. 216, 78 N. W. 1111.

⁴⁷ *Reynolds v. McMullen*, 55 Mich. 568, 22 N. W. 41.

⁴⁸ *Putnam v. Pitney*, 45 Minn. 242, 47 N. W. 790; *Babcock v. Collins*, 60 Minn. 73, 76, 61 N. W. 1020; *Martin v. Gage*,

iciliary representative succeeds to the legal title of the personalty of the decedent in other jurisdictions rests upon the law of comity but it is none the less the law. This rule is subject to the qualification that the foreign state where such property is situated has the right to assert its jurisdiction over it by ancillary administration to protect its own citizens who are creditors of the estate.⁴⁹ A foreign representative cannot transfer or assign personal property in this state without procuring a certificate from the Attorney General consenting to the transfer or assignment.⁵⁰

1182. Sale of corporate stock—A domiciliary representative, in the absence of ancillary administration may sell and assign stock in a foreign corporation, and the foreign corporation may voluntarily consent to its transfer by accepting the outstanding certificate and issuing a new one to the purchaser.⁵¹ A corporation of this state cannot transfer on its books stock of a non-resident decedent without the consent of the Attorney General.⁵²

1183. Assignment of choses in action—A representative may, by indorsement or assignment, transfer a foreign bill, note or other chose in action, owned by the decedent, and his assignee may sue thereon in his own name in the foreign jurisdiction, though the representative could not do so without taking out local letters.⁵³ Before a representative of a non-resident decedent can assign personal property of the decedent in this state he must secure the consent of the Attorney General.⁵⁴ Independent of statute or contract a foreign representative possibly cannot assign a mortgage of land in this state so as to enable the assignee to enforce payment thereof by foreclosure.⁵⁵

1184. Receiving payment of debts—A foreign representative may receive a voluntary payment of a debt due the decedent, there being no local administration, and such payment is a good defence to an action by

147 Mass. 204, 17 N. E. 310; *Crosby v. Charlestown*, 78 N. H. 39, 95 Atl. 1043; *Union Trust Co. v. Pacific T. & T. Co.*, 31 Cal. App. 64, 159 Pac. 820; *Morrison v. Hass*, 229 Mass. 514; 118 N. E. 893; *Morrison v. Berkshire L. & T. Co.*, 220 Mass. 519, 118 N. W. 895; *Compton's Administrator v. Borderland Coal Co.*, 179 Ky. 695, 201 S. W. 20; 13 A. & E. Ency. of Law (2 ed.) 934; 18 Cyc. 1229; 24 C. J. 1121; 45 Am. St. Rep. 664.

⁴⁹ *Putnam v. Pitney*, 45 Minn. 242, 47 N. W. 790.

⁵⁰ G. S. 1913, § 2281.

⁵¹ *Luce v. Manchester, etc. R. Co.*, 63 N. H. 588, 3 Atl. 618; *Putnam v. Pitney*, 45 Minn. 242, 47 N. W. 790; 13 A. & E.

Ency. of Law (2 ed.) 942; 18 Cyc. 1231; 24 C. J. 1122.

⁵² G. S. 1913, § 2281; *State v. Probate Court*, 142 Minn. 415, 172 N. W. 318.

⁵³ See § 1187.

⁵⁴ G. S. 1913, § 2281.

⁵⁵ *Cutter v. Davenport*, 1 Pick. (Mass.) 81; *Brown v. Smith*, 101 Me. 545, 64 Atl. 915; *Reynolds v. McMullen*, 55 Mich. 568, 22 N. W. 41; *Dial v. Gary*, 14 S. C. 573; *Heyward v. Williams*, 57 S. C. 235, 35 S. E. 503; *Gove v. Gove*, 64 N. H. 503, 15 Atl. 121 (holding that he may); 13 A. & E. Ency. of Law (2 ed.) 943; 18 Cyc. 1231; 24 C. J. 1122. See §§ 740-742, 1180.

an ancillary representative subsequently appointed at the domicile of the debtor.⁵⁶ A payment to a foreign representative is ordinarily no defence to an action by a previously appointed local representative.⁵⁷

1185. Compromise of claims—A representative may compromise a claim of his estate against a non-resident debtor.⁵⁸

1186. Receiving dividends—A foreign representative may receive payment of dividends on corporate stock.⁵⁹

ACTIONS BY

1187. Independent of statute—It is a general rule that, independent of statute, a representative cannot sue, as such, in a foreign jurisdiction. It is immaterial that there are no local creditors.⁶⁰ This rule has been characterized as narrow and provincial. It has been contended that the correct rule would recognize the same right in a domiciliary representative as in any other owner of personalty to maintain suits for its possession, unless and until that right is superseded by the institution of ancillary administration in the state where the property is situated.⁶¹ The reason for the rule is the protection of the rights of local creditors.⁶² While a representative cannot sue on a chose in action in a foreign jurisdiction, without statutory authority, his assignee may do so.⁶³ The right of the assignee to sue may be affected by our state inheritance tax law.⁶⁴ The general rule that a representative cannot sue in a foreign jurisdiction applies only where he must sue in his representative capacity; that is, on a cause of action accruing to the decedent prior to his death. It does not apply to causes of action accruing to the representative, even

⁵⁶ Putnam v. Pitney, 45 Minn. 242, 47 N. W. 790; Dexter v. Berge, 76 Minn. 216, 78 N. W. 1111; McCully v. Cooper, 114 Cal. 258, 46 Pac. 82; Wilkins v. Ellett, 108 U. S. 256; Crosby v. Charlestown, 78 N. H. 39, 95 Atl. 1043; Morrison v. Hass, 229 Mass. 514, 118 N. E. 893; Morrison v. Berkshire L. & T. Co., 229 Mass. 519, 118 N. E. 895; 13 A. & E. Ency. of Law (2 ed.) 932; 18 Cyc. 1229; 24 C. J. 1120; Woerner, Am. Law of Adm. (2 ed.) 161; 10 A. L. R. 276.

⁵⁷ See § 1201.

⁵⁸ Compton's Administrator v. Borderland Coal Co., 179 Ky. 695, 201 S. W. 20. See §§ 756, 873.

⁵⁹ Putnam v. Pitney, 45 Minn. 242, 47 N. W. 790.

⁶⁰ Pott v. Pennington, 16 Minn. 509 (460); Fogle v. Schaeffer, 23 Minn. 304; Putnam v. Pitney, 45 Minn. 242, 47 N. W. 790; Cone v. Nimocks, 78 Minn. 249, 80 N. W. 1056; Pulver v. Leonard, 176

Fed. 586; Johnson v. Powers, 139 U. S. 156; Mansfield v. McFarland, 202 Pa. 173, 51 Atl. 763; Helme v. Buckelew, 229 N. Y. 363, 128 N. E. 216; 8 Ency. of Pl. & Pr. 700; 13 A. & E. Ency. of Law (2 ed.) 945; 18 Cyc. 1237; 24 C. J. 1129; Woerner, Am. Law of Adm. (2 ed.) § 160; 12 Probate Reports Ann. 250.

⁶¹ Putnam v. Pitney, 45 Minn. 242, 47 N. W. 790.

⁶² Wilkins v. Ellett, 108 U. S. 256. See 24 C. J. 1130.

⁶³ Putnam v. Pitney, 45 Minn. 242, 47 N. W. 790; Cone v. Nimocks, 78 Minn. 249, 80 N. W. 1056; General Conference v. Michigan S. & B. Assn., 166 Mich. 504, 132 N. W. 94; 8 Ency. Pl. & Pr. 711; 13 A. & E. Ency. of Law (2 ed.) 942; 18 Cyc. 1231; 24 C. J. 1121; Woerner, Am. Law of Adm. (2 ed.) § 161; 10 A. L. R. 276.

⁶⁴ See G. S. 1913, § 2281.

though they accrue to him by virtue of his representative capacity. Allegations of representative capacity may be disregarded.⁶⁵ If a note belonging to an estate is payable to bearer or indorsed in blank a foreign representative may sue thereon in his individual capacity.⁶⁶ A foreign representative may sue in his individual capacity on a judgment recovered by him in another state in his representative capacity. If he sues in his representative capacity the allegation of representative capacity may be disregarded.⁶⁷ He may sue on any contract between himself and the defendant though it purported to be made in his representative capacity. Allegations of representative capacity may be disregarded.⁶⁸ If a representative has reduced personal property of the estate to his possession in the state of his appointment, and it is thereafter wrongfully taken from him and carried into another state, he may maintain an action for its recovery in the latter state in his individual capacity.⁶⁹ An exception to the general rule is sometimes recognized where the foreign representative has a cause of action as a mere trustee for the benefit of particular beneficiaries.⁷⁰

1188. Statute—Any foreign executor or administrator may commence and prosecute an action in this state, in his representative capacity, in the same manner and under the same restrictions as in case of a resident: Provided, that before commencing such action he shall file an authenticated copy of his appointment as executor or administrator with the probate court of the county in which such action is to be commenced.⁷¹ A failure to file letters as provided by the statute merely affects the capacity to sue in our courts and is waived unless objection is raised by answer or demurrer.⁷² A failure to file letters before com-

⁶⁵ *Moore v. Petty*, 135 Fed. 668; *Old Dominion Trust Co. v. First Nat. Bank*, 252 Fed. 613; 8 Ency. Pl. & Pr. 708; 13 A. & E. Ency. of Law (2 ed.) 951; 18 Cyc. 1240; 24 C. J. 1131; *Woerner, Am. Law of Adm.* (2 ed.) § 162.

⁶⁶ *Knapp v. Lec*, 42 Mich. 41, 3 N. W. 244; 8 Ency. Pl. & Pr. 711; 13 A. & E. Ency. of Law (2 ed.) 952; 18 Cyc. 1239; 24 C. J. 1132; *Woerner, Am. Law of Adm.* (2 ed.) § 162.

⁶⁷ *Talmage v. Chapel*, 16 Mass. 71; *Lewis v. Adams*, 70 Cal. 403, 11 Pac. 833; *McCully v. Cooper*, 114 Cal. 258, 46 Pac. 82; *Hare v. O'Brien*, 233 Pa. St. 330, 82 Atl. 475; *De Paris v. Wilmington Trust Co.*, 7 (Boyce) Del. 178, 104 Atl. 691; 8 Ency. Pl. & Pr. 710; 13 A. & E. Ency. of Law (2 ed.) 952; 18 Cyc. 1239; 24 C. J. 1131; *Woerner, Am. Law of Adm.* (2 ed.) § 162; 39 L. R. A. (N. S.) 430; *Ann. Cas.* 1913B, 626.

⁶⁸ *Morse v. King*, 73 N. J. L. 548, 63 Atl. 986; 13 A. & E. Ency. of Law (2 ed.) 951; 18 Cyc. 1240; 24 C. J. 1131; *Woerner, Am. Law of Adm.* (2 ed.) § 162.

⁶⁹ *McCully v. Cooper*, 114 Cal. 258, 46 Pac. 82; 8 Ency. Pl. & Pr. 709; 13 A. & E. Ency. of Law (2 ed.) 951; 18 Cyc. 1240; 24 C. J. 1131; *Woerner, Am. Law of Adm.* (2 ed.) § 162.

⁷⁰ *Knight v. Moline, etc. Ry. Co.*, 160 Iowa 160, 140 N. W. 839. See § 1176.

⁷¹ G. S. 1913, § 8178. See 8 Ency. Pl. & Pr. 705; 13 A. & E. Ency. of Law (2 ed.) 953; 18 Cyc. 1241; 24 C. J. 1134; *Woerner, Am. Law of Adm.* (2 ed.) 163; 12 Probate Reports Ann. 250.

⁷² *Pope v. Waugh*, 94 Minn. 502, 103 N. W. 500; *Pulver v. Leonard*, 176 Fed. 586.

mencing an action is not cured by filing them thereafter, if proper objection is made.⁷³ The letters are properly authenticated in accordance with the act of Congress.⁷⁴ The statute does not require a foreign executor to prove the will or to obtain letters in this state.⁷⁵ The filing of the letters under the statute is a purely ministerial act requiring no action on the part of the court.⁷⁶ A foreign representative cannot maintain an action for trespass to realty in this state, if the will has not been proved or letters issued here, though an authenticated copy of his foreign appointment is filed as provided by statute.⁷⁷ The statute does not authorize an action in this state against a foreign representative.⁷⁸ It does not confer any greater rights over the property of the decedent than would be enjoyed by the representative if he had taken out letters here.⁷⁹ It does not affect the right of the court of this state to appoint an ancillary representative.⁸⁰ It authorizes an action for death by wrongful act upon a cause of action arising in the state where the foreign representative was appointed and belonging to the estate of the deceased person.⁸¹ It authorizes an action in a federal court sitting in this state.⁸² It applies to a corporation acting as a representative.⁸³ It does not authorize an action to recover anything that would not be assets in the hands of the representative.⁸⁴ It authorizes an action for specific performance against a vendor.⁸⁵ It authorizes an action for tort as well as on contract.⁸⁶ It does not authorize a foreign representative to receive or recover personal assets in this state after the grant of ancillary administration here.⁸⁷ The subsequent appointment of an ancillary administration here will not defeat a prior action under the statute by a foreign representative, if there are no debts in this state requiring protection and there is nothing to be done but the collection of assets.⁸⁸ The mere fact that a foreign representative has removed from the state of his appointment will not defeat an action under the

⁷³ *Fogle v. Schaeffer*, 23 Minn. 304. See 4 L. R. A. (N. S.) 657.

⁷⁴ *First Nat. Bank v. Kidd*, 20 Minn. 234 (212); *Brown v. Chicago & N. W. Ry. Co.*, 129 Minn. 347, 152 N. W. 729. See § 307.

⁷⁵ *Babcock v. Collins*, 60 Minn. 73, 61 N. W. 1020.

⁷⁶ *Smith v. Peckham*, 39 Wis. 414.

⁷⁷ *Pott v. Pennington*, 16 Minn. 509 (460).

⁷⁸ *Burton v. Williams*, 63 Neb. 431, 68 N. W. 483; *Thorburn v. Gates*, 230 Fed. 922.

⁷⁹ *Jones v. Clett*, 114 Ga. 673, 40 S. E. 719.

⁸⁰ *Broughton v. Bradley*, 34 Ala. 694.

⁸¹ *Brown v. Chicago & N. W. Ry. Co.*, 129 Minn. 347, 152 N. W. 729; *State v.*

District Court, 140 Minn. 494, 168 N. W. 494. See L. R. A. 1916E, 166.

⁸² *Beaumont v. Beaumont*, 144 Fed. 288. See *Pulver v. Leonard*, 176 Fed. 586.

⁸³ *Germantown Trust Co. v. Whitney*, 19 S. D. 108, 102 N. W. 304.

⁸⁴ *Fairchild v. Hagel*, 54 Ark. 61, 41 S. W. 1102.

⁸⁵ *Stewart v. Griffith*, 217 U. S. 323.

⁸⁶ *Averitt v. Pope*, 30 Ga. 660.

⁸⁷ *Grayson v. Robertson*, 122 Ala. 330, 25 So. 229. See *Campbell v. Hughes*, 144 Ala. 393, 42 So. 42; *Hensley v. Rich (Ind.)* 132 N. E. 632; 4 L. R. A. (N. S.) 657.

⁸⁸ *Greenwalt v. Bastian*, 10 Kan. App. 101, 61 Pac. 513.

statute.⁸⁹ A similar statute has been held not to authorize a statutory action to determine adverse claims.⁹⁰

1189. Pleading—In an action purporting to be brought by plaintiff as a foreign administrator, the allegations in the complaint to the effect that plaintiff has been duly appointed such foreign administrator, and has duly filed in the proper probate court of this state a duly authenticated copy of his appointment, are put in issue by an answer in the form of a general denial.⁹¹

ACTIONS AGAINST

1190. In general—As a general rule no action will lie against a foreign representative in his official capacity. A representative can be called to account for the assets of the estate only in the courts of the jurisdiction in which he is appointed.⁹² Independent of statute, an action will lie against a foreign representative in his official capacity in exceptional cases affecting property within the local jurisdiction. An equitable action to determine the title to property is such a case.⁹³ A foreign representative may be sued in his individual capacity on any contract made by himself, though it purported to be made in his representative capacity.⁹⁴ While a representative cannot ordinarily be compelled to account for funds of the estate in the courts of a foreign jurisdiction, yet if he carries such funds into a foreign jurisdiction and there misapplies them, and threatens still further to misapply them, a beneficiary of the estate may maintain an equitable action against him in such jurisdiction to prevent a waste of the funds and their proper application.⁹⁵ If a foreign representative is sued without authority in a foreign jurisdiction a judgment against him is not binding on the estate in the state of his appointment.⁹⁶ If a foreign representative takes

⁸⁹ *Bethel v. Pawnee County*, 95 Neb. 203, 145 N. W. 363.

⁹⁰ *Colburn v. Latham*, 32 S. D. 310, 143 N. W. 278.

⁹¹ *Fogle v. Schaeffer*, 23 Minn. 304.

⁹² *Vaughan v. Northup*, 15 Pet. (U. S.) 1; *Courtney v. Pradt*, 160 Fed. 561; *Helme v. Buckelew*, 229 N. Y. 363, 128 N. E. 216; *Burton v. Williams*, 63 Neb. 431, 88 N. W. 765; *Thorburn v. Gates*, 230 Fed. 922. See 8 Ency. Pl. & Pr. 714; 13 A. & E. Ency. of Law (2 ed.) 957; 18 Cyc. 1244; 24 C. J. 1136; 11 R. C. L. 450; *Woerner, Am. Law of Adm.* (2 ed.) §§ 160, 163, 164; 29 Harv. L. Rev. 442; 27 L. R. A. 101; 35 L. R. A. (N. S.) 334.

⁹³ *Bergmann v. Lord*, 194 N. Y. 70, 86 N. E. 828; *Holmes v. Camp*, 219 N. Y.

359, 114 N. E. 841. See 11 Col. L. Rev. 565; 29 Harv. L. Rev. 442; *Woerner, Am. Law of Adm.* (2 ed.) § 164; 8 Ency. Pl. & Pr. 715; 11 R. C. L. 451; 18 Cyc. 1245; 24 C. J. 1138; 13 A. & E. Ency. of Law (2 ed.) 959.

⁹⁴ *Johnston v. Wallis*, 112 N. Y. 230, 19 N. E. 653; 13 A. & E. Ency. of Law (2 ed.) 959; 18 Cyc. 1246; 24 C. J. 1139.

⁹⁵ *Falke v. Terry*, 32 Colo. 85, 75 Pac. 425; 8 Ency. Pl. & Pr. 715; 13 A. & E. Ency. of Law (2 ed.) 959; 18 Cyc. 1245; 24 C. J. 1138; 11 R. C. L. 451; *Woerner, Am. Law of Adm.* (2 ed.) § 164; 29 Harv. L. Rev. 442; 27 L. R. A. 112; 35 L. R. A. (N. S.) 334.

⁹⁶ *Barber v. Keiser*, 202 Ill. App. 377, 279 Ill. 287, 116 N. E. 706. See 27 L. R. A. 101.

out letters here he may be sued here the same as a domestic representative.⁹⁷ Under G. S. 1913, § 7685, a foreign representative may be voluntarily substituted as defendant in an action pending against the decedent at the time of his death.⁹⁸ The representative may possibly waive his exemption from suit.⁹⁹

ANCILLARY ADMINISTRATION

1191. Definition—An ancillary administration is one granted by a state or country other than that of the domicil of the decedent. It is called "ancillary" because it is normally granted after and in subordination to the administration granted at the domicil of the decedent, which is the principal or primary administration, regardless of which is granted first.¹

1192. Object—The primary object of ancillary administration is the protection of local creditors.²

1193. Not favored—How far discretionary—When may be denied—Application by foreign creditor—An ancillary administration is not a matter of absolute right. A divided administration is always to be avoided as it is expensive and is apt to give one set of creditors an advantage over others and cause a clashing of interests. It should be denied where the parties might just as well be remitted to the domiciliary administration.³ A creditor residing in Maine, whose debtor died in New Jersey, the state of his domicil, and where his will was probated, letters testamentary issued, and the administration of his estate being had, petitioned a probate court in this state that the will be admitted to probate and letters of administration issued here, alleging that the testator left personal property in this state. There were no creditors,

⁹⁷ *Hopper v. Hopper*, 125 N. Y. 400, 26 N. E. 457; *Parsons v. Lyman*, 20 N. Y. 103.

⁹⁸ *Brown v. Brown*, 35 Minn. 191, 28 N. W. 238. See *National Council v. Scheiber*, 137 Minn. 423, 163 N. W. 781; *Brown v. Fletcher*, 146 Mich. 401, 109 N. W. 686; *Brown v. Fletcher's Estate*, 210 U. S. 82; 15 L. R. A. (N. S.) 632.

⁹⁹ *Lackner v. McKechney*, 252 Fed. 403. See *Helme v. Buckelew*, 229 N. Y. 363, 128 N. E. 216; 18 Cyc. 1245; 24 C. J. 1137.

¹ *Putnam v. Pitney*, 45 Minn. 242, 47 N. W. 790; *Rackemann v. Taylor*, 204 Mass. 394, 90 N. E. 552; *Crosby v. Charleston*, 78 N. H. 39, 95 Atl. 1043; *Compton's Ad. v. Borderland Coal Co.*, 179 Ky. 695, 201 S. W. 20; *McCully v. Cooper*, 114 Cal. 258, 46 Pac. 82; 13 A.

& E. Ency. of Law (2 ed.) 919; 18 Cyc. 1222; 24 C. J. 1110; *Woerner, Am. Law of Adm.* (2 ed.) § 158; 9 L. R. A. 218, 246; 35 Am. Dec. 483. See *Stromberg v. Stromberg*, 119 Minn. 325, 138 N. W. 428 (administration held not strictly ancillary as there were no assets at the domicil).

² *Putnam v. Pitney*, 45 Minn. 242, 47 N. W. 790; *Murphy v. Crouse*, 135 Cal. 14, 66 Pac. 971; 13 A. & E. Ency. of Law (2 ed.) 923; 18 Cyc. 1223; 24 C. J. 1112. See §§ 1193, 1202, 1207.

³ *Putnam v. Pitney*, 45 Minn. 242, 47 N. W. 790; *Gregory v. Lansing*, 115 Minn. 73, 131 N. W. 1010; *In re Daughday's Estate*, 168 Cal. 63, 141 Pac. 929; *Rackemann v. Taylor*, 204 Mass. 394, 90 N. E. 552; 13 A. & E. Ency. of Law (2 ed.) 923.

legatees, or distributees of the estate residing here, and no reason was shown why the petitioner could not prove and collect his claim in New Jersey, where the principal administration was being had. Held, that the petition was properly denied, as ancillary administration in this state was unnecessary, and to grant it would, under the circumstances, be contrary to the principles of comity between states.⁴

1194. Jurisdiction—The probate courts of this state have jurisdiction to grant ancillary administration in all cases where a decedent leaves property in this state and died domiciled out of it. A cause of action is property within this rule.⁵ They have jurisdiction to grant administration here on the estate of a non-resident left here, though the will of the decedent has not yet been proved in the state of his domicile, or an administrator appointed there if he died intestate. Unless special reasons exist to the contrary administration should not be granted here until after it has been granted at the domicile.⁶ Jurisdiction to authorize ancillary administration need not be conferred by express provision. It is an essential attribute of probate jurisdiction.⁷

1195. Primary administration at domicile—The right of succession to the personal estate of a deceased person depends on the law of his domicile whether he dies testate or intestate. The settlement of his estate and the disposition of his personal property are to be made in accordance with the law of that place. If he owns real estate in another state or country, that is subject to the laws of the place where it is situated and no one can take or hold it otherwise than in conformity with those laws. But those laws are not intended to interfere with the reasonable right of control and disposition of its owner, so far as to have a situs for the purposes of disposition by will, or by succession under the statutes of distribution in the place of his domicile. The primary proof of a will and the primary administration of an estate, if the owner dies intestate, should be had where he had his domicile. If he has property in another state or country, it may be necessary to prove the will or to take out administration there, either for the purpose of obtaining and collecting the property, or for the security of local creditors, or the protection of rights of the state to receive taxes, or of residents of the state who ought

⁴ Putnam v. Pitney, 45 Minn. 242, 47 N. W. 790. See Gregory v. Lansing, 115 Minn. 73, 131 N. W. 1010.

⁵ Hutchins v. St. Paul etc. Ry. Co., 44 Minn. 5, 46 N. W. 79; Putnam v. Pitney, 45 Minn. 242, 47 N. W. 790; Gregory v. Lansing, 115 Minn. 73, 131 N. W. 1010; Stromberg v. Stromberg, 119 Minn. 325, 138 N. W. 428; Lipman v. Bechhoefer, 141 Minn. 131, 169 N. W. 536; Iowa v. Slimmer, 248 U. S. 115;

13 A. & E. Ency. of Law (2 ed.) 921; 18 Cyc. 1223; 24 C. J. 1111. See § 295.

⁶ Putnam v. Pitney, 45 Minn. 242, 47 N. W. 790; Lipman v. Bechhoefer, 141 Minn. 131, 169 N. W. 536; Bowdoin v. Holland, 10 Cush. (Mass.) 17; McCarron v. New York Central R. Co. (Mass.) 131 N. E. 478; 13 A. & E. Ency. of Law (2 ed.) 928; 18 Cyc. 1224; 24 C. J. 1114. See § 295.

⁷ Atchison etc. Ry. Co. v. Berkshire (Tex.) 201 S. W. 1093.

to get what they are entitled to receive from the estate without being obliged to follow the property into another jurisdiction. But such probate of a will or such administration of an intestate estate is always merely ancillary. It is not for the purpose of establishing rights of succession, whether under a will or otherwise. Those are to be established in the courts of the state or country where the deceased had his domicil.⁸

1196. Local creditors not necessary—To secure ancillary administration it is not necessary to show the existence of local creditors.⁹

1197. Necessity of local assets—Ancillary administration cannot be granted unless the decedent left assets in the state where such administration is sought.¹⁰

1198. What constitutes assets—**Situs for purposes of administration**—Ancillary administration may be granted though the decedent left only realty in the state and administration proceedings are pending at his domicil and his estate there is solvent.¹¹ For the purposes of distribution of the estate of a non-resident decedent all his personal property is regarded as being situated at the place of his last domicil, subject to the right of his creditors in the state where it is actually found to subject it through ancillary administration to the payment of their claims. Property of a decedent not subject to the claims of his creditors may be secured by his heirs without resort to this fiction.¹² Personal property, whether tangible or intangible, is regarded as located, for purposes of administration in the territory of that state whose laws must furnish the remedies for its reduction to possession.¹³ All simple contract debts and choses in action are assets at the domicil of the debtor though the creditor is a non-resident. This rule is not affected by the fact that the debt is evidenced by a bill or note.¹⁴ The situs of a note secured by a

⁸ Rackemann v. Taylor, 204 Mass. 394, 90 N. E. 552; Putnam v. Pitney, 45 Minn. 242, 47 N. W. 790; In re Hanreddy's Estate (Wis.) 186 N. W. 744; Wilkins v. Ellett, 108 U. S. 256.

⁹ Murphy v. Crouse, 135 Cal. 14, 66 Pac. 971. See, however, Putnam v. Pitney, 45 Minn. 242, 47 N. W. 790.

¹⁰ Hutchins v. St. Paul etc. Ry. Co., 44 Minn. 5, 46 N. W. 79; Gregory v. Lansing, 115 Minn. 73, 131 N. W. 1010; Lipman v. Bechhoefer, 141 Minn. 131, 169 N. W. 536; Mallory v. Burlington etc. R. Co., 53 Kan. 557, 36 Pac. 1059; Martin v. Gage, 147 Mass. 204, 17 N. E. 310; 13 A. & E. Ency. of Law (2 ed.) 921; 18 Cyc. 1223; 24 C. J. 1112; Woerner, Am. Law of Adm. (2 ed.) § 205; L. R. A. 1915D, 856.

¹¹ Prescott v. Durfee, 131 Mass. 477;

State v. Superior Court, 52 Wash. 149, 100 Pac. 198; Mowry v. McQueen, 80 Minn. 385, 83 N. W. 348; Lees v. Wetmore, 58 Iowa 170, 12 N. W. 238; Moore's Estate v. Moore, 33 Neb. 509, 50 N. W. 443; 13 A. & E. Ency. of Law (2 ed.) 923; 18 Cyc. 1223; 24 C. J. 1113.

¹² Stromberg v. Stromberg, 119 Minn. 325, 138 N. W. 428.

¹³ Gregory v. Lansing, 115 Minn. 73, 131 N. W. 1010.

¹⁴ Gregory v. Lansing, 115 Minn. 73, 131 N. W. 1010; State v. Probate Court, 128 Minn. 371, 150 N. W. 1094; Murphy v. Crouse, 135 Cal. 14, 66 Pac. 971; Wyman v. Halstead, 109 U. S. 654; Baker v. Baker, Eccles & Co., 242 U. S. 394; 13 A. & E. Ency. of Law (2 ed.) 925; 18 Cyc. 72, 23 C. J. 1016. See 27 Harv. L. Rev. 115; 31 Id. 905.

real estate mortgage is not affected by the fact that the real estate lies in another state.¹⁵ Tangible personal property has a situs for purposes of administration wherever it may be found regardless of the domicile of the owner.¹⁶ It is generally held that debts under seal (specialties) have a situs where found regardless of the domicile of the debtor.¹⁷ There is a conflict of opinion as to the situs of a judgment debt for purposes of administration, but according to the better view it is where the debtor is domiciled.¹⁸ Corporate stock is generally deemed to have a situs at the domicile of the corporation for purposes of administration.¹⁹ It may have a situs for purposes of administration in the state where the corporation maintains an office for the transfer of its stock.²⁰ For the purpose of imposing an inheritance tax the stock of a corporation incorporated under the laws of this state has a situs here, though it is owned by a non-resident and the certificates are kept at his domicile.²¹ A state which has created a corporation has such control over the transfer of its shares of stock that it may administer on the shares of a deceased owner.²² A deposit account in a bank of this state, which is subject to withdrawal by check or surrender of the bank book, held and owned by a non-resident of this state at the time of his death, constitutes property situated in this state, within the meaning of our statutes upon the subject of the administration of the estates of non-resident deceased persons.²³ The mere fact that a non-resident keeps stocks, bonds and notes in a safe-deposit vault here does not necessarily make them assets for the purpose of administration here.²⁴ A policy of insurance may be the basis of ancillary administration.²⁵ If a policy is assets of

¹⁵ *Holcombe v. Richards*, 38 Minn. 38, 42, 35 N. W. 714; 13 A. & E. Ency. of Law (2 ed.) 925; 23 C. J. 1017.

¹⁶ *Kennedy v. Hodges*, 215 Mass. 112, 102 N. E. 432; 23 C. J. 1016.

¹⁷ 13 A. & E. Ency. of Law (2 ed.) 924; 18 Cyc. 73; 23 C. J. 1017; *Kennedy v. Hodges*, 215 Mass. 112, 102 N. E. 432 (coupon bonds). This rule is purely technical and ought not to be followed in this state where all private seals are abolished. See however, *Gregory v. Lansing*, 115 Minn. 73, 76, 131 N. W. 1010; *State v. Probate Court*, 128 Minn. 371, 382, 150 N. W. 1094.

¹⁸ *Miller v. Hoover*, 121 Mo. App. 503, 97 S. W. 210; *Swaney v. Scott*, 9 Humph. (Tenn.) 327; 11 A. & E. Ency. of Law (2 ed.) 766; 13 Id. 924; 18 Cyc. 73; 23 C. J. 1017; 20 Harv. L. Rev. 326.

¹⁹ *Putnam v. Pitney*, 45 Minn. 242, 47 N. W. 790; *State v. Probate Court*, 67 Minn. 51, 69 N. W. 609, 908; *State v.*

Probate Court, 142 Minn. 415, 172 N. W. 318; *Kennedy v. Hodges*, 215 Mass. 112, 102 N. E. 432; *Murphy v. Crouse*, 135 Cal. 14, 66 Pac. 971; *Gamble v. Dawson*, 67 Wash. 72, 120 Pac. 1060; 13 A. & E. Ency. of Law (2 ed.) 925; 18 Cyc. 73; 23 C. J. 1017. See, contra, *In re Miller*, 90 Kan. 819, 136 Pac. 255 (situs of stock held to be at domicile of owner); *L. R. A.* 1915D, 856.

²⁰ *Lockwood v. United States Steel Corp.*, 209 N. Y. 375, 103 N. E. 697; 27 Harv. L. Rev. 384.

²¹ *State v. Probate Court*, 142 Minn. 415, 172 N. W. 318.

²² *Baker v. Baker, Eccles & Co.*, 242 U. S. 394.

²³ *Gregory v. Lansing*, 115 Minn. 73, 131 N. W. 1010. See *Kennedy v. Hodges*, 215 Mass. 112, 102 N. E. 432.

²⁴ *Crosby v. Charlestown*, 78 N. H. 39, 95 Atl. 1043.

²⁵ *Stromberg v. Stromberg*, 119 Minn.

an estate a domiciliary or ancillary representative in possession thereof may maintain an action thereon wherever the company can be sued.²⁶ If an action on a policy is begun in a court of competent jurisdiction courts of other states will not entertain an action thereon.²⁷ Uncashed checks payable to the decedent and drawn on local banks have a local situs for purposes of administration.²⁸ A cause of action under a statute for death by wrongful act is an asset sufficient to justify ancillary administration.²⁹ A cause of action for death by wrongful act under a foreign statute in favor of a resident of this state is ground for the appointment of an administrator here, and this is true though the cause of action is the only asset of the estate in this state and an action thereon has been commenced in another state.³⁰ Ancillary administration may be founded on property of the decedent brought into the state after his death, if it was not brought merely for temporary purposes or fraudulently. The rule is otherwise if the property was reduced to the possession of the domiciliary representative before it was brought into the state.³¹ Property in transit through the state, or brought into the state temporarily or fraudulently, is not a basis for administration. But when a debtor of the decedent comes within a state, even temporarily, the debt is assets there and he may be sued.³² An apparent and bona fide claim is a sufficient basis for ancillary administration.³³ A mere equitable claim to real property may be an asset sufficient to justify ancillary administration, but the claim must have some reasonable basis, and it is discretionary with the probate court to deny ancillary administration where the object may be as well or better attained in another forum.³⁴ If it appears that all the property of the decedent in the state has been removed or legally disposed of ancillary administration should be de-

325, 138 N. W. 428. See *New England Mut. Life Ins. Co. v. Woodworth*, 111 U. S. 138.

²⁶ *Sulz v. Mutual R. F. L. Assn.*, 145 N. Y. 563, 40 N. E. 242; *New York Life Ins. Co. v. Smith*, 67 Fed. 694.

²⁷ *Sulz v. Mutual R. F. L. Assn.*, 145 N. Y. 563, 40 N. E. 242; *Traflet v. Empire Life Ins. Co.*, 64 N. J. L. 387, 46 Atl. 204.

²⁸ *Kennedy v. Hodges*, 215 Mass. 112, 102 N. E. 432.

²⁹ *Hutchins v. St. Paul etc. Ry. Co.*, 44 Minn. 5, 46 N. W. 79; *Vukmirovich v. Nickolich*, 123 Minn. 165, 143 N. W. 255; *Castigliano v. Great Northern Ry. Co.*, 129 Minn. 279, 152 N. W. 413; *State v. Probate Court*, 149 Minn. 464, 184 N. W. 43. See *Ann. Cas.* 1917C, 1217.

³⁰ *State v. Probate Court*, 149 Minn. 464, 184 N. W. 43; *McCarron v. New*

York Central R. Co. (Mass.) 131 N. E. 478.

³¹ *Hill v. Barton*, 194 Mo. App. 325, 188 S. W. 1105; *Saunders v. Weston*, 74 Me. 85; 13 A. & E. Ency. of Law (2 ed.) 923; 18 Cyc. 72, 1223; 23 C. J. 1015; *Woerner*, Am. Law of Adm. (2 ed.) § 159; L. R. A. 1915D, 865; 121 Am. St. Rep. 237. See G. S. 1913, § 7205.

³² *Christy v. Vest*, 36 Iowa 285; *Vanner v. Bevil*, 17 Ala. 286; *Saunders v. Weston*, 74 Me. 85; *Pinney v. McGregory*, 102 Mass. 186; *Stearns v. Wright*, 51 N. H. 600; *Fox v. Carr*, 16 Hun (N. Y.) 434; 31 Harv. L. Rev. 908; 18 Cyc. 1224.

³³ *Beach's Appeal*, 76 Conn. 118, 55 Atl. 596; *Emery v. Cooley*, 83 Conn. 235, 76 Atl. 529.

³⁴ *In re Daughaday's Estate*, 168 Cal. 63, 141 Pac. 929.

nied.³⁵ A debt due a non-resident from a person who removes into this state after the death of such creditor authorizes administration here in the county into which the debtor moves.³⁶ In a proceeding to have letters of administration granted on the local estate of a non-resident decedent at the instance of petitioning creditors, it is only necessary to make a prima facie showing that the petitioners are creditors; the question of the validity of the claims being one to be determined in other proceedings between the creditors and the representative of the estate.³⁷ Notes and bonds of a non-resident given a situs in this state are subject to administration here though they were placed here fraudulently to avoid taxation at the domicil of the decedent.³⁸

1199. Domicil of decedent—The determination of the courts of one state as to the domicil of the decedent are not conclusive on the courts of another state.³⁹

1200. Who appointed representative—Ordinarily ancillary letters will be granted to a domiciliary representative if he applies therefor, or, to his nominee or attorney, but the matter rests in the discretion of the probate court. A foreign creditor may be appointed.⁴⁰

1201. Powers of ancillary representative—Collection of assets—An ancillary representative is entitled to all the assets of the estate within the jurisdiction of the state in which he is appointed, and may maintain appropriate actions therefor.⁴¹ It is the right and duty of an ancillary representative to take charge of all the property of the decedent constituting assets of his estate within the jurisdiction and to collect all debts owing the decedent by residents of the state.⁴² The right of an ancillary representative to the property of the decedent extends only to such property within the ancillary jurisdiction and which is assets for purposes of administration therein.⁴³ If the legal title to a demand, or the possession of evidence of it, is in the domiciliary representative, the ancillary representative cannot sue thereon.⁴⁴ An ancillary administrator

³⁵ Shaw, Appellant, 81 Me. 207, 16 Atl. 662; Martin v. Gage, 147 Mass. 204, 17 N. E. 310.

³⁶ Pinney v. McGregory, 102 Mass. 186.

³⁷ In re Mumford's Estate, 173 Cal. 511, 160 Pac. 667.

³⁸ Iowa v. Slimmer, 248 U. S. 115.

³⁹ See §§ 305, 647.

⁴⁰ See §§ 301, 306, 1172, 1193; 13 A. & E. Ency. of Law (2 ed.) 926; 18 Cyc. 1224; 24 C. J. 1114; 48 L. R. A. (N. S.) 858.

⁴¹ Crosby v. Charlestown, 78 N. H. 39, 95 Atl. 1043; McCully v. Cooper, 114 Cal. 258, 46 Pac. 82; Hensley v. Rich (Ind.) 132 N. E. 632; 13 A. & E. Ency.

of Law (2 ed.) 931; 18 Cyc. 1227; 24 C. J. 1118; 1 A. L. R. 1359.

⁴² McCully v. Cooper, 114 Cal. 258, 46 Pac. 82; 13 A. & E. Ency. of Law (2 ed.) 934; 18 Cyc. 1228; 24 C. J. 1119; 1 A. L. R. 1359.

⁴³ Crosby v. Charlestown, 78 N. H. 39, 95 Atl. 1043; First Nat. Bank v. Dowdy, 175 Mo. App. 478, 161 S. W. 859; Compton's Administrator v. Borderland Coal Co., 179 Ky. 695, 201 S. W. 20; 13 A. & E. Ency. of Law (2 ed.) 931; 18 Cyc. 1227; 24 C. J. 1118.

⁴⁴ Merrill v. New England Mut. L. Ins. Co., 103 Mass. 248; Union Ins. Co. v. Lewis, 97 U. S. 682; De Paris v. Wilmington Trust Co., 7 (Boyce) Del. 178,

in this state may recover an evidence of a debt due the decedent here in the hands of a domiciliary administrator temporarily within the state.⁴⁵ Payment to a domiciliary representative by a creditor of another state after the appointment in such state of an ancillary representative is no defence to an action by the latter. The fact that the domiciliary representative has in his possession the written evidence of the debt does not change the rule.⁴⁶ But if there are no local creditors a payment made to a foreign domiciliary representative is a good discharge of the debt, though an ancillary representative was appointed prior to such payment, if the payment was made in good faith and without actual notice of the ancillary administration.⁴⁷ After the appointment of an ancillary representative the domiciliary representative cannot collect assets in the ancillary jurisdiction in his representative capacity, but he may sue in the domiciliary jurisdiction a resident of the ancillary jurisdiction who comes within the domiciliary jurisdiction after the appointment of the ancillary representative.⁴⁸ The payment of a guaranteed debt by a domiciliary administrator of a co-guarantor, after his death, gives an ancillary administrator appointed in another jurisdiction no right to proceed against the other guarantor for contribution.⁴⁹ An ancillary administrator cannot exercise a power in a will. Only a general administrator can do that.⁵⁰ Where an ancillary representative is appointed before there is any administration at the domicil of the decedent, he may take possession of the chattels of the decedent in the state of the domicil or collect debts of the decedent from creditors there, if he can do so peaceably without resorting to the process of the local courts.⁵¹

1202. Claims—Allowance and payment—Conflict of laws—The matter of the presentation, allowance and payment of claims is governed by the local law rather than the law of the domiciliary administration.⁵² The fact that a domestic creditor has presented his claim in the domiciliary administration and had it allowed does not prevent its presentation and allowance in ancillary administration.⁵³ All the creditors, resi-

104 Atl. 691; *Ames v. Citizens Nat. Bank* (Kan.) 181 Pac. 564.

⁴⁵ *McCully v. Cooper*, 114 Cal. 258, 46 Pac. 82.

⁴⁶ *Walker v. Welker*, 55 Ill. App. 118; *Equitable Life Assur. Soc. v. Vogel*, 76 Ala. 441; *Grayson v. Robertson*, 122 Ala. 330; 13 A. & E. Ency. of Law (2 ed.) 933; 18 Cyc. 1229; 24 C. J. 1120.

⁴⁷ *Mass v. Germain Sav. Bank*, 176 N. Y. 377, 68 N. E. 658.

⁴⁸ See §§ 1188, 1204.

⁴⁹ *De Paris v. Wilmington Trust Co.*, 7 (Boyce) Del. 178, 104 Atl. 691.

⁵⁰ *Smith v. Abbott*, 79 N. J. Eq. 117, 81 Atl. 115; *In re Carter's Estate*, 88 Atl. 1084.

⁵¹ *Morrison v. Hass*, 229 Mass. 514, 118 N. E. 893; *Morrison v. Berkshire L. & T. Co.*, 229 Mass. 519, 118 N. E. 895.

⁵² *Wilson v. Hartford Fire Ins. Co.*, 164 Fed. 817; *Goodall v. Marshall*, 11 N. H. 88; 13 A. & E. Ency. of Law (2 ed.) 936; 18 Cyc. 1233; 24 C. J. 1125; *Woerner*, Am. Law of Adm. (2 ed.) § 166.

⁵³ *State v. Probate Court*, 67 Minn. 51, 69 N. W. 609, 908.

dent or non-resident, may present and have their claims allowed in the ancillary administration and are entitled to have the real and personal property of the decedent applied to the payment of their claims.⁵⁴ A widow of a non-resident decedent may claim her statutory allowance under G. S. 1913, § 7243(1).⁵⁵ The pendency of proceedings by a creditor to enforce a claim against the estate in the domiciliary administration does not bar the presentation and allowance of the same claim in an ancillary administration.⁵⁶ Where there is a domiciliary and an ancillary administration creditors may present their claims in either and not necessarily in both.⁵⁷ All the claims proved in the ancillary administration should be paid before any of the estate is sent to the domiciliary administration.⁵⁸ If the estate is insolvent a local creditor is entitled to only a pro rata dividend though the local assets are sufficient to pay his claim in full. In other words, all creditors of the same class, whether resident or non-resident, are entitled to share equally in the assets.⁵⁹ The underlying principle is that property should be so administered that all claimants in any jurisdiction should receive their equal ratable shares of the whole property in whatever jurisdiction it may be situated.⁶⁰ If an intestate leaves real and personal property in the state of his domicil and only real property here, the same person being administrator of both estates, the real property here constitutes a fund for the payment of debts in this state, and the administrator is not bound to see that either estate is exonerated at the expense of the other, but he is required to administer and dispose of each estate in good faith according to the laws of the state in which it is situated.⁶¹ A claim in one state is not necessarily barred because it has not been presented and has become barred in another state.⁶² The allowance or disallowance of a claim in one state, having the force of a judgment in rem, is binding when the same claim is presented in another state.⁶³ A local creditor may col-

⁵⁴ *State v. Probate Court*, 25 Minn. 22, 28; *State v. Probate Court*, 67 Minn. 51, 69 N. W. 609, 908; *More v. Luther*, 153 Mich. 206, 116 N. W. 986; *Goodall v. Marshall*, 11 N. H. 88; *McKee v. Dodd*, 152 Cal. 637, 93 Pac. 854; *Dow v. Lillie*, 26 N. D. 512, 144 N. W. 1082. See L. R. A. 1915F, 1041.

⁵⁵ *Stromberg v. Stromberg*, 119 Minn. 325, 138 N. W. 428; *Barrett v. Helm* (Minn.) 188 N. W. 207.

⁵⁶ *Goodall v. Marshall*, 11 N. H. 88; *Merrill v. New England Mut. Life Ins. Co.*, 103 Mass. 245.

⁵⁷ *Dow v. Lillie*, 26 N. D. 512, 144 N. W. 1082.

⁵⁸ *Bedell v. Clark*, 171 Mich. 486, 137 N. W. 627. See § 1207.

⁵⁹ *Dawes v. Head*, 3 Pick. (Mass.) 128;

Davis v. Esley, 8 Pick. (Mass.) 475; *Ramsey v. Ramsey*, 196 Ill. 179, 63 N. E. 618; *Miner v. Austin*, 45 Iowa 221; *In re Hanreddy's Estate* (Wis.) 186 N. W. 744; 13 A. & E. Ency. of Law (2 ed.) 936; 18 Cyc. 1234; 24 C. J. 1125.

⁶⁰ *Buswell v. Iron Hall*, 161 Mass. 224, 36 N. E. 1065; *In re Hanreddy's Estate* (Wis.) 186 N. W. 744.

⁶¹ *Cowden v. Jacobson*, 165 Mass. 240, 43 N. E. 98.

⁶² *Wilson v. Hartford Fire Ins. Co.*, 164 Fed. 817. See 19 L. R. A. (N. S.) 553.

⁶³ *Owsley v. Central Trust Co.*, 196 Fed. 412; *Sanborn v. Perry*, 86 Wis. 361, 56 N. W. 337. See *Reed v. Bloodworth* (Ala.) 76 So. 376 (claim reduced to judgment in one state not presented

lect his debt out of the assets in this state regardless of whether the administration proceedings here are principal or ancillary. He cannot be forced to go to another jurisdiction to collect his debt by an application of the doctrine of marshaling assets.⁶⁴

1203. Sale of realty under license from probate court—An ancillary representative may procure a license to sell realty of the decedent in the jurisdiction of his appointment to pay debts of the estate, though there is sufficient personalty in the domiciliary jurisdiction to pay all the debts of the estate.⁶⁵ Where a decedent leaves real property, but no personal property, in a state other than his domicil, and ancillary administration is granted there, proof of a debt in the domiciliary administration is sufficient to support an application in the ancillary administration for license to sell the real property and to transmit the proceeds to the domiciliary administration to pay debts.⁶⁶

1204. Relation between domiciliary and ancillary administrations—Though a will is proved de novo in an ancillary administration the principal administration is at the domicil of the decedent.⁶⁷ The domiciliary administration is the primary administration regardless of which is initiated first.⁶⁸ As a general rule no privity exists between domiciliary and ancillary administrations. In a general sense each is independent in its own jurisdiction.⁶⁹ An ancillary administrator is not the agent of a domiciliary executor. His authority is independent and exclusive within the jurisdiction of his appointment.⁷⁰ The probate of a foreign will upon a foreign certificate of probate is not ancillary to the foreign administration in such a sense that the final decree of distribution of real property in this state is not a final construction of the will.⁷¹ Ancillary and domiciliary administrations are distinct and have no common liability for the expenses of each other.⁷² A domiciliary representative may sue a debtor of the estate who comes into the domiciliary jurisdic-

within statutory time in another state held barred in the latter).

⁶⁴ *Tod v. Mitchell*, 228 Mass. 541, 117 N. E. 899.

⁶⁵ *Lawrence's Appeal*, 49 Conn. 411; 18 Cyc. 1232; 24 C. J. 1123; L. R. A. 1915D, 754. See *Mowry v. McQueen*, 80 Minn. 385, 390, 83 N. W. 348, and § 956.

⁶⁶ *Dow v. Lillie*, 26 N. D. 512, 144 N. W. 1082; L. R. A. 1915D, 754.

⁶⁷ *In re Hollins*, 139 N. Y. S. 713; *Rackemann v. Taylor*, 204 Mass. 394, 90 N. E. 552; 13 A. & E. Ency. of Law (2 ed.) 919; 18 Cyc. 1222.

⁶⁸ *Crosby v. Charlestown*, 78 N. H. 39, 95 Atl. 1043; 18 Cyc. 1222.

⁶⁹ *Anderson v. Louisville etc. R. Co.*,

210 Fed. 689; *Wilson v. Hartford Fire Ins. Co.*, 164 Fed. 817; *Cooper v. Ives*, 62 Kan. 395, 63 Pac. 434; *Lawrence's Appeal*, 49 Conn. 411; *Winter v. Winter*, 101 Wis. 494, 77 N. W. 883; *De Paris v. Wilmington Trust Co.*, 7 (Boyce) Del. 178, 104 Atl. 691; 13 A. & E. Ency. of Law (2 ed.) 920; 18 Cyc. 1222, 1226; 24 C. J. 1117; *Woerner, Am. Law of Adm.* (2 ed.) § 158.

⁷⁰ *Gray v. Lenox*, 215 Mass. 598, 102 N. E. 1097; 18 Cyc. 1226.

⁷¹ *Alaska Banking & Safe Deposit Co. v. Noyer*, 64 Wash. 672, 117 Pac. 492.

⁷² *Bishop v. Ross*, 56 Ind. App. 610, 103 N. E. 505.

tion, notwithstanding ancillary administration in the jurisdiction where the debtor resides.⁷³

1205. Same—Judgments—Estoppel—There is no privity between administrators of the estates of the same decedent in different jurisdictions in such a sense as to make judgments for or against them binding on one another, and this is true though the same person is administrator in the different jurisdictions.⁷⁴ A judgment recovered against an administrator of a decedent in one state is no evidence of debt in a subsequent suit by the same plaintiff in another state against an administrator appointed there, whether the same or a different person, or against any other person having assets of the decedent.⁷⁵ There is no privity between the executor and an administrator with the will annexed appointed in another state which makes a decree in a court of such state against the latter binding under the full faith and credit clause of the federal constitution upon the former in the courts of the state in which such executor is appointed.⁷⁶ An ancillary administrator in one jurisdiction is not in privity with an ancillary administrator in another jurisdiction and a judgment against one is not *res judicata* and a bar to a suit by the other.⁷⁷ Executors under the same will appointed in different jurisdictions are in privity. An ancillary executor is bound by a judgment allowing a claim against the estate in the domiciliary jurisdiction.⁷⁸ Where a representative in one state recovers a judgment on a claim in favor of the estate the claim merges in the judgment and the judgment is a good defence to an action by another representative in another state on the same claim.⁷⁹ Where, as in this state, a claim is presented in the probate court and is allowed or disallowed, the judgment is in rem and not for or against the representative, and is binding, under the full faith and credit clause of the federal constitution, in other jurisdictions.⁸⁰ A decree of distribution obtained in one state cannot be attacked for fraud or mistake in another state.⁸¹

⁷³ *Equitable Life Assn. Soc. v. Vogel*, 76 Ala. 441; 13 A. & E. Ency. of Law (2 ed.) 934; 24 C. J. 1121.

⁷⁴ *Johnson v. Powers*, 139 U. S. 156; *Nash v. Benari*, 117 Me. 491, 105 Atl. 107; *Braithwaite v. Harvey*, 14 Mont. 208, 36 Pac. 38; *Helme v. Buckelew*, 229 N. Y. 363, 128 N. E. 216; 12 A. & E. Ency. of Law (2 ed.) 920; 18 Cyc. 1227; 24 C. J. 1117; *Woerner*, Am. Law of Adm. (2 ed.) § 158; 27 L. R. A. 101; 3 A. L. R. 64.

⁷⁵ *Johnson v. Powers*, 139 U. S. 156; *Nash v. Benari*, 117 Me. 491, 105 Atl. 107.

⁷⁶ *Brown v. Fletcher's Estate*, 210 U. S. 82. See *Reed v. Bloodworth* (Ala.) 76 So. 376; 23 Harv. L. Rev. 565.

⁷⁷ *Ingersoll v. Coram*, 211 U. S. 335.

⁷⁸ *Owsley v. Central Trust Co.*, 196 Fed. 412; 18 Cyc. 1227; 24 C. J. 1118; *Woerner*, Am. Law of Adm. (2 ed.) § 158.

⁷⁹ *Lewis v. Adams*, 70 Cal. 403, 11 Pac. 833.

⁸⁰ *Sanborn v. Perry*, 86 Wis. 361, 56 N. W. 337; *Owsley v. Central Trust Co.*, 196 Fed. 412. See *Johnson v. Powers*, 139 U. S. 156.

⁸¹ *Mooney v. Hinds*, 160 Mass. 469, 36 N. E. 484.

1206. Accounting—A representative is accountable only to the court appointing him for assets within the jurisdiction of that court and for assets received in other jurisdictions by virtue of such appointment. An ancillary representative is accountable to the court appointing him for assets in the local jurisdiction and for assets received elsewhere by virtue of such appointment. If an ancillary representative is also the domiciliary representative he is not accountable in the ancillary jurisdiction for assets received by virtue of his domiciliary appointment, nor is he accountable in the domiciliary jurisdiction for assets received by virtue of his ancillary appointment. If a domiciliary representative receives assets voluntarily paid or delivered to him in another jurisdiction he is accountable for them to the domiciliary court appointing him, and this rule applies though after receiving the assets he is appointed an ancillary representative in the jurisdiction where he received such assets.⁸² If a domiciliary representative is also an ancillary representative his final accounting and settlement must be had in the domiciliary court, at least if he is first appointed by that court.⁸³ Where the same person is both the domiciliary and ancillary representative a settlement of his account in one jurisdiction is conclusive upon him in the other, in the absence of fraud, but a settlement in one jurisdiction does not relieve him of the duty to account in the other.⁸⁴

1207. Disposition of residue—Statute—In all cases of administration in this state of the estates of decedents who were non-residents, upon payment of the expenses of administration and of the debts here proved, the residue of the personalty shall be distributed according to the terms of the will applicable thereto, if there be a will, or according to the law of the decedent's domicil. Or the court, in its discretion, may direct that it be transmitted to the personal representative of the decedent at the place of such domicil, to be disposed of by him. And the real estate not sold in the course of administration shall be assigned according to the will, if there be one; otherwise, according to the laws of this state.⁸⁵ This statute is not a statute of devolution but one regulating adminis-

⁸² *Parsons v. Lyman*, 20 N. Y. 103; *Dawes v. Bolyston*, 9 Mass. 337; *Jennison v. Hapgood*, 10 Pick. (Mass.) 77; *Stevens v. Gaylord*, 11 Mass. 256; *Cowden v. Jacobson*, 165 Mass. 240, 43 N. E. 98; *Kennedy v. Hodges*, 215 Mass. 112, 102 N. E. 432; *Normand's Administrator v. Groguard*, 17 N. J. Eq. 425; *Wigman v. Provident Life & Trust Co.*, 79 W. Va. 562, 92 S. E. 415; *Whalley v. Lawrence's Estate* (Vt.) 108 Atl. 387; 13 A. & E. Ency. of Law (2 ed.) 961; 18 Cyc. 1247; 24 C. J. 1141; *Woerner*, Am. Law of Adm. (2 ed.) §§ 160, 308, 537; 7 Prob. Rep. Ann. 382; L. R. A.

1918E, 718. See *Whittaker v. Meeds*, 146 Minn. 160, 164, 178 N. W. 597.

⁸³ *In re Stevens' Estate*, 171 Mich. 486, 137 N. W. 627; *Dickinson v. Belden*, 268 Ill. 105, 108 N. E. 1011. See 24 C. J. 1141.

⁸⁴ *Clark v. Blackington*, 110 Mass. 569; *Cowden v. Jacobson*, 165 Mass. 240, 43 N. E. 98; *Grant v. Rogers*, 94 N. C. 755; *Leach v. Buckner*, 19 W. Va. 36, 47; 13 A. & E. Ency. of Law (2 ed.) 904; 18 Cyc. 1248; 24 C. J. 1141.

⁸⁵ G. S. 1913, § 7278. See 24 C. J. 1126-1128.

tration proceedings in the matter of disposing of the residue of the real estate of a non-resident decedent. Such real estate must be assigned subject to any conditions and restrictions imposed by the statutes of this state upon the testamentary disposition of real estate generally.⁸⁶ For purposes of distribution all the personal property of a decedent is regarded by a fiction of law as situated at his last domicile, though in fact it may be situated elsewhere.⁸⁷ Any residue of assets after the payment of debts and expenses of the ancillary administration, whether arising from real or personal property, should be sent to the domiciliary administrator or executor, unless there is some special reason to the contrary. Our statute leaves the matter in the discretion of the court.⁸⁸ There should be no order for the transmission of the residue to the domiciliary representative until there has been a final accounting by the ancillary representative in the ancillary jurisdiction.⁸⁹ The domiciliary representative cannot demand of the ancillary representative assets remaining after payment of local creditors. It rests in the discretion of the local court to direct the ancillary representative to transmit the balance or to distribute it directly to legatees, devisees or heirs.⁹⁰ The domiciliary representative has no right to the immediate payment or delivery of property in the hands of an ancillary representative; it being only that remaining after the completion of the ancillary administration to which the domiciliary representative is entitled.⁹¹ The authority to order the estate of a non-resident to be transmitted to the place of the principal administration does not exist until after the payment of all claims for which the estate is liable in the ancillary jurisdiction.⁹² The local court need not surrender control until provision is made for the payment of local inheritance taxes.⁹³ If legacies are distributed in ancillary proceedings inheritance taxes due at the domicile are property deducted.⁹⁴ It seems that the allowance of the final account of an ancillary representative in which he credits himself with

⁸⁶ *Boeing v. Owsley*, 122 Minn. 190, 142 N. W. 129. See *Stromberg v. Stromberg*, 119 Minn. 325, 138 N. W. 428.

⁸⁷ *Stromberg v. Stromberg*, 119 Minn. 325, 138 N. W. 428.

⁸⁸ *Putnam v. Pitney*, 45 Minn. 242, 47 N. W. 790; *Gregory v. Lansing*, 115 Minn. 73, 131 N. W. 1010; *Iowa v. Slimmer*, 248 U. S. 115; *Rackemann v. Taylor*, 204 Mass. 394, 90 N. E. 552; *Bedell v. Clark*, 171 Mich. 486, 137 N. W. 627; *Rader v. Stubblefield*, 43 Wash. 334, 86 Pac. 560; *In re Apple's Estate*, 66 Cal. 432, 6 Pac. 7; *McCully v. Cooper*, 114 Cal. 258, 46 Pac. 82; *Lawrence v. Kitteridge*, 21 Conn. 577; *Whalley v. Lawrence's Estate* (Vt.) 108 Atl. 387; *In re*

Campbell's Estate (Utah) 173 Pac. 688; 13 A. & E. Ency. of Law (2 ed.) 938; 18 Cyc. 1235; 24 C. J. 1126; 11 R. C. L. 441; *Woerner, Am. Law of Adm.* (2 ed.) § 167; *L. R. A.* 1915A, 431.

⁸⁹ *Parsons v. Lyman*, 20 N. Y. 103, 121.

⁹⁰ *Gray v. Lenox*, 215 Mass. 598, 102 N. E. 1097.

⁹¹ *Putnam v. Middleborough*, 209 Mass. 456, 95 N. E. 749.

⁹² *Newell v. Peaslee*, 151 Mass. 601, 25 N. E. 26; 13 A. & E. Ency. of Law (2 ed.) 940; 18 Cyc. 1236; 24 C. J. 1125.

⁹³ *State v. District Court*, 41 Mont. 357, 109 Pac. 438.

⁹⁴ *In re Hollins*, 139 N. Y. S. 713.

a residue in his hands as paid to the domiciliary representative has the effect of an order of the court to transmit such residue.⁹⁵ Where in ancillary proceedings the probate court of another state makes an order of distribution whereby distributees receive a larger share than they are entitled to, the error may be corrected on distribution of the principal estate by requiring such distributees to account for the excess.⁹⁶ No state need allow property of a decedent to be taken without its borders until debts due to its own citizens have been satisfied.⁹⁷ Where personal property is distributed in ancillary proceedings according to the provisions of a will, a construction placed on the will by the domiciliary court is controlling.⁹⁸ Where a court of ancillary administration makes distribution it cannot thereby oust the domiciliary court of jurisdiction to finally construe the will of the decedent and make final distribution according to the law of his domicil.⁹¹ The mere fact that executors of the testator, domiciled at his death in another state, take ancillary administration in this state and ask for an order of distribution as to the residue of the estate cannot confer jurisdiction upon the probate court to go beyond its powers in the ancillary administration; and hence does not estop the executors from asking that the fund be transmitted to the principal administration.⁹⁹ Any residue of personal property after the payment of debts and expenses of administration is to be distributed in case of intestacy according to the law of the domicil of the decedent, whether the distribution is made in the domiciliary or ancillary administration. If there is a will it is to be distributed according to the terms thereof.¹ For the purposes of distribution of the estate of a non-resident decedent, all his personal property is regarded as being at the place of his domicil, subject to the right of his creditors in the state where the property is actually found to lay hold thereof through ancillary administration in the probate court to the extent of satisfying their claims.² While the residue of the personal property of a deceased intestate is to be distributed according to the law of his domicil, the law of the ancillary jurisdiction determines what property therein shall be deemed

⁹⁵ *Emery v. Batchelder*, 132 Mass. 452.

⁹⁶ *Dickinson v. Ridgely*, 188 Ill. App. 252.

⁹⁷ *Baker v. Baker, Eccles & Co.*, 242 U. S. 394.

⁹⁸ *Rackemann v. Taylor*, 204 Mass. 394, 90 N. E. 552; *Bedell v. Clark*, 171 Mich. 486, 137 N. W. 627. See *In re Campbell's Estate* (Utah) 173 Pac. 688.

⁹¹ *Whalley v. Lawrence's Estate* (Vt.) 108 Atl. 387.

⁹⁹ *Bedell v. Clark*, 171 Mich. 486, 137 N. W. 627.

¹ *Putnam v. Pitney*, 45 Minn. 242, 47 N. W. 790; *Stromberg v. Stromberg*, 119 Minn. 325, 327, 138 N. W. 428; *Goodall v. Marshall*, 11 N. H. 88; *Kingsbury v. Bazeley*, 75 N. H. 13, 70 Atl. 916; *Le-couturier v. Ickelheimer*, 205 Fed. 682; *Rackemann v. Taylor*, 204 Mass. 394, 90 N. E. 552; *Whalley v. Lawrence's Estate* (Vt.) 108 Atl. 387; 13 A. & E. Ency. of Law (2 ed.) 941; 18 Cyc. 1237; 24 C. J. 1128. See § 80.

² *Stromberg v. Stromberg*, 119 Minn. 325, 138 N. W. 428.

a part of his estate and subject to distribution. The statutory allowance to a widow is to be deducted.³

1208. Removal of ancillary representative—Where a foreign executor is appointed an ancillary executor the fact that he is thereafter removed by the court of his domicile does not require his removal by the court of the ancillary administration as a matter of law.⁴

PURCHASERS FROM HEIRS

1209. In general—The title of real property vests in the heirs and devisees immediately upon the death of the owner and they may sell and convey it without waiting to have it formally assigned to them by a decree of distribution in administration proceedings. The purchasers take subject to the debts of the decedent and the charges of administration.⁵ They take subject to the debts of the heir, devisee or legatee to the estate.⁶ They take subject to a testamentary charge of legacies on the realty.⁷ They take subject to a testamentary charge of debts on the realty.⁸ They take subject to contribution for a pretermitted or posthumous child.⁹ They may contest the probate of a will which would prejudice them.¹⁰ They may resist confirmation of a sale under license.¹¹ They are concluded and protected by a final decree. If they purchase after the decree in good faith they take free of liability for the debts of the decedent and the expenses of administration.¹² Purchasers from heirs or devisees after a final decree of distribution are protected against a vacation of the decree for fraud if they purchased in good faith.¹³ A probate of a will in one state does not affect a bona fide purchaser of land in another state from an heir before the probate of the will in the state where the land lies. A purchaser is protected by the presumption that land sold by an heir descended to him.¹⁴ Creditors of the decedent may lose their rights as against purchasers from heirs or devisees by laches though the purchasers were charged with constructive notice of the facts.¹⁵ Where the title appears of record to be

³ *Stromberg v. Stromberg*, 119 Minn. 325, 138 N. W. 428; *Barrett v. Heim* (Minn.) 188 N. W. 207. See *Boeing v. Owsley*, 122 Minn. 190, 142 N. W. 129.

⁴ *American Missionary Assn. v. Hall*, 138 Mich. 247, 101 N. W. 535. See 18 Cyc. 1226.

⁵ *State v. Probate Court*, 25 Minn. 22; *Byrnes v. Sexton*, 62 Minn. 135, 138, 64 N. W. 155; *Vachon v. Nichols-Chisholm Lumber Co.*, 126 Minn. 303, 144 N. W. 223, 148 N. W. 288; *Spotts v. Hanley*, 85 Cal. 155, 24 Pac. 738; *Curtis v. Schell*, 129 Cal. 208, 61 Pac. 951; *Ashton v. Heggerty*, 130 Cal. 516, 62 Pac. 934; *Blair v. Hazzard*, 158 Cal. 721, 112

Pac. 298; *In re Norton's Estate*, 160 Mich. 531, 135 N. W. 253; 18 C. J. 897. See § 1060.

⁶ See § 1093.

⁷ See § 398.

⁸ See § 944.

⁹ See § 151.

¹⁰ See § 262.

¹¹ See § 978.

¹² See §§ 1073, 1081, 1224.

¹³ *St. Paul Gaslight Co. v. Kenny*, 97 Minn. 150, 106 N. W. 344.

¹⁴ See §§ 81, 294.

¹⁵ *Berkey v. St. Paul Nat. Bank*, 54 Minn. 448, 454, 56 N. W. 53.

in a testator at the time of his death, and his will is subsequently duly proved in this state, and the lands are conveyed by a devisee to a bona fide purchaser, whose deed is duly recorded, the title of the latter will be preferred to that of a grantee in a deed of the same lands, executed by the testator before his death, but recorded subsequent to the deed of the the presumption that land sold by an heir descended to him.¹⁴ Creditors purchaser from the devisee.¹⁵ An intestate died seized of several parcels of real estate and left as his heirs at law his widow and nineteen children and grandchildren. The value of the several parcels was appraised by appraisers appointed by the probate court. Thereafter at a conference between a majority in interest of the heirs, it was decided to appoint an attorney in fact to make sales and execute contracts and conveyances, and those present also agreed unanimously that an heir should have the right to buy any parcel at its appraised value. A power of attorney was executed by all the heirs except three grandchildren who were minors and whose rights are not involved in this action. Thereafter the attorney in fact sold a parcel of the land to an heir at its appraised value. Held, that this sale did not operate as a constructive fraud upon those heirs who had not been informed of the understanding that an heir should be allowed to buy at the appraised value, as it appears that both the attorney in fact and the purchaser acted in good faith, and that the sale was for the fair value of the land.¹⁷

LIABILITY OF HEIRS, DEVISEES AND LEGATEES TO CREDITORS OF DECEDENT AFTER SETTLEMENT OF ESTATE

1210. In general—Construction of statutes—The liability of heirs, devisees and legatees is purely statutory and the statutes are to be strictly construed.¹⁸ Chapters 74 and 84 of the general statutes must be read together as one body of the law relating to the liability of estates of decedents for debts of the decedent. The debts or claims upon which actions are allowed by chapter 84 are the same as those covered by chapter 74.¹⁹ The personal property of the decedent is the primary fund for the payment of debts of the decedent under chapter 84 as well as under chapter 74.²⁰ A widow, as respects her statutory third of the property, is an heir of her husband, within the meaning of these statutes.²¹ An action will not lie against an heir, devisee or legatee on a claim that

¹⁴ *Lyon v. Gleason*, 40 Minn. 434, 42 N. W. 286.

¹⁷ *Ziebarth v. Donaldson* (Minn.) 185 N. W. 377.

¹⁸ *Hunt v. Burns*, 90 Minn. 172, 95 N. W. 1110. See, upon the subject in general, 13 Ency. Pl. & Pr. 11; 14 Cyc. 184; 18 C. J. 953; *Woerner*, Am. Law of Adm. (2 ed.) §§ 574-579; 112 Am. St.

Rep. 1017; L. R. A. 1916A, 1185; 32 Harv. L. Rev. 334.

¹⁹ *Bryant v. Livermore*, 20 Minn. 313 (271).

²⁰ *Bryant v. Livermore*, 20 Minn. 313 (271).

²¹ *Lake Phalen Land & Imp. Co. v. Lindeke*, 66 Minn. 209, 68 N. W. 974.

was provable in the probate court and was not presented therein.²² An exception to this general rule has been made in the case of a claim of a servant excepted from the exemption of homesteads by section 12 of article 1 of the constitution, no order limiting the time for filing claims having been made by the probate court.²³ Such an action will not lie on a claim that has been disallowed in the probate court.²⁴ It will lie on a contingent claim not provable in the district court.²⁵ It will not lie on a claim which, though contingent during the time limited for presenting claims to the probate court, matured and became absolute before the administration of the estate was closed and final decree made.²⁶ In such an action it is immaterial what amount of personal property and what amount of real property the defendants received from the estate, so long as they received more than enough of both or either to satisfy the claim of the plaintiff.²⁷

1211. Limitation of actions—The statute formerly provided that no action should be maintained unless commenced within one year from the time the claim was allowed or established.²⁸

1212. Liability of next of kin—Contribution—Statute—The next of kin of a deceased person are liable to an action by a creditor of the estate, to recover the distributive shares received by them out of such estate, or so much thereof as shall be necessary to satisfy his debt, which action may be against all or against any one or more of them. The plaintiff may recover the value of all assets received by all the defendants, if necessary to satisfy his demand, and his recovery shall be apportioned among the defendants in proportion to the value of the assets received by each, without deduction on account of there being other relatives who have received assets. But any one against whom such recovery has been had may maintain an action for contribution against all or any other relatives of the decedent to whom assets have been paid, and may recover of each defendant such proportionate share of

²² G. S. 1913, § 7322; *Bryant v. Livermore*, 20 Minn. 313 (271); *Hill v. Nichols*, 47 Minn. 382, 50 N. W. 367; *Siebert v. Quesnel*, 65 Minn. 107, 108, 67 N. W. 806; *Hunt v. Burns*, 90 Minn. 172, 95 N. W. 1110; *Ramstadt v. Thunem*, 136 Minn. 222, 161 N. W. 413.

²³ *Ramstadt v. Thunem*, 136 Minn. 222, 161 N. W. 413.

²⁴ *Bryant v. Livermore*, 20 Minn. 313 (271).

²⁵ *McKeen v. Waldron*, 25 Minn. 406; *Hantzch v. Massolt*, 61 Minn. 361, 63 N. W. 1069; *Lake Phalen Land & Imp. Co. v. Lindeke*, 66 Minn. 209, 68 N. W. 974; *Dent v. Matteson*, 70 Minn. 519, 73 N. W. 416; *Id.*, 73 Minn. 170, 75 N. W.

1041; *Markell v. Ray*, 75 Minn. 138, 77 N. W. 788; *Willoughby v. St. Paul German Ins. Co.*, 80 Minn. 432, 83 N. W. 377; *Clark v. Gates*, 84 Minn. 381, 383, 87 N. W. 941; *Hunt v. Burns*, 90 Minn. 172, 95 N. W. 1110. See 18 C. J. 954; 58 L. R. A. 82; L. R. A. 1916A, 1185; 32 Harv. L. Rev. 331.

²⁶ *Hunt v. Burns*, 90 Minn. 172, 95 N. W. 1110.

²⁷ *Lake Phalen Land & Imp. Co. v. Lindeke*, 66 Minn. 209, 68 N. W. 974.

²⁸ G. S. 1894, § 5927; *Markell v. Ray*, 75 Minn. 138, 77 N. W. 788; *Holden v. Turrell*, 86 Minn. 214, 90 N. W. 395. See 18 C. J. 956; 32 Harv. L. Rev. 340.

the amount paid by plaintiff as the value of assets received by each bears to the value of all the assets distributed to all the relatives.²⁹ G. S. 1894, § 5918 (G. S. 1913, § 8179), provides that an action of this kind may be brought by a creditor against all of the next of kin jointly, or against any one or more of them, where one or more of them have secured a distributive share out of the estate. G. S. 1894, § 5920 (G. S. 1913, § 8179), provides that when a recovery is had against any one of said next of kin he may maintain an action against all the other relatives of the decedent for contribution. G. S. 1894, § 5923 (G. S. 1913, § 8181) provides that in case of judgment against several next of kin or legatees jointly, the payment or satisfaction of the judgment recovered against any one of the defendants discharges him and his property from such judgment. Under these provisions a judgment against two next of kin, and each of them, for a gross sum, has been sustained.³⁰

1213. Liability of legatees—Apportionment—Statute—Legatees are liable to an action by a creditor of the testator to recover the value of legacies received by them. Such action may be brought against all or any one or more of the legatees. The plaintiff cannot recover unless he shows:

1. That no assets were delivered by the executor or administrator to the heirs or next of kin; or
2. That the value of the assets so delivered has been recovered by another creditor; or
3. That such assets are not sufficient to satisfy the demands of the plaintiff, in which case he can recover only the deficiency.

The whole amount which the plaintiff can recover shall be apportioned among all the legatees, in proportion to the amount of their legacies respectively, and his proportion only can be recovered of each legatee.³¹ In an action against a legatee no greater amount can be recovered than his proportionate share of the debt, as defined by G. S. 1894, § 5921 (G. S. 1913, § 8180).³²

1214. Joint action against several legatees or next of kin—Effect of payment or satisfaction of judgment—Costs—Statute—If an action be brought against several next of kin jointly, or several legatees jointly, for assets delivered to them, and a recovery be had against them, the costs shall be apportioned among the several defendants in proportion to the amount of the damages recovered against each. In either case, the payment or satisfaction of the judgment recovered against any one of the defendants shall discharge him and his property from such judgment.³³

²⁹ G. S. 1913, § 8179.

³⁰ *Dent v. Matteson*, 73 Minn. 170, 75 N. W. 1041. See 32 Harv. L. Rev. 347.

³¹ G. S. 1913, § 8180.

³² *Hunt v. Grant*, 87 Minn. 189, 91 N. W. 485. See 32 Harv. L. Rev. 347.

³³ G. S. 1913, § 8181.

1215. Liability of heirs and devisees of realty when personalty insufficient—All must be joined in action—Statute—Heirs and devisees are liable to an action by a creditor of a deceased person to recover a debt, to the extent of the value of any real property inherited by or devised to them. If such action be against the heirs, all heirs who are liable shall be made parties thereto. But the heirs shall not be liable for the debt unless it shall appear that the personal assets were not sufficient to discharge it, or that, after due proceedings before the probate court, the creditor is unable to collect the debt from the personal representatives of the decedent, or from his next of kin or legatee; and if the personal assets were sufficient to pay a part of the debt, or in case a part thereof has been collected as hereinbefore mentioned, the heirs of such deceased person are liable for the residue. But nothing in this section shall affect the liability of heirs for a debt of their ancestors, where, by his will, such debt was expressly charged exclusively on the real property descended to such heirs, or directed to be paid out of the real property so descended, before resorting to the personal property.³⁴

1216. Apportionment of liability—Terms of will controlling—Contribution—Statute—Whenever the heirs, devisees, or legatees have received real or personal estate, and are liable by law for any debts, such liability shall be in proportion to the estate they have respectively received, and a creditor may recover his claim against a part or all of them to the amount of such liability. If, by the testator's will, any part of his estate, or any devisees or legatees, are made exclusively liable for the debt, the devisees or legatees shall contribute among themselves accordingly.³⁵

1217. New parties—Issues—Apportionment—Statute—If all the persons liable for the payment of any such debt shall not be included as defendants, the action shall not thereby be dismissed or barred; but the court may order any other parties brought in, and allow such amendments as may be necessary, on such terms as it may prescribe. If more than one person is liable, and the creditor shall bring action against all or any of them, and those liable shall dispute the debt, or the amount claimed, the court may order an issue to be framed, and direct the amount to be ascertained by a jury, and shall determine how much each is liable to pay.³⁶

1218. Estate of deceased heirs, etc., when liable—Statute—If any of the heirs, devisees, or legatees die without having paid his just share of the debts, his estate shall be liable therefor as for his own debt, to the extent to which he would have been liable if living.³⁷

³⁴ G. S. 1913, § 8182.

³⁵ G. S. 1913, § 8183.

³⁶ G. S. 1913, § 8184.

³⁷ G. S. 1913, § 8185.

1219. Contribution—Statute—When any heir, devisee, or legatee pays more than his share of such debt, the other persons liable shall be holden and compelled to contribute their just proportion of the same.³⁸

1220. Priority among debts—Statute—Whenever the next of kin, legatees, heirs, and devisees are liable for the debts of their ancestor, or testator, they shall give preference in the payment of the same, and be liable therefor, in the following order:

1. Debts entitled to a preference under the laws of the United States.
2. Judgments against the ancestor or testator, according to the priority thereof respectively.
3. Debts due to other creditors.³⁹

1221. No preference between debts of same class—Statute—No preference shall be given by any next of kin, legatee, heir, or devisee to one debt over another of the same class, except one specified in § 8187 (1220, *supra*) subd. 2; nor shall a debt due and payable be entitled to a preference over one not due; nor shall the commencement of an action against any next of kin, legatee, heir, or devisee, for the recovery of a debt, entitle it to preference over others of the same class.⁴⁰

1222. Defences—Other debts outstanding or paid—Statute—The next of kin, legatees, heirs, and devisees may show, in their defence, that there are unsatisfied debts of a prior class, or others of the same class as the debt in action; and if it shall appear that the value of the personal property delivered, or of the real estate descended or devised, to them does not exceed the debts of a prior class, judgment shall be rendered in their favor. If the value of such property exceeds the amount of debts which are entitled to preference over the debt in action, judgment shall be rendered against them only for such a sum as bears a just proportion to the other debts of the same class. If a debt of a class prior to the one in action, or of the same class, is paid by any next of kin, legatees, heirs, or devisees, they may prove such payment, and the amount thereof shall be treated, in ascertaining the amount to be recovered, as if it were unpaid.⁴¹

1223. Real property descended—Lien of judgment—Statute—If it appears that the real property so descended was not alienated by the heir at the time of the commencement of the action, the court shall order that plaintiff's debt, or the proportion thereof which he is entitled to recover, be levied upon such real estate, and not otherwise; and every judgment rendered in such action has preference, as a lien on such real estate, to any judgment obtained against such heir for a debt of his own.⁴²

³⁸ G. S. 1913, § 8186. See § 943.

³⁹ G. S. 1913, § 8187.

⁴⁰ G. S. 1913, § 8188.

⁴¹ G. S. 1913, § 8189.

⁴² G. S. 1913, § 8190.

1224. Personal liability—Alienation before suit—Statute—If it appears in the action that before the commencement thereof the heir has aliened the real property descended to him or any part thereof, he shall be personally liable for the value of that aliened; and judgment may be rendered therefor, and execution awarded, as in actions for his own debts. But no real property aliened in good faith by an heir, before action commenced against him, shall be liable to execution or in any manner affected by a judgment against him.⁴³

1225. Joint action against several heirs or devisees of realty—Apportionment of liability—Statute—In actions brought against several heirs or several devisees jointly, the amount of plaintiff's recovery shall be apportioned among all the heirs of the ancestor, or all the devisees of the testator, in proportion to the value of the real property descended or devised, and such proportion only can be recovered of each.⁴⁴

1226. Liability of devisees of realty—Limitations—Statute—Devisees made liable to creditors of their testator by the provisions of this chapter shall not be held liable unless it shall appear that his personal assets and the real property descended to his heirs were insufficient to discharge the debt, or that after due proceedings before the probate court the creditor has been unable to recover the debt or any part thereof from the personal representative of the testator, or his next of kin, legatees, or heirs. In either of said cases the amount of the deficiency of the personal assets, and of the real property descended to satisfy the debt of the plaintiff, and the amount which he may have failed to recover from the personal representative, next of kin, legatees, and heirs of the testator, may be recovered of the devisees, to the extent of the real property devised to them respectively. But nothing in this section shall affect the liability of the devisees for a debt of their testator which was charged by will exclusively upon the real property devised, or made payable exclusively by such devisees, or out of the real property devised before resorting to the personal property or to any other real property descended or devised.⁴⁵

1227. Devisees—Application of chapter—Statute—The provisions of this chapter with regard to heirs, and to proceedings by and against them, and to judgments and executions against them, are applicable to actions and proceedings against devisees, and they must in like manner be jointly sued.⁴⁶

⁴³ G. S. 1913, § 8191.

⁴⁴ G. S. 1913, § 8192.

⁴⁵ G. S. 1913, § 8193.

⁴⁶ G. S. 1913, § 8194.

INHERITANCE TAXES

1228. Constitutionality—The present inheritance tax law of 1905 and the amendment of 1911, have been held constitutional against various objections.⁴⁷

1229. Nature of tax—The inheritance tax in this state is not a tax on the property, but a tax on the transfer or right of succession.⁴⁸

1230. Construction—The statute is to be given a fair and reasonable construction—not a strict construction.⁴⁹ All the provisions of the statute must be construed together as interdependent parts of one law.⁵⁰ The practical construction placed on the statute by the public officers charged with its administration is entitled to great weight.⁵¹ In the interest of uniformity the construction placed on similar statutes in other states should be followed when reasonably possible.⁵² The present inheritance tax law of 1905 has been held inapplicable to a transfer of property made prior to its enactment.⁵³

1231. Exemptions and deductions—The inheritance tax is to be computed on the clear value of the property, or the interest therein, which actually passes to the beneficiaries. In other words, all the expenses and charges of administration are to be deducted before computing the tax.⁵⁴ The amount expended by a representative for a monument over the grave of the decedent, approved by the probate court, is not subject to an inheritance tax.⁵⁵ The amount paid out of an estate as a federal inheritance tax is to be deducted as an expense of administration before computing the amount of a state inheritance tax.⁵⁶ The amount allowed to a widow for the support of herself and family under G. S. 1913, § 7243, pending administration, and the personal property to which

⁴⁷ *State v. Bazille*, 97 Minn. 11, 106 N. W. 93; *State v. Probate Court*, 112 Minn. 279, 128 N. W. 18; *State v. Probate Court*, 128 Minn. 371, 150 N. W. 1094. For cases holding prior acts unconstitutional see, *Drew v. Tift*, 79 Minn. 175, 81 N. W. 839; *State v. Bazille*, 87 Minn. 500, 92 N. W. 415; *State v. Harvey*, 90 Minn. 180, 95 N. W. 764.

⁴⁸ *State v. Bazille*, 97 Minn. 11, 106 N. W. 93; *State v. Probate Court*, 124 Minn. 508, 145 N. W. 390; *State v. Probate Court*, 128 Minn. 371, 150 N. W. 1094; *State v. Probate Court*, 137 Minn. 238, 163 N. W. 285; *State v. Probate Court*, 143 Minn. 77, 172 N. W. 902.

⁴⁹ *State v. Bazille*, 97 Minn. 11, 106 N. W. 93. See, contra, *State v. Probate Court*, 137 Minn. 238, 163 N. W. 285 (statute to be construed strictly against the government).

⁵⁰ *State v. Probate Court*, 100 Minn. 192, 110 N. W. 865.

⁵¹ *In re Boutin's Estate*, 149 Minn. 148, 182 N. W. 990. See *In re Thorne's Estate*, 145 Minn. 42, 177 N. W. 638.

⁵² *State v. Probate Court*, 136 Minn. 392, 162 N. W. 459.

⁵³ *State v. Probate Court*, 102 Minn. 268, 113 N. W. 888.

⁵⁴ *State v. Probate Court*, 101 Minn. 485, 112 N. W. 878; *State v. Probate Court*, 138 Minn. 107, 164 N. W. 365; *State v. Probate Court*, 139 Minn. 210, 166 N. W. 125; *State v. Probate Court*, 143 Minn. 77, 172 N. W. 902.

⁵⁵ *State v. Probate Court*, 138 Minn. 107, 164 N. W. 365.

⁵⁶ *State v. Probate Court*, 139 Minn. 210, 166 N. W. 125. See 7 A. L. R. 714.

she is entitled under the same section, are not subject to an inheritance tax.⁵⁷ The life estate of the widow in the homestead is not subject to the inheritance tax, and the value thereof is a proper deduction in the tax proceedings, even though she takes a fee title thereto by the last will and testament of her husband.⁵⁸ In determining the value of an estate for the purpose of levying an inheritance tax, incumbrances on the real estate must be deducted from the value of the real estate, and not from the value of the personal property. The value of the real estate for the purpose of such taxation is measured by the value of the decedent's interest therein determined by deducting the incumbrances from the value of the land.⁵⁹ Where the property of an estate is committed to a trustee for a definite period, to be by him managed and controlled for the benefit of those to whom it passes by will, the compensation of the trustee fixed by the will is not a proper item to deduct from the valuation of the estate.⁶⁰

1232. Conflict of laws—Non-residents—Situs of property—The language of the statute indicates an intention on the part of the legislature to impose a succession tax in all cases where it has the power to impose such a tax. The statute is not limited to cases where the devolution of property is governed by the laws of this state.⁶¹ As between debtor and creditor the situs of a debt is the domicile of the creditor. But the creditor may give it a situs elsewhere, and it may be taxed under the laws of the state where the evidences of indebtedness are deposited. Our statute imposes the tax on the transfer of the property and not upon the property itself. A transfer made in this state by a resident testator is taxable here, though the property transferred had an actual situs in another state at the time of the death of the testator and the transfer is also taxable in the latter state.⁶² Whether the fact that an obligation of a debtor resident in Minnesota is secured by a mortgage of real property situated therein gives a situs to the obligation rendering it subject to a succession tax in Minnesota is an open question. But where the obligation is secured by a mortgage of real property of a corporate debtor, organized under the laws of this state as a railroad corporation, a portion of which property is in this state and a larger portion in other states through which the railroad passes and where it is subject to the jurisdiction of the courts and where the debt can be enforced and the mortgage foreclosed and the whole mortgaged property sold, the fact that the mortgage covers property in this state does

⁵⁷ State v. Probate Court, 137 Minn. 238, 163 N. W. 285.

⁵⁸ In re Murphy's Estate, 146 Minn. 418, 178 N. W. 1003, 179 N. W. 728.

⁵⁹ State v. Probate Court, 145 Minn. 155, 176 N. W. 493.

⁶⁰ State v. Probate Court, 101 Minn. 485, 112 N. W. 878.

⁶¹ State v. Probate Court, 128 Minn. 371, 150 N. W. 1094.

⁶² State v. Probate Court, 124 Minn. 508, 145 N. W. 390.

not give it a taxable situs here supporting a succession tax.⁶³ Capital stock represents the interest of its owner in the corporation and the rights of such owner rest on the laws of the state which created the corporation. A transfer by will of stock of a domestic corporation is subject to the inheritance tax of this state though the testator was a resident of another state and kept the certificates of stock in such state and the courts of that state could acquire jurisdiction by service of process therein. The situation of a stockholder differs from that of a bondholder. By exerting jurisdiction over the transfer from a non-resident decedent of the stock of a domestic corporation, the taxation statute severs the situs of such stock from the domicil of the decedent for the purposes of the statute. Where a domestic corporation is incorporated only in this state, the tax on a transfer by will of its stock is to be computed on the full value of such stock, less the exemptions allowed by statute, though the properties of the corporation may be situated in several states. Where the corporation is incorporated in several states there may be an apportionment.⁶⁴ The devolution of debts owed by residents of this state, whether evidenced by promissory notes or not, and of the stock of corporations of this state, and of the stock of national banks located in this state, is subject to a succession tax in this state, though the debts were owing to, and the stock was held by, non-resident decedents.⁶⁵ The personal property of a non-resident decedent, which has a situs in this state or is subject to the laws thereof, is subject to the succession tax of this state, though the devolution of such property is governed by the law of the domicil of the decedent.⁶⁶ That it is necessary for a non-resident creditor of a resident debtor to come into the state and invoke its laws and resort to its courts to enforce his obligations is a fact of importance in determining the right of the state to impose a succession tax on the devolution of the obligation. Where the security holder is a non-resident and the security is not physically within the state it is the one essential fact to confer jurisdiction to impose such a tax.⁶⁷ The rule of practical construction is held not to control the court in this case, the statute being that when a decedent is a non-resident, the property within the jurisdiction of the state transferred by his will or by intestate law is subject to a tax, and the difficulty of its application being dependent chiefly on the facts of a given case.⁶⁸ Shares of beneficial certificates in a trust entitling the holder to dividends from the shares of mining corporations, domestic and foreign

⁶³ *State v. Chadwick*, 133 Minn. 117, 157 N. W. 1076, 158 N. W. 637.

⁶⁴ *State v. Probate Court*, 142 Minn. 415, 172 N. W. 318.

⁶⁵ *State v. Probate Court*, 128 Minn. 371, 150 N. W. 1094; *State v. Probate Court*, 142 Minn. 415, 172 N. W. 318.

⁶⁶ *State v. Probate Court*, 128 Minn. 371, 150 N. W. 1094.

⁶⁷ *State v. Chadwick*, 133 Minn. 117, 157 N. W. 1076, 158 N. W. 637. See *State v. Probate Court*, 142 Minn. 415, 172 N. W. 318.

⁶⁸ *In re Thorne's Estate*, 145 Minn. 412, 177 N. W. 638.

constituting the corpus of the trust and to ultimately share in the trust property, and which certificates have a market value, are subject to a succession tax when their non-resident owner dies, if the trust has a domicile or situs within the jurisdiction of this state. The trust here in question has such situs within this state from the fact that its principal place of administration is within this state where the corpus of the trust is kept and managed and where its president, secretary, and office force is located, notwithstanding, for convenience, some of its business is transacted in another state, where two of the four trustees reside.⁶⁹ Bonds of the Great Northern Railway Company, a company incorporated under the laws of this state, having its principal place of business and general offices here, payable in New York, owned by a resident of Illinois and in his possession there at the time of his death, the persons succeeding thereto being residents of Illinois, the company being subject to jurisdiction in states other than Minnesota and it not being necessary to invoke the laws of Minnesota or to resort to its courts to enforce the obligation of the bonds, have been held not subject to a succession tax in Minnesota.⁷⁰ A resident of this state, acting under a power of appointment in a will of his mother, transferred by will personal property actually situated in another state to beneficiaries resident in the latter state. Held, that the transfer was made here and taxable here; that it was the exercise of the power of appointment that constituted the transfer of the property and not its creation; that under our inheritance tax law the appointment when made was a taxable transfer, in the same manner as though the property to which the appointment related belonged absolutely to the donee of the power and had been bequeathed or devised by the will.⁷¹ The reciprocal exemption amendment of 1911, since repealed, applies only where the laws of another state impose an inheritance tax upon "transfers of personal property of decedents," but "exempt or do not impose a tax upon transfers of personal property of residents of Minnesota having its situs in such state." Laws of another state which impose such tax only where the property passes to collateral relatives or strangers, but do impose such tax where personal property within such state, belonging to residents of Minnesota, passes by will to such collateral relatives or strangers, do not bring the property of residents of that state within such exemption.⁷²

1233. What transfers taxable—Devises, bequests and inheritances—Transfers by non-residents—Gifts in contemplation of death—Powers of appointment—Statute—A tax shall be and is hereby imposed upon any

⁶⁹ *In re Thorne's Estate*, 145 Minn. 412, 177 N. W. 638.

⁷¹ *State v. Probate Court*, 124 Minn. 508, 145 N. W. 390.

⁷⁰ *State v. Chadwick*, 133 Minn. 117, 157 N. W. 1076, 158 N. W. 637. See *State v. Probate Court*, 142 Minn. 415, 172 N. W. 318; 8 A. L. R. 863.

⁷² *State v. Probate Court*, 128 Minn. 371, 150 N. W. 1094.

transfer of property, real, personal or mixed, or any interest therein, or income therefrom in trust or otherwise, to any person, association or corporation, except county, town or municipal corporation within the state, for strictly county, town or municipal purposes, in the following cases:

(1) When the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of the state.

(2) When a transfer is by will or intestate law, of property within the state or within its jurisdiction and the decedent was a non-resident of the state at the time of his death.

(3) When the transfer is of property made by a resident or by a non-resident when such non-resident's property is within this state, or within its jurisdiction, by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death.

(4) Such tax shall be imposed when any such person or corporation become beneficially entitled, in possession or expectancy to any property or the income thereof, by any such transfer whether made before or after the passage of this act.

(5) Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure.⁷³ The word "transfer" in the statute is not to be given a narrow or technical meaning. It means in this connection a change in the possession and ownership of property.⁷⁴ The state may impose a succession tax on the transfer of any property taxable under the general tax laws. The legislature intended to tax, under the inheritance tax law, everything which it had power to tax.⁷⁵ The statutory one-third, to which a surviving spouse renouncing a will is entitled, is subject to an

⁷³ G. S. 1913, § 2271.

⁷⁵ *State v. Probate Court*, 145 Minn.

⁷⁴ *State v. Probate Court*, 137 Minn. 155, 176 N. W. 493.

238, 163 N. W. 285.

inheritance tax, in so far as it exceeds the statutory exemption.⁷⁶ Transfers made in contemplation of the death of the grantor, or intended to take effect in possession or enjoyment at or after such death, are subject to an inheritance tax, if beyond the statutory exemption in value. It is immaterial whether the grantor was seeking to evade the tax.⁷⁷ A beneficiary under a will may renounce the gift and if he does the gift is not subject to an inheritance tax.⁷⁸ Where there is an outright sale and assignment of a beneficiary's interest in an estate the interest of the assignor as determined by the will and decree of distribution is subject to an inheritance tax.⁷⁹ An exercise of a power of appointment under a will is a "transfer" within the statute.⁸⁰ The interest of the vendor under an executory contract of sale is taxable as personal property, and where the vendor died a resident of this state, such interest is subject to the inheritance tax of this state.⁸¹

1234. Computation of tax—Primary rates—Exemptions—Statute—
The tax so imposed shall be computed upon the true and full value in money of such property at the rates hereinafter prescribed and only upon the excess of the exemptions hereinafter granted.

Section 2a. When the property or any beneficial interest therein passes by any such transfer where the amount of the property shall exceed in value the exemption hereinafter specified and shall not exceed in value fifteen thousand dollars the tax hereby imposed shall be:

(1) Where the person entitled to any beneficial interest in such property shall be the wife, or lineal issue, at the rate of one per centum of the clear value of such interest in such property.

(2) Where the person or persons entitled to any beneficial interest in such property shall be the husband, lineal ancestor of the decedent or any child adopted as such in conformity with the laws of this state, or any child to whom such decedent for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday, and was continuous for said ten years thereafter, or any lineal issue of such adoption or mutually acknowledged child, at the rate of one and one-half per centum of the clear value of such interest in such property.

(3) Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister or a descendant of a broth-

⁷⁶ State v. Probate Court, 137 Minn. 238, 163 N. W. 285.

⁷⁷ State v. Probate Court, 102 Minn. 268, 113 N. W. 888; State v. Probate Court, 143 Minn. 77, 172 N. W. 902. See 7 A. L. R. 1028; 35 Harv. L. Rev. 773.

⁷⁸ State v. Probate Court, 143 Minn. 77, 172 N. W. 902.

⁷⁹ State v. Probate Court, 143 Minn. 77, 172 N. W. 902.

⁸⁰ State v. Probate Court, 124 Minn. 508, 145 N. W. 390. See 5 A. L. R. 183 (property appointed by deed); 18 A. L. R. 1470; 35 Harv. L. Rev. 326.

⁸¹ State v. Probate Court, 145 Minn. 155, 176 N. W. 493.

er or sister of the decedent, a wife or widow of a son, or the husband of a daughter of the decedent, at the rate of three per centum of the clear value of such interest in such property.

(4) Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother or a descendant of a brother or sister of the father or mother of the decedent, at the rate of four per centum of the clear value of such interest in such property.

(5) Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the decedent, or shall be a body politic or corporate, except as hereinafter provided, at the rate of five per centum of the clear value of such interest in such property.

Section 2b. The foregoing rates in section 2a are for convenience termed the primary rates.

When the amount of the clear value of such property or interest exceed fifteen thousand dollars, the rates of tax upon such excess shall be as follows:

(1) Upon all in excess of fifteen thousand dollars and up to thirty thousand dollars, two times the primary rates.

(2) Upon all in excess of thirty thousand dollars and up to fifty thousand dollars, two and one-half times the primary rates.

(3) Upon all in excess of fifty thousand dollars and up to one hundred thousand dollars, three times the primary rates.

(4) Upon all in excess of one hundred thousand dollars, four times the primary rates.

Section 2c. The following exemptions from the tax are hereby allowed: "any devise, bequest, gift, or transfer to or for the use of the state of Minnesota or any political division thereof for public purposes exclusively, and any devise, bequest, gift, or transfer to or for the use of any corporation or association organized and operated for religious, charitable, scientific, literary or educational purposes exclusively, including the encouragement of art and the prevention of cruelty to children or animals, no part of which devise, bequest, gift or transfer, inures to the profit of any private stockholder or individual, and any bequest or transfer to a trustee or trustees exclusively for such purposes shall be exempt."

(2) Property of the clear value of ten thousand dollars transferred to the widow of the decedent (or husband of the decedent, each of the lineal issue of the decedent, or any child adopted as such in conformity with the laws of this state, or any child to whom the decedent for not less than ten [10] years prior to such transfer stood in the mutually acknowledged relation of a parent; provided, however, such relationship began at or before the child's fifteenth birthday, and was continuous for

said ten years thereafter, or any lineal issue of such adopted or mutually acknowledged child), shall be exempt.

(3) Property of the clear value of three thousand dollars transferred to each of the lineal ancestors of the decedent shall be exempt.

(4) Property of the clear value of one thousand dollars transferred to each of the persons described in the third subdivision of section two a (2a) shall be exempt.

(5) Property of the clear value of two hundred and fifty dollars transferred to each of the persons described in the fourth subdivision of section two a (2a) shall be exempt.

(6) Property of the clear value of one hundred dollars transferred to each of the persons and corporations described in the fifth subdivision of section two a (2a) shall be exempt.⁸² In fixing the rate the exemption is to be disregarded. Upon all property passing to an heir, legatee, or devisee, in excess of the clear value of \$15,000, the secondary rate applies; the primary rate applying only to what remains of the first \$15,000 after deducting the exemption.⁸³ If the tax rate is uncertain the tax is to be paid at the highest rate to which the succession would in any event be subject. If subsequent events show that this rate was too high the excess tax is to be refunded.⁸⁴ If in any case it appears that the tax at the minimum rate has accrued upon a definite amount, as to which the beneficiary has entered into the actual use and enjoyment, he will not be heard to claim that no tax can be collected because in the future it may appear that he should have been taxed at a higher rate upon a larger amount.⁸⁵ Where the estate descends to two or more legatees or devisees in equal shares an exemption to each should be allowed.⁸⁶ A decree of distribution is conclusive on the state for the purpose of computing inheritance taxes, if it was not entered collusively to evade or reduce the tax.⁸⁷ Where a will contest has been amicably settled between the beneficiaries named in a will, and they have in good faith stipulated for a decree of distribution in accordance with the settlement, and there is no intent to evade or reduce the inheritance tax, the tax should be computed upon the share received by each beneficiary under the decree.⁸⁸ Where testator devised all his property to his wife for life, remainder to their daughter, the title vests on the death of the testator, and the probate court in the first instance correctly determined the

⁸² G. S. 1913, § 2272, as amended by Laws 1919, c. 410.

⁸³ *In re Boutin's Estate*, 149 Minn. 148, 182 N. W. 990. The rule was otherwise prior to the amendment of 1911. *State v. Probate Court*, 111 Minn. 297, 126 N. W. 1070; *State v. Probate Court*, 112 Minn. 279, 128 N. W. 18.

⁸⁴ *State v. Probate Court*, 136 Minn. 392, 162 N. W. 459.

⁸⁵ *State v. Probate Court*, 112 Minn. 279, 128 N. W. 18.

⁸⁶ *State v. Probate Court*, 101 Minn. 485, 112 N. W. 878.

⁸⁷ *State v. Probate Court*, 143 Minn. 77, 172 N. W. 902. See 33 Harv. L. Rev. 574.

⁸⁸ *State v. Probate Court*, 143 Minn. 77, 172 N. W. 902.

value of the legacy to each of the legatees for the purpose of inheritance taxation, under section 2272, G. S. 1913, as amended by chapter 410, Laws of 1919.⁸⁹

1235. When taxes due and payable—Statute—All taxes imposed by this act shall take effect at and upon the death of the person from whom the transfer is made and shall be due and payable at the expiration of one year from such death, except as otherwise provided in this act.⁹⁰ The statute requires the immediate payment of all inheritance taxes at the expiration of one year after the death of the person making the transfer, except in the single case of a tax measured by the value of an estate or interest not susceptible of present valuation.⁹¹ That the persons to whom the succession will ultimately pass may not yet be known, and that the amount which will pass to a particular person may not yet be known, are not grounds for deferring the payment of a tax.⁹² Where the present value of a precedent estate was ascertained and the present value of the estate which would pass to the remainderman was the difference between the present value of the precedent estate and the present value of the entire estate, it was held that the tax on the estate of the remainderman was payable presently.⁹³ Prior to the amendment of 1911 the tax became due when the beneficiary entered into the possession and enjoyment of any part exceeding the statutory exemption.⁹⁴

1236. Valuation of future and limited estates, income, interest, and annuities—Statute—The value of every future or limited estate, income, interest or annuity dependent upon any life or lives in being, shall be determined by the rule, method and standard of mortality and value employed by the commissioner of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computations shall be five per centum per annum.⁹⁵ It was held, prior to the amendment of 1911, that in determining the value of a life estate the court might refer to life and annuity tables.⁹⁶

1237. Transfers in trust—Valuation—When taxes payable—Statute—When any transfer is made in trust for any person or persons, or corporation or corporations, and the right of the beneficiaries of said trust to receive the property embraced in said trust is susceptible of present valuation, then and in such case the tax thereon shall be paid at the same time and in the same manner and in like amount, that would be

⁸⁹ *In re Meldrum's Estate*, 149 Minn. 342, 183 N. W. 835.

⁹⁰ G. S. 1913, § 2273.

⁹¹ *State v. Probate Court*, 136 Minn. 392, 162 N. W. 459.

⁹² *State v. Probate Court*, 136 Minn. 392, 162 N. W. 459.

⁹³ *State v. Probate Court*, 136 Minn. 392, 162 N. W. 459.

⁹⁴ See § 1253.

⁹⁵ G. S. 1913, § 2273.

⁹⁶ *State v. Probate Court*, 100 Minn. 192, 110 N. W. 865.

the case if the beneficiaries of such trust received the same directly from the decedent or the persons from whom the property is transferred.⁹⁷

1238. Possibility of life estate or estate for years being divested does not affect tax—Statute—Where an estate for life or for years can be divested by the act or omission of the legatee or devisee, it shall be taxed as if there were no possibility of such divesting.⁹⁸

1239. Conditional or contingent estates or interests—How taxable—Statute—When property is transferred in trust or otherwise, and the rights, interest or estates of the transferee are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of said contingencies or conditions, would be possible under the provisions of this act, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred; provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this act, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article, with interest thereon at the rate of three per centum per annum from the time of payment. Such return of overpayment shall be made in the manner provided by section 21c.

The tax on any devise, bequest, legacy, gift or transfer limited, conditioned, dependent or determinable upon the happening of any contingency or future event, by reason of which the full and true value thereof cannot be ascertained as provided for by the provisions of this act at or before the time when the taxes become due and payable as hereinbefore provided, shall accrue and become due and payable when the person or corporation beneficially entitled thereto shall come into actual possession or enjoyment thereof.

Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited.⁹⁹ A will gave the residue of an estate to trustees to be invested, and directed them to pay semi-annually the net income therefrom to B, during the time the estate should remain

⁹⁷ G. S. 1913, § 2273.

⁹⁸ G. S. 1913, § 2273.

⁹⁹ G. S. 1913, § 2273.

in their hands, and to pay and deliver the corpus of the estate to him in four equal instalments, the first one to be turned over to him when he should have attained the age of twenty-five years, and the others, in their order, when he should have reached the age of thirty, thirty-five, and forty years, respectively. The will, in the event of B's death before he should have received the whole or any part of the estate, gave the balance remaining in the hands of the trustees to other legatees. Held, under Laws 1905, c. 288, prior to the amendment of Laws 1911, c. 209, that a tax on a legacy which vests only upon the happening of some uncertain future event, so that the true value thereof cannot be presently ascertained, accrues and becomes payable only when the beneficiary is entitled to the possession or enjoyment thereof; that the transfer of the residue of the estate to the trustees was not taxable, but that a tax would accrue and become payable from time to time on the income and on the corpus of the estate as B should become entitled to them or any part thereof.¹

1240. Contingent incumbrances disregarded—Statute—In estimating the value of any estate or interest in property, to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made on account of any contingent incumbrance thereon, nor on account of any contingency upon the happening of which the estate or property, or some part thereof or interest therein might be abridged, defeated or diminished; provided, however, that in the event of such incumbrance taking effect as an actual burden upon the interest of the beneficiary or in the event of the abridgment, defeat or diminution of said estate or property, or interest therein, as aforesaid, a return shall be made to the person properly entitled thereto of a proportionate amount of such tax on account of the incumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed on account of the actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided by section 21c.²

1241. Increase on remainder after life estate or interest taxable—Statute—Where any property shall, after the passage of this act, be transferred subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase accruing to any person or corporation upon the extinction or determination of such charge, estate or interest, shall be deemed a transfer of property taxable under the provisions of this act in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase from the person from whom the title to their respective estates or interests is derived.³

¹ State v. Probate Court, 100 Minn. 192, 110 N. W. 865.

² G. S. 1913, § 2273.

³ G. S. 1913, § 2273.

1242. Duty of representative to collect, deduct and pay taxes—Shares of estate not deliverable until taxes paid—Statute—Any administrator, executor or trustee having in charge or in trust any property for distribution embraced in or belonging to any inheritance, devise, bequest, legacy or gift, subject to the tax thereon as imposed by this act, shall deduct the tax therefrom, and within thirty days thereafter he shall pay over the same to the county treasurer as herein provided.

If such property be not in money, he shall collect the tax on such inheritance, devise, bequest, legacy or gift upon the appraised value thereof, from the person entitled thereto.

He shall not deliver, or be compelled to deliver, any property embraced in any inheritance, devise, bequest, legacy or gift, subject to tax under this act, to any person until he shall have collected the tax thereon.⁴

1243. Taxes payable to county or state treasurer—Receipts—No final accounting of representative without receipt—Statute—The tax imposed by this act upon inheritances, devises, bequests or legacies shall be paid to the treasurer of the county in which the probate court having jurisdiction, as herein provided, is located; and the tax so imposed upon gifts shall be payable to the state treasurer, and the treasurer to whom the tax is paid shall give the executor, administrator, trustee or person paying such tax, duplicate receipts therefor, one of which shall be immediately transmitted to the state auditor, whose duty it shall be to charge the treasurer so receiving the tax with the amount thereof; and where such tax is paid to the county treasurer he shall seal said receipt with the seal of his office and countersign the same and return it to the executor, administrator or trustee, whereupon it shall be a proper voucher in the settlement of his accounts. No executor, administrator, or trustee shall be entitled to a final accounting of an estate, in the settlement of which a tax may become due under the provisions of this act, until he shall produce a receipt, so sealed and countersigned by the state auditor, or a certified copy of the same. All taxes paid into the county treasury under the provisions of this act shall immediately be paid into the state treasury upon the warrant of the state auditor and shall belong to and be a part of the revenue fund of the state.⁵

1244. Tax a lien—Personal liability of distributee and representative of estate—Statute—Every tax imposed by this act shall be a lien upon the property embraced in any inheritance, devise, bequest, legacy or gift until paid, and the person to whom such property is transferred and the administrators, executors and trustees of every estate embracing such property shall be personally liable for such tax, until its payment, to the extent of the value of such property.⁶

1245. Interest on tax—Statute—If such tax is not paid within one year from the accruing thereof, interest shall be charged and collected thereon at the rate of seven per centum per annum from the time the

⁴ G. S. 1913, § 2274.

⁵ G. S. 1913, § 2275.

⁶ G. S. 1913, § 2276.

tax is due, unless, by reason of claims upon the estate, necessary litigation or other unavoidable cause of delay, such tax cannot be determined as herein provided; in such case interest at the rate of six per centum per annum shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which seven per centum shall be charged.⁷

1246. Sale of property by representative to pay tax—Statute—Every executor, administrator or trustee shall have full power to sell so much of the property embraced in any inheritance, devise, bequest or legacy as will enable him to pay the tax imposed by this act, in the same manner as he might be entitled by law to do for the payment of the debts of a testator or intestate.⁸

1247. Legacy charged on property—Lien—Legacy of money for limited period—Duty of representative—Statute—If any bequest or legacy shall be charged upon or payable out of any property, the heir or devisee shall deduct such tax therefrom and pay such tax to the administrator, executor or trustee, and the tax shall remain a lien or charge on such property until paid; and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the bequest or legacy might be enforced, or by the county attorney under section 20 of this act. If any bequest or legacy shall be given in money to any person for a limited period, the administrator, executor or trustee shall retain the tax upon the whole amount; but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him to make an apportionment, if the case requires, of the sum to be paid into his hands by such legatee or beneficiary, and for such further order relative thereto, as the case may require.⁹

1248. Transfers of stock or obligation by foreign representative—Payment of tax—Statute—If a foreign executor, administrator or trustee shall assign or transfer any stock or obligation in this state, standing in the name of a decedent or in trust for a decedent, liable to any such tax, the tax shall be paid to the state treasurer on the transfer thereof, and no such assignment or transfer shall be valid until such tax is paid.¹⁰

1249. Transfers of personal property in this state by foreign representatives—Certificate of attorney general prerequisite—Statute—If any non-resident of this state dies owning personal property in this state, such property may be transferred or assigned by the personal representative of, or trustee for the decedent, only after such representative or trustee shall have procured a certificate from the attorney general consenting to the transfer of such property. Such consent shall be issued by the attorney general only in case there is no tax due hereunder; or in case there is a tax, when the same shall have been paid.¹¹

⁷ G. S. 1913, § 2277.

¹⁰ G. S. 1913, § 2281.

⁸ G. S. 1913, § 2278.

¹¹ G. S. 1913, § 2281.

⁹ G. S. 1913, § 2279.

1250. Property of decedent with safety deposit company, bank, or others—Notice to county treasurer before delivery to representative—Statute—No safe deposit company, bank or other institution, person or persons holding securities or assets of a decedent, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent, or upon their order or request, unless notice of the time and place of such intended transfer be served upon the county treasurer, personally or by representative, to examine said securities at the time of such delivery or transfer. If upon such examination the county treasurer or his said representatives shall for any cause deem it advisable that such securities or assets should not be immediately delivered or transferred, he may forthwith notify in writing such company, bank, institution or person to defer delivery or transfer thereof for a period not to exceed ten days from the date of such notice, and thereupon it shall be the duty of the party notified to defer such delivery or transfer until the time stated in such notice or until the revocation thereof within such ten days. Failure to serve the notice first above mentioned, or to allow such examination, or to defer the delivery of such securities or assets for the time stated in the second of said notices, shall render said safe deposit company, trust company, bank or other institution, person or persons, liable to the payment of the tax due upon the said security or assets, pursuant to the provisions of this act.¹²

1251. Notice to county treasurer of petition for letters testamentary or of administration—Determination of value of shares of estate and amount of taxes thereon by probate court—Right of county treasurer and attorney general to letters—Statute—Upon the presentation of any petition to any probate court of this state for letters testamentary or of administration, or for ancillary letters, testamentary or of administration, the probate court shall cause a copy of the citation or order for the hearing of such petition to be served upon the county treasurer of his county not less than ten days prior to such hearing. The court shall thereupon, as soon as practicable after the granting of any such letters, proceed to ascertain and determine the value of every inheritance, devise, bequest or legacy embraced in or payable out of the estate in which such letters are granted and the taxes due thereon. The county treasurers of the several counties, and the attorney general, shall have the same right to apply for letters of administration as are conferred upon creditors by law.¹³

1252. Appointment of appraisers—Statute—The probate court may, in any matter mentioned in the preceding section, either upon its own motion or upon the application of any interested party, including county treasurers and the attorney general, and as often as and when occasion requires, appoint one or more impartial and disinterested persons as appraisers to appraise the true and full value of the property embrac-

¹² G. S. 1913, § 2282.

¹³ G. S. 1913, § 2283.

ed in any inheritance, devise, bequest, or legacy, subject to the payment of any tax imposed by this act.¹⁴ Appraisers cannot be appointed until thirty days after the probate court has furnished the county treasurer and attorney general with copies of the will, if any, the initial petition for administration, and the general inventory and appraisal.¹⁵

1253. Appraisal of estate at full value at death of decedent—Statute— Every inheritance, devise, bequest, legacy, transfer or gift upon which a tax is imposed under this act shall be appraised at its full and true value immediately upon the death of decedent, or as soon thereafter as may be practicable; provided, however, that when such devise, bequest, legacy, transfer or gift shall be of such a nature that its true and full value cannot be ascertained, as herein provided, at such time, it shall be appraised in like manner at the time such value first becomes ascertainable.¹⁶ Under Laws 1905, c. 288, prior to the amendments made by Laws 1911, c. 209, a tax upon an inheritance was computed upon the value at the time of the decedent's death of the right to receive the amount actually paid at the date of its payment; and it became due when the beneficiary entered into the possession and enjoyment of any part exceeding the statutory exemption.¹⁷

1254. Report of appraisers—Determination of value of estate and amount of tax by probate court with or without appraisal—Statute— The report of the appraisers shall be filed with the probate court, and from such report and other proof relating to any such estate before the probate court the court shall forthwith, as of course, determine the true and full value of all such estate and the amount of tax to which the same are liable; or the probate court may so determine the full and true value of all such estates and the amount of tax to which the same are liable without appointing appraisers.¹⁸ The probate court cannot appoint appraisers, or determine the amount of the tax without appraisers, until thirty days after it has furnished the county treasurer and the attorney general with copies of the will, if any, the initial petition for administration, and the general inventory and appraisal.¹⁹ The provision of the statute authorizing the probate court to determine the amount of the tax is constitutional.²⁰ The court may determine the fact of ownership of land by decedent for the purpose of fixing liability for inheritance taxes.²¹ The probate court, when assigning an estate

¹⁴ G. S. 1913, § 2284. See, for procedure on appraisal, G. S. 1913, §§ 2285-2289.

¹⁵ See § 1256.

¹⁶ G. S. 1913, § 2285. See 13 A. L. R. 127.

¹⁷ State v. Probate Court, 100 Minn. 192, 110 N. W. 865; State v. Probate Court, 112 Minn. 279, 128 N. W. 18;

State v. Probate Court, 132 Minn. 104, 155 N. W. 1077.

¹⁸ G. S. 1913, § 2287.

¹⁹ See § 1256.

²⁰ State v. Probate Court, 112 Minn. 279, 128 N. W. 18; State v. Probate Court, 140 Minn. 342, 168 N. W. 14.

²¹ State v. Probate Court, 140 Minn. 342, 168 N. W. 14.

to trustees for the beneficial use of another, has no power to find what taxes will accrue in the future.²²

1255. Notice to interested parties of determination by probate court of amount of tax—Statute—The probate court shall immediately give notice, upon the determination of the value of any inheritance, devise, bequest, legacy, transfer or gift which is taxable under this act, and the tax to which it is liable, to all parties known to be interested therein, including the state auditor, attorney general and the county treasurer. Such notice shall be given by serving a copy on the attorney of all persons who may have appeared by attorney, and as to persons who have not so appeared, by mail, where the addresses of the persons to be notified are known or can be ascertained, otherwise such notice shall be given by publishing said notice once in a qualified newspaper. The expenses of such publication shall be certified and paid by the state treasurer in the same manner as hereinbefore provided for the payment of the fees and expenses of appraisers. Accompanying such notice given the attorney general shall be a copy of the order determining such tax, and also a full report showing such other matters in connection therewith as may be required by the attorney general upon such forms as may be furnished by him to said court or as may be particularly requested. The county board may allow the county treasurer and the judge of probate to employ such additional clerical assistance for all or part of the time as may be necessary to properly perform the additional duties imposed upon such officers by the inheritance tax law.²³

1256. Objections—Notice and hearing—Reassessment—Bill of particulars—General inventory and appraisal—Statute—Within thirty days after the service of the notice of the assessment and determination by the probate court of any tax imposed by this act, the attorney general, county treasurer, or any person interested therein, may file with said court objections thereto, in writing, and praying for a reassessment and redetermination of such tax. Upon any objection being so filed the probate court shall appoint a time for the hearing thereof and cause notice of such hearing to be given to the attorney general, county treasurer and all parties interested at least ten days before the hearing thereof. Such notice shall be served in the manner provided for in section 18 as amended by section 7 [2288] of this act.

At the time appointed in such notice the court shall proceed to hear such objections and any evidence which may be offered in support thereof or opposition thereto; and if, after such hearing, said court shall be of the opinion that a reassessment or redetermination of such tax should be made, it shall, by order, set aside the assessment and determination theretofore made and order a reassessment in the same manner as if no

²² State v. Probate Court, 112 Minn. 279, 128 N. W. 18.

²³ G. S. 1913, § 2288.

assessment had been made, or the said court may, without ordering a resubmission to appraisers, set aside the assessment and determination theretofore made and fix and determine the value of the property embraced in any legacy, inheritance, devise or transfer and fix and determine the amount of the tax thereon in accordance with the appraisal theretofore filed, so far as the same is not in dispute, and in accordance with the evidence introduced by the respective parties in interest as to any items of the appraisers' report which may have been objected to by any party interested, including the attorney general and the personal representatives of the decedent.

In any case where objections are filed by the attorney general as hereinbefore provided for, he shall, within ten days before the time set by the court for the hearing thereof, file with the clerk of the court a bill of particulars setting forth the items in any such report objected to and as to which he proposes to offer testimony; he shall also mail a copy thereof, within said time, to the personal representative of the decedent or the attorney or attorneys for the latter. In case objections are filed by any other person, he or she shall likewise file such a bill of particulars with the court and serve a copy thereof upon the attorney general within ten days after the filing of the objections.

Before any inheritance tax appraisers are appointed, the court shall require the general inventory and general appraisal to be filed, and in all estates so appraised at over \$10,000 and in all other estates where any part of such estate may be subject to an inheritance tax, the court shall furnish the county treasurer and the attorney general with a copy of such general inventory and appraisal, and shall not determine the tax due, nor appoint inheritance tax appraisers until thirty days thereafter. A copy of the will of decedent, if any is probated, and also a copy of the initial petition in said estate shall accompany such copies of the general inventory and appraisal.²⁴

1257. Other statutory provisions—Other provisions of the inheritance tax law, omitted here, relate to the collection of taxes not voluntarily paid, omitted property, record books, forms, reports of the probate court and register of deeds, composition agreements, powers of the attorney general in enforcing the law, refundment of taxes, return of percentage of taxes to counties, special tax seal of attorney general, and the appointment of a special attorney general to have charge of inheritance tax matters.²⁵

1258. Costs and disbursements—In proceedings for the collection of an inheritance tax the state acts in its governmental capacity, not in its proprietary interest, and is not liable for costs and disbursements when the proceeding fails.²⁶

²⁴ G. S. 1913, § 2289.

²⁵ See G. S. 1913, §§ 2290-2297.

²⁶ *State v. Chadwick*, 133 Minn. 117, 124, 157 N. W. 1076, 158 N. W. 837.

GUARDIAN AND WARD

IN GENERAL

1259. Father and mother natural guardians—Statute—The father and mother are the natural guardians of their minor children, and, being themselves competent to transact their own business and not otherwise unsuitable, they are equally entitled to their custody and the care of their education. If either dies or is disqualified to act, the guardianship devolves upon the other.²⁷ Prior to the revision of the statutes in 1905 the common-law rule that the father was the natural guardian of his legitimate minor children was in force in this state.²⁸ Under the common law the mother is the natural guardian of her minor children if the father is dead.²⁹ The natural guardians of a minor have no authority over his property except as expressly authorized by statute. Their authority is limited to the control of his person and education. They cannot collect, discharge or compromise claims in his favor, or sell, manage or dispose of his property, or maintain or defend actions in his behalf, except as expressly authorized by statute.³⁰ They cannot sell the realty of the ward under a license from the probate court.³¹

1260. Minor ward of court—A minor under guardianship is a ward of the court appointing the guardian.³²

1261. Estoppel of person acting as guardian to deny authority—One who has acted as a guardian is estopped from denying his authority as such in order to avoid liability for his acts and from asserting claims in conflict therewith.³³ This rule applies even though the guardianship has been terminated by the ward arriving at majority.³⁴

1262. Appointment of guardian ad litem not affected by general guardianship—Statute—Nothing contained in this chapter shall affect or impair the power of any court to appoint a guardian to protect the interest of any minor interested in any suit or proceeding commenced or to be commenced, or other matter pending therein, at any time.³⁵

²⁷ G. S. 1913, § 7442. See *Jacobs v. Jacobs*, 136 Minn. 190, 161 N. W. 525.

²⁸ *Townsend v. Kendall*, 4 Minn. 412 (315, 321).

²⁹ *Hanson v. Swenson*, 77 Minn. 70, 75, 79 N. W. 598.

³⁰ *Power v. Harlow*, 57 Mich. 107, 23 N. W. 606; *Ringstad v. Hanson*, 150 Iowa 324, 130 N. W. 145; *Kendall v. Miller*, 9 Cal. 591; *McNeil v. First Cong. Soc.*, 66 Cal. 105, 4 Pac. 1096; 15 A. & E. Ency. of Law (2 ed.) 26; 21 Cyc. 77;

12 R. C. L. 1108; *Woerner*, Am. Law of Guard. § 14; 6 A. L. R. 115.

³¹ See § 1298.

³² *Cox v. Manvel*, 56 Minn. 358, 362, 57 N. W. 1062.

³³ *Svanburg v. Fosseen*, 75 Minn. 350, 365, 78 N. W. 4; 15 A. & E. Ency. of Law (2 ed.) 76; 21 Cyc. 195, 246.

³⁴ *Bombeck v. Bombeck*, 18 Mo. App. 26.

³⁵ G. S. 1913, § 7432.

GUARDIANS OF MINORS

APPOINTMENT AND TENURE

1263. Jurisdiction—Jurisdiction to appoint a guardian exists as well when the minor has property in the state where the appointment is sought as where he is domiciled therein. It rests in both cases on the right and duty of the state to take care of those who are unable to take care of themselves, as respects either person or property.³⁶ Application for the appointment of a guardian for a resident minor must be in the county where the minor resides.³⁷ The ward must reside in the county at the time when the petition is presented.³⁸ Application for the appointment of a guardian for a non-resident minor may be in any county of the state wherein he has property.³⁹ If application is made in the wrong county the appointment may be set aside in direct proceedings but it is probably not subject to collateral attack.⁴⁰ A prior and existing appointment in another state does not bar a subsequent appointment of a guardian here if the ward is brought into this state.⁴¹ The domicil of his father is the domicil of a minor child. In case of divorce or abandonment the domicil of the mother may be that of the child.⁴²

1264. When authorized—Statute—Whenever it appears necessary or convenient, the probate court may appoint a guardian for either the person or estate, or both, of any minor who has no guardian appointed by will, and who is a resident of the county, or who resides without the state and has property within the county; provided, however, that notice shall first be given in such manner, as the court may direct to the parents of such minor, if living, and if no parent is living, or if the whereabouts of both parents is unknown, then to the next of kin or custodian of the person of such minor; and provided further that no appointment by the probate court of a guardian of the person of a child under the age of eighteen shall be effective, if, at the time of making the same, proceedings involving the care and custody of such child are pending in a district court in this state, acting as a juvenile court.⁴³

³⁶ *Davis v. Hudson*, 29 Minn. 27, 31, 11 N. W. 136; *West Duluth Land Co. v. Kurtz*, 45 Minn. 380, 47 N. W. 1134.

³⁷ *In re Taylor's Estate*, 131 Cal. 180, 63 Pac. 180; 15 A. & E. Ency. of Law (2 ed.) 33; 21 Cyc. 24.

³⁸ *Harding v. Weld*, 128 Mass. 587.

³⁹ See § 1345.

⁴⁰ See §§ 647, 1273.

⁴¹ *Jones v. Bowman*, 13 Wyo. 79, 77 Pac. 439.

⁴² *State v. Streukens*, 60 Minn. 325, 327, 62 N. W. 259; *Fox v. Hicks*, 81 Minn. 197, 83 N. W. 538; 15 A. & E. Ency. of Law (2 ed.) 33; 21 Cyc. 25; 49 L. R. A. (N. S.) 860, 875.

⁴³ G. S. 1913, § 7425, as amended by Laws 1917, c. 236.

1265. Petition—A proper petition is a jurisdictional prerequisite to the appointment of a guardian.⁴⁴

1266. Notice—Notice of hearing on an application for the appointment of a guardian shall be such as the court directs.⁴⁵ Provision is made for notice to the parents of the minor or next of kin or custodian.⁴⁶ Notice is not a constitutional prerequisite to the appointment of a guardian.⁴⁷ In the case of the appointment of a guardian for the estate of a non-resident the notice under a former statute was held a jurisdictional requirement, but under the present statutes the rule is perhaps otherwise. The giving of the notice is presumed on a collateral attack unless the record affirmatively shows that no notice was given.⁴⁸ A guardian for a resident minor under fourteen years of age may be appointed by the court without notice, but it ought not to be done under ordinary circumstances.⁴⁹ A special guardian may be appointed without notice.⁵⁰ Where the father has custody of a minor and petitions to be appointed guardian notice to the father is not necessary.⁵¹

1267. Nomination of guardian—Statute—If the minor be under the age of fourteen years, such appointment may be made on petition of a relative or of some other person on behalf of the minor. If above the age of fourteen years, he may nominate his own guardian, who, if approved by the court, shall be appointed. If not so approved, or if the minor resides out of the state, or if, after being duly cited by the court, he neglects for ten days to nominate a suitable person, the court may appoint his guardian in the same manner as if he was under the age of fourteen years. A minor may make such nomination before a justice of the peace, a notary public, or a city or town clerk, who shall certify the fact to the probate court.⁵² If a minor is over fourteen years of age he has a right to nominate his guardian, but the nominee is not entitled to appointment unless he is approved by the court.⁵³

⁴⁴ G. S. 1913, § 7227. See *Bombolis v. Minneapolis & St. Louis R. Co.*, 128 Minn. 112, 150 N. W. 385; and §§ 31, 35.

⁴⁵ G. S. 1913, §§ 7228, 7440.

⁴⁶ See § 1264; *Harding v. Brown* (Mass.) 117 N. E. 638.

⁴⁷ *Kurtz v. St. Paul & Duluth R. Co.*, 48 Minn. 339, 342, 51 N. W. 221; *In re Lundberg*, 143 Cal. 402, 77 Pac. 156.

⁴⁸ G. S. 1913, § 7440; *Davis v. Hudson*, 29 Minn. 27, 11 N. W. 136. This decision, so far as it holds notice jurisdictional, was criticized but not overruled in *Kurtz v. St. Paul & Duluth R. Co.*, 48 Minn. 339, 343, 51 N. W. 221. It is inconsistent with *Hanson v. Nygaard*, 105 Minn. 30, 117 N. W. 235. It is to

be observed that it was decided before the enactment of the present statute providing that every proceeding in the probate court shall be commenced by petition. See *Bombolis v. Minneapolis & St. Louis R. Co.*, 128 Minn. 112, 150 N. W. 385; and §§ 31, 35, 40, 1345.

⁴⁹ *State v. Bazille*, 81 Minn. 370, 84 N. W. 120.

⁵⁰ See § 1342.

⁵¹ *Asher v. Yorba*, 125 Cal. 513, 58 Pac. 137.

⁵² G. S. 1913, § 7426.

⁵³ *Hanson v. Swenson*, 77 Minn. 70, 74, 79 N. W. 598; *Benedict v. Minneapolis & St. Louis R. Co.*, 86 Minn. 224, 90 N. W. 360, 1133.

1268. Same—When minor under guardianship becomes fourteen years of age—When a guardian has been appointed by the court for a minor under the age of fourteen years, the minor at any time after he attains that age, unless such guardian is a testamentary guardian, may select his own guardian, subject to the approval of the court.⁵⁴

1269. Who appointed—Trust companies—In selecting a guardian for the person and estate of a minor the main consideration is the present and future welfare of the child. The father or mother will be selected unless there are strong reasons to the contrary. The mere fact that a parent is poor does not disqualify him. Though a child is under fourteen years of age its choice may have some weight, but it is not controlling. If the father or mother is not selected their wishes should control unless there are strong reasons to the contrary. Other things being equal relatives should be selected.⁵⁵ By express provision of statute domestic trust companies may be appointed guardians.⁵⁶ National banks may be appointed guardians of the estates of minors when licensed by the Federal Reserve Board.⁵⁷ Non-residents should not be appointed unless there are special reasons therefor.⁵⁷

1270. Married women may be guardians—Marriage of female guardian—Statute—A woman shall not be disqualified by reason of her marriage from acting as guardian, and the marriage of a female guardian shall not terminate her guardianship.⁵⁸

1271. Guardian may be appointed for estate only—Statute—The probate court, in its discretion, may appoint a guardian of the estate only of a ward, and commit the custody of such ward to some other person; and the court may, from time to time, direct the guardian to pay to the custodian such sums of money for the maintenance and education of such ward as it shall deem reasonable and proper.⁵⁹

1272. Court may prescribe duties in order of appointment—Statute—The court, with the consent of the person to be appointed guardian of a minor, may insert in the order of appointment conditions in respect to the care, treatment, education, and welfare of the minor not other-

⁵⁴ G. S. 1913, § 7427; *Hanson v. Swenson*, 77 Minn. 70, 74, 79 N. W. 598.

⁵⁵ *Willet v. Warren*, 34 Wash. 647, 76 Pac. 273; *Russner v. McMillan*, 37 Wash. 416, 79 Pac. 988; *In re Lundberg*, 123 Cal. 402, 77 Pac. 156; *In re Dellow's Estate*, 1 Cal. App. 529, 558; *In re Mathews* (Cal.) 164 Pac. 8; *Jain v. Priest* (Idaho) 164 Pac. 364; *Harding v. Brown* (Mass.) 117 N. E. 638; 15 A. & E. Ency. of Law (2 ed.) 38; 21 Cyc. 34.

⁵⁶ G. S. 1913, § 6410; *Minnesota Loan & Trust Co. v. Beebe*, 40 Minn. 7, 41 N. W. 232.

⁵⁷ *First Nat. Bank v. Union Trust Co.*, 244 U. S. 416.

⁵⁸ *In re Johnson*, 87 Iowa 130, 54 N. W. 69; 15 A. & E. Ency. of Law (2 ed.) 41; 21 Cyc. 37.

⁵⁹ G. S. 1913, § 7430.

⁶⁰ G. S. 1913, § 7429.

wise obligatory. The performance of such conditions shall be a part of the guardian's duties and be covered by his bond.⁶⁰

1273. Effect of letters—Collateral attack—If letters of guardianship are granted by a court of competent jurisdiction they cannot be attacked collaterally for error, irregularity or fraud, but are conclusive evidence of the due appointment and authority of the guardian named.⁶¹ Letters of guardianship granted by a domestic probate court are not subject to collateral attack for want of jurisdiction not affirmatively appearing on the face of the record.⁶²

1274. Proof of appointment—The records of the probate court are competent evidence of the appointment of a guardian, without the production of the original letters and without accounting for their absence.⁶³ The letters of a guardian are conclusive proof of his appointment in a collateral proceeding.⁶⁴ An order of the probate court confirming a sale of real property by a guardian is no evidence that the person making the conveyance was in fact a guardian.⁶⁵

1275. Termination of guardianship—The statute provides that unless sooner discharged according to law a guardian of a minor shall continue as such guardian until the minor arrives at full age.⁶⁶ A guardianship of a minor terminates absolutely and ipso facto when the ward reaches majority, except for purposes of accounting and settlement.⁶⁷ It does not continue after the majority of the ward though the ward and former guardian agree that it shall.⁶⁸ A guardianship continues after the majority of the ward for purposes of accounting and settlement.⁶⁹ A guardian of minors may maintain an action to recover money collected for him as guardian by an attorney, though after the collection and before the commencement of the action some of the minors have become of age.⁷⁰

⁶⁰ G. S. 1913, § 7443.

⁶¹ *Davis v. Hudson*, 29 Minn. 27, 11 N. W. 136; *Minnesota Loan & Trust Co. v. Beebe*, 40 Minn. 7, 41 N. W. 232; *State v. Lawrence*, 88 Minn. 310, 90 N. W. 769; *Hodgdon v. Southern Pac. R. Co.*, 75 Cal. 642, 17 Pac. 928 (fraud or collusion); *In re Lundberg*, 143 Cal. 402, 77 Pac. 156 (rule applies on habeas corpus when guardian justifies control of minor under letters of guardianship—collateral attack); *Derome v. Vose*, 140 Mass. 575, 5 N. W. 478; 15 A. & E. Ency. of Law (2 ed.) 37; 21 Cyc. 49.

⁶² *Davis v. Hudson*, 29 Minn. 27, 11 N. W. 136.

⁶³ *Davis v. Hudson*, 29 Minn. 27, 11 N. W. 136.

⁶⁴ See § 1273.

⁶⁵ *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462; *Burrell v. Chicago, etc. Ry. Co.*, 43 Minn. 363, 45 N. W. 849.

⁶⁶ See § 1286.

⁶⁷ G. S. 1913, §§ 7442, 7460; *Jacobs v. Fouse*, 23 Minn. 51; *Huntsman v. Fish*, 36 Minn. 148, 30 N. W. 455; *Curtis v. Devoe*, 121 Cal. 468, 53 Pac. 936; 15 A. & E. Ency. of Law (2 ed.) 45; 21 Cyc. 50.

⁶⁸ *In re Kincaid's Estate*, 120 Cal. 203, 52 Pac. 492.

⁶⁹ *Jacobs v. Fouse*, 23 Minn. 51; *Huntsman v. Fish*, 36 Minn. 148, 30 N. W. 455.

⁷⁰ *Huntsman v. Fish*, 36 Minn. 148, 30 N. W. 455. See Ann. Cas. 1914A, 604 (effect of minor attaining majority on action by guardian).

1276. Marriage of female ward—Statute—The marriage of a female ward under guardianship as a minor shall terminate such guardianship; provided that this section shall not apply to any person under guardianship on account of delinquency by order of a juvenile court.⁷¹

BONDS AND OATH

1277. General bond—Oath—Statute—Every person appointed guardian, before letters are issued to him, shall give bond as hereinbefore provided, and, before entering upon the duties of his trust, he shall take and subscribe an oath to faithfully perform all the duties of such guardian according to law.⁷² Every executor, administrator or guardian, before entering upon his duties as such, is required to take and subscribe an oath that he will faithfully and justly perform all the duties of his office and trust, to the best of his ability.⁷³ The bonds of guardians and of executors and administrators are governed largely by the same statutes.⁷⁴ Provision is made by statute for the deposit of securities of an estate with a trust company to avoid the necessity of new or additional security.⁷⁵ No bond or oath is required of a trust company acting as guardian.⁷⁶ The bond may be that of a surety company and the guardian is entitled on his accounting to an allowance for the cost thereof as limited by statute.⁷⁷ The duties of a guardian prescribed by the order of appointment are covered by his general bond.⁷⁸ Our statute provides that the guardian shall give a bond before letters are issued to him, but probably his acts after receiving letters and before giving a bond are not absolutely void. The failure to give a bond ought not to render the letters subject to collateral attack, or prejudice those who deal in good faith with the guardian in reliance on his letters.⁷⁹ Consent of the probate court is a prerequisite to an action on the bond, but it need not be alleged in the complaint.⁸⁰ The order and determination of the probate court as to the amount due from a guardian to his ward, made after due notice to the guardian, is conclusive on the sureties of the guardian, whether they had notice or appeared at the hearing or not.⁸¹ Ordinarily an action will not lie on a bond to recover a balance due a ward until there has been an accounting in the probate court and a

⁷¹ G. S. 1913, § 7431, as amended by Laws 1917, c. 235.

⁷² G. S. 1913, § 7441.

⁷³ G. S. 1913, § 5734.

⁷⁴ See §§ 666-721.

⁷⁵ See § 673.

⁷⁶ G. S. 1913, § 6410.

⁷⁷ G. S. 1913, §§ 8235, 8238.

⁷⁸ See § 1272.

⁷⁹ *Palmer v. Oakley*, 2 Dougl. (Mich.) 433; *Russell v. Coffin*, 8 Pick. (Mass.) 143; *Hunt v. Insley*, 56 Kan. 213, 42

Pac. 709; 15 A. & E. Ency. of Law (2 ed.) 43; 21 Cyc. 45; 33 L. R. A. 759-765.

⁸⁰ G. S. 1913, § 7421; *Hantzch v. Masolt*, 61 Minn. 361, 63 N. W. 1069; *Eaton v. Gale*, 96 Minn. 161, 104 N. W. 833. See § 696.

⁸¹ *Jacobson v. Anderson*, 72 Minn. 426, 75 N. W. 607; *Cross v. White*, 80 Minn. 413, 83 N. W. 393; *Holden v. Turrell*, 86 Minn. 214, 90 N. W. 395. See §§ 687, 1044, 1073.

determination of the amount due.⁸² A delivery by the guardian to the probate court of the funds of the ward, at the expiration of the guardianship, has been held not to exonerate the guardian or his sureties.⁸³ In an action by a creditor of the ward on the bond, the decree of the probate court on an accounting is conclusive as to whether the guardian had assets in his hands and the amount thereof. If a guardian with sufficient assets refuses to pay debts of his ward, an action will lie on his bond, at least if the debt has been first ascertained by a judgment against the ward or allowed by the probate court.⁸⁴ The statutory limitation of six years applies to an action on the bond. As to when the statute begins to run there is much difference of opinion. The question is an open one in this state.⁸⁵ An action on a bond may be defeated by the laches of the ward in calling for an accounting by the guardian.⁸⁶ In an action on a bond it is proper to charge interest on money converted by the guardian.⁸⁷ A guardian's general bond covers a sale of realty by the guardian. The special sale bond is a cumulative remedy.⁸⁸

POWERS, DUTIES AND LIABILITIES

1278. Guardians officers of probate court and subject to its control—A guardian is an officer of the court appointing him and subject to its orders and directions in the conduct of the guardianship.⁸⁹

1279. Notice of powers of guardian—Those who deal with a guardian are charged with notice of his powers and in order to hold the ward must see to it that the guardian has authority to do the act.⁹⁰

1280. Powers before appointment—Before one's appointment as guardian he has no authority to bind the estate of his future ward.⁹¹

⁸² *Hantzsch v. Massolt*, 61 Minn. 361, 364, 63 N. W. 1069; *Brandes v. Carpenter*, 68 Minn. 388, 71 N. W. 402; 15 A. & E. Ency. of Law (2 ed.) 120; 21 Cyc. 241.

⁸³ *Jacobson v. Anderson*, 72 Minn. 426, 75 N. W. 607.

⁸⁴ *In re Hause*, 32 Minn. 155, 19 N. W. 973; *Long v. Copeland*, 182 Mass. 332, 65 N. E. 384.

⁸⁵ See *Brandes v. Carpenter*, 68 Minn. 388, 71 N. W. 402; *Gronna v. Goldammer*, 26 N. D. 122, 143 N. W. 394; *In re McPhee*, 10 Cal. App. 162, 101 Pac. 530; *Kugler v. Prien*, 62 Wis. 248, 22 N. W. 396; *Ball v. La Clair*, 17 Neb. 30, 22 N. W. 118; *McKim v. Mann*, 141 Mass. 507; 6 N. E. 740; *Perkins v. Stimmel*, 114 N. Y. 359, 21 N. E. 729; 15 A. & E. Ency. of Law (2 ed.) 121; 21 Cyc. 246; 47 L. R. A. (N. S.) 460; Ann. Cas. 1916A, 170.

⁸⁶ *Brandes v. Carpenter*, 68 Minn. 388, 71 N. W. 402; *Sweet v. Lowry*, 123 Minn. 13, 142 N. W. 882. See *Sweet v. Lowry*, 131 Minn. 109, 154 N. W. 793.

⁸⁷ *Frederickson v. American Surety Co.*, 135 Minn. 346, 160 N. W. 859.

⁸⁸ *Frederickson v. American Surety Co.*, 135 Minn. 346, 160 N. W. 859. See § 972.

⁸⁹ *Perine v. Grand Lodge*, 48 Minn. 82, 87, 50 N. W. 1022; *Kurtz v. St. Paul & Duluth R. Co.*, 48 Minn. 339, 342, 51 N. W. 221; *Cox v. Manvel*, 56 Minn. 358, 57 N. W. 1062; *Thompson v. Thompson* (Iowa) 160 N. W. 922.

⁹⁰ *Cox v. Manvel*, 50 Minn. 87, 52 N. W. 273.

⁹¹ *Huntsman v. Fish*, 36 Minn. 148, 30 N. W. 455.

1281. Guardians trustees—Fiduciary relation—Resulting trust—While guardians are not trustees in the strict sense of the term, they are trustees in the sense that they occupy a fiduciary relation to their wards and their duties are in general those of trustees. They cannot use the funds of their wards for their personal advantage or acquire, directly or indirectly, adverse interests. They must manage the trust property solely in the interest of their wards and are held to a strict accountability.⁹² If a guardian of a minor purchases real estate partly with money of his ward, and partly with his own money, and takes title in his own name, a trust results in respect to the property in favor of the minor, who may claim not merely a lien as security for the money, but a proportionate share of the estate. In such a case, the guardian having died, the district court has jurisdiction to declare and enforce the trust by a transfer of the legal title.⁹³ The rule which disables a trustee from purchasing for his own benefit at a sale made by him in the discharge of a fiduciary duty is not applicable to the guardian of minor heirs, when a sale of real property belonging to the estate of a decedent is sold by an administrator under the order of the probate court for the purpose of satisfying a claim against the estate which has been duly presented and allowed.⁹⁴ A guardian is a trustee of the estate of his ward and is held to strict accountability in his management thereof.⁹⁵ A guardian who receives property for his ward receives and holds it in trust for the ward to be managed and controlled under the direction of the court appointing him, and when the ward reaches his majority it is the duty of the guardian to account for the property and deliver any balance to the ward.⁹⁶ A guardian is not a trustee of an express trust.⁹⁷

1282. Use of trust funds in guardian's business—For a guardian to use the funds of his ward in his own private business is a gross and wilful violation of his trust and a conversion of the funds. He is liable absolutely for all losses, regardless of his good faith or diligence and

⁹² *Ashton v. Thompson*, 32 Minn. 25, 41, 18 N. W. 918; *Bitzer v. Bobo*, 39 Minn. 18, 38 N. W. 609; *Williams v. Schembri*, 44 Minn. 250, 46 N. W. 403; *Barber v. Bowen*, 47 Minn. 118, 49 N. W. 684; *In re Granstrand*, 49 Minn. 438, 52 N. W. 41; *Johnson v. Northwestern Mutual Life Ins. Co.*, 56 Minn. 365, 377, 57 N. W. 934, 59 N. W. 992; *Svanburg v. Fosseen*, 75 Minn. 350, 365, 78 N. W. 4; *Brown v. Fischer*, 77 Minn. 1, 79 N. W. 494; *Everett v. O'Leary*, 90 Minn. 154, 155, 95 N. W. 901; *Thompson v. Thompson* (Iowa) 160 N. W. 922;

Stude v. Gross (Iowa) 162 N. W. 10; 15 A. & E. Ency. of Law (2 ed.) 75; 21 Cyc. 78. See § 1360.

⁹³ *Bitzo v. Bobo*, 39 Minn. 18, 38 N. W. 609.

⁹⁴ *Barber v. Bowen*, 47 Minn. 118, 49 N. W. 684.

⁹⁵ *Reynolds v. Garber-Buick Co.*, 183 Mich. 157, 149 N. W. 985; *Thompson v. Thompson* (Iowa) 160 N. W. 922.

⁹⁶ *Thompson v. Thompson* (Iowa) 160 N. W. 922.

⁹⁷ *Perine v. Grand Lodge*, 48 Minn. 82, 87, 50 N. W. 1022.

he is accountable for all profits or for interest, at the election of the ward.⁹⁸

1283. Following ward's money or property in hands of third persons—Where a third person wrongfully receives money from a guardian knowing it to belong to a ward the latter, upon attaining majority, may recover it under a common count for money had and received.⁹⁹ One knowingly receiving funds of a ward in payment of an unauthorized purchase by the guardian is liable to the ward. A surety on the bond of the guardian may be subrogated to the rights of the ward.¹ Where a guardian wrongfully transfers trust property to third persons who are not bona fide purchasers for a valuable consideration the property or its proceeds may be recovered by the ward or other person subrogated to the rights of the ward. No recovery can be had if the transfer was merely voidable and the transferee was a bona fide purchaser for a valuable consideration.²

1284. Standard of conduct—Ordinary or reasonable care and diligence—In the discharge of his duties a guardian is bound to exercise reasonable care and diligence, in other words, such care and diligence as persons of ordinary care and diligence usually exercise in their own affairs of a like nature and under similar circumstances.³

1285. Inventory—Appraisement—Statute—Every guardian, within three months after his appointment, shall make and return to the probate court an inventory and appraisement of all the property, real and personal, belonging to his ward which has come to his possession or knowledge. If the ward be a non-resident at the time of the appointment, the inventory shall include only his property within this state. Such inventory and appraisement shall be made in the same manner as in estates of decedents.⁴

1286. Powers in general—Duration—Residence and education of ward—**Natural guardians—Statute**—The guardian of a minor shall have the custody of his ward and charge of his education, and the care and management of his estate, unless otherwise specified in his appointment. Unless sooner discharged according to law, he shall continue as such guardian until the minor arrives at full age. But the father and mother are the natural guardians of their minor children, and, being themselves competent to transact their own business and not otherwise unsuitable,

⁹⁸ *Stude v. Gross* (Iowa) 162 N. W. 10; 15 A. & E. Ency. of Law (2 ed.) 95; 21 Cyc. 103.

⁹⁹ *Thompson v. Thompson* (Iowa) 160 N. W. 922.

¹ *Empire State Surety Co. v. Cohen*, 156 N. Y. S. 935.

² *United States Fidelity & Guaranty Co. v. Citizens State Bank*, 36 N. D. 16,

161 N. W. 562; *Brovan v. Kyle* (Wis.) 165 N. W. 382. See *White v. Iselin*, 26 Minn. 487, 5 N. W. 359; 15 A. & E. Ency. of Law (2 ed.) 83; 21 Cyc. 102; 12 R. C. L. 1172.

³ *Crosby v. Merriam*, 31 Minn. 342, 17 N. W. 950; 15 A. & E. Ency. of Law (2 ed.) 73; 21 Cyc. 78.

⁴ G. S. 1913, § 7445.

they are equally entitled to their custody and the care of their education. If either dies or is disqualified to act, the guardianship devolves upon the other.⁵ As a general rule a guardian has the same control over his ward as a parent over his child. He may change the residence of his ward from one state or country to another, when such change will be for the benefit of the ward, and he may select the school which his ward shall attend.⁶ The authority of the officers of the state public school over minors committed to their guardianship under the statute continues during their minority unless sooner relinquished by the voluntary act of such officers, and is superior to the rights of a guardian either previously or subsequently appointed.⁷

1287. Ward not bound by unauthorized acts of guardian—The unauthorized acts of a guardian do not bind his ward unless he ratifies them after maturity. A guardian is not the agent of his ward and the ward is not bound by the acts of the guardian in accordance with the law of principal and agent. The ward is not estopped by the unauthorized acts of the guardian.⁸

1288. Ratification by ward of unauthorized acts of guardian—Estoppel—A ward cannot, during his minority, ratify or confirm an unauthorized act or breach of trust of the guardian. No act of his during minority will estop a ward after maturity from questioning an unauthorized act or breach of trust of his guardian. Even an express request by the ward to the guardian to do the improper act will not give rise to an estoppel.⁹

1289. Control over person of ward—In general—As a general rule the power of a general guardian over the person of his ward is the same as that of a parent. His right to the custody of his ward will be enforced by the courts.¹⁰

1290. Use of force in control of ward—A guardian may use force, in a reasonable and moderate manner, to restrain or correct his ward, in the exercise of lawful authority.¹¹

1291. Changing domicil of ward—A guardian may change the domicil of his ward from one state or country to another when the change is to the benefit of the ward. This power of the guardian, however, is subject to the control of the courts.¹²

⁵ G. S. 1913, § 7442.

⁶ *Townsend v. Kendall*, 4 Minn. 412 (315). See § 1291.

⁷ *Armstrong v. Board of Control*, 88 Minn. 382, 93 N. W. 3.

⁸ *Cox v. Manvel*, 50 Minn. 87, 52 N. W. 273; *Reynolds v. Garber-Buick Co.*, 183 Mich. 157, 149 N. W. 985. See § 1288.

⁹ *Reynolds v. Garber-Buick Co.*, 183 Mich. 157, 149 N. W. 985. See § 1287.

¹⁰ *Townsend v. Kendall*, 4 Minn. 412 (315).

¹¹ G. S. 1913, § 8634.

¹² *Townsend v. Kendall*, 4 Minn. 412 (315). See 15 A. & E. Ency. of Law (2 ed.) 52; 21 Cyc. 63; 12 R. C. L. 1121; 89 Am. St. Rep. 257; 49 L. R. A. (N. S.)

1292. Consent to marriage of ward—Statute—It is provided by statute that if any person intending to marry shall be under age, and shall not have had a former husband or wife, a marriage license shall not be issued unless the consent of the parents or guardians shall be personally given before the clerk, or certified under the hand of such parents or guardians, attested by two witnesses, one of whom shall appear before the clerk and make oath that he saw said parents or guardians subscribe, or heard them acknowledge, the same.¹³

1293. Payment of education out of estate though parent living—Statute—Whenever a minor child of a living parent has property sufficient for his maintenance and education in a manner more expensive than such parent can reasonably afford, under all the circumstances, the expenses of the education and maintenance of such minor may be defrayed out of his own property, in whole or in part, as shall be deemed reasonable by the court.¹⁴

1294. Management of estate—Support of ward—Sale of real estate—Statute—Every guardian shall manage the estate of his ward economically, applying the income and profits thereof, so far as may be necessary, to the suitable maintenance and support of the ward and his family, if he have one; and, if such income and profits be insufficient for that purpose, the guardian, under license from the court, may sell real estate therefor.¹⁵

1295. Support and education of ward—Allowance for—Statute—The guardian shall pay, out of the estate of his ward, the reasonable charges of his support and education in a manner suited to his position in life and the value of his estate. If the available funds are at any time insufficient to meet such charges, the guardian may advance the same, and be allowed therefor in his account. In case the guardian shall refuse or neglect to provide such suitable support and education, any third person, at the ward's request, may do so and be reimbursed out of such estate. But all such expenditures, however or by whomsoever made, shall be approved and allowed by the probate court before they shall become a valid charge upon the ward's estate.¹⁶

1296. Interest of guardian in property of ward—A guardian has no title or personal interest in the property of his ward, but only a naked authority not coupled with an interest. The legal as well as the beneficial title to both real and personal property remains in the ward. The guardian has a right to the possession of both forms of property, but only for the purposes of his trust and for the use and benefit of the ward. His possession is the possession of the ward. He holds the pos-

809; Ann. Cas. 1913E, 1207; 24 Harv. L. Rev. 142.

¹³ G. S. 1913, § 7095; State v. District Court, 118 Minn. 170, 172, 136 N. W. 746.

¹⁴ G. S. 1913, § 7444. See § 1333.

¹⁵ G. S. 1913, § 7447. See § 1333.

¹⁶ G. S. 1913, § 7448. See § 1333.

session merely as the officer of the court appointing him and subject to its orders in relation thereto.¹⁷

1297. Sale of personal property—A guardian may sell the personal property of his ward without an order of court. Though he makes an improper sale a bona fide purchaser takes a good title. If the property is of considerable value it is the better practice for the guardian to obtain leave of court before selling it.¹⁸ He may sell and assign a mortgage of real estate belonging to his ward without an order of court.¹⁹ In the absence of evidence to the contrary the courts of this state will presume that a guardian is authorized by the laws of another state to sell personal property of his ward without an order of court. The right to enter a soldier's additional homestead under the federal statutes is personal property within this rule.²⁰ A special guardian is not authorized to sell or dispose of personal property of his ward without a license from the probate court.²¹ A statutory guardian is subject to the direction and control of the probate court in the sale of his ward's property, and any sale of it in violation of the order of the court is unauthorized, though, in the absence of any order on the subject, the guardian would have authority to make such sale. If a guardian sells the property in violation of the direction of the court, the mere fact that the court subsequently allows the account of the guardian, in which he charges himself with the proceeds of the sale, it not appearing that the court knew that the guardian had disobeyed its orders or the source from which the money charged in the account was derived, does not amount to a confirmation of the unauthorized sale.²²

1298. Sale of real property—Except as authorized by statute or will a guardian has no authority to sell or contract to sell the real property of the ward.²³ Our statutes provide for the sale of the real property of the ward by his guardian under certain circumstances.²⁴ The statutes governing sales of real property by executors and administrators under license apply to sales by guardians and the cases involving sales by guardians thereunder will be found elsewhere.²⁵ The statutes authorizing

¹⁷ *Humphrey v. Bulsson*, 19 Minn. 221 (182); *Lamar v. Micou*, 112 U. S. 452; *Thompson v. Thompson* (Iowa) 160 N. W. 922; *Stude v. Gross* (Iowa) 162 N. W. 10; *Rollins v. Marsh*, 128 Mass. 116; *Newton v. Nutt*, 58 N. H. 599; *Hutchins v. Dresser*, 26 Me. 76; *Brovan v. Kyle* (Wis.) 165 N. W. 382; 15 A. & E. Ency. of Law (2 ed.) 54; 21 Cyc. 77. See § 1361.

¹⁸ *Humphrey v. Bulsson*, 19 Minn. 221 (182); *Pardoe v. Merritt*, 75 Minn. 12, 77 N. W. 552. See *Cox v. Manvel*, 50 Minn. 87, 52 N. W. 273; *Id.*, 56 Minn.

358, 57 N. W. 1062; 15 A. & E. Ency. of Law (2 ed.) 56; 21 Cyc. 83; Ann. Cas. 1916C, 334.

¹⁹ *Humphrey v. Bulsson*, 19 Minn. 221 (182).

²⁰ *Pardoe v. Merritt*, 75 Minn. 12, 77 N. W. 552.

²¹ See § 1343.

²² *Cox v. Manvel*, 56 Minn. 358, 57 N. W. 1062.

²³ 15 A. & E. Ency. of Law (2 ed.) 57; 21 Cyc. 82; 12 R. C. L. 1127.

²⁴ See §§ 954, 962, 1294, 1310.

²⁵ See §§ 946-1008.

sales under license from the probate court do not apply to natural guardians.²⁶ A special guardian is not authorized to sell or mortgage the real estate of his ward.²⁷ The right of a ward to recover his real property improperly sold survives and is assignable.²⁸ If an incompetent is without wife or children his homestead may probably be sold for his support, in the absence of other available property.²⁹

1299. Mortgaging real property of ward—A guardian has no authority to mortgage the real property of his ward for any purpose, except as authorized by statute or will.³⁰ Provision is made by statute for mortgaging the real property of a ward under license from the probate court in certain cases, and for the extension or renewal of existing mortgages.³¹ A guardian has no authority to borrow money on the security of his ward's real estate without an order of court. If he does so he is personally liable for the debt.³²

1300. Contract for sale of real property of ward—A contract by the holder of the fee title to real property, and the holder of the life estate, to convey the property, including both estates, held a joint contract to be enforced as to both or not at all. The holder of the life estate was an incompetent person and was represented by a guardian who as such joined in the contract, subject to the approval of the probate court. The court refused to confirm the sale. Held, that the contract, being the joint obligation of the vendors, and not enforceable as to the incompetent party, was properly set aside as to both, the personal liability of the guardian under the contract not being determined.³³

1301. Power of attorney to convey real property of ward—A guardian was authorized by order of court to appoint an attorney to convey land of the ward and he executed a blank power, no person being named as attorney. Another person, the guardian not knowing of and taking no part in selecting an attorney, inserted a name in the blank for the name of the attorney. Held, that the instrument was not valid as a power of attorney.³⁴

1302. Leasing real property of ward—A general guardian has authority to lease the real property of his ward for a period not exceeding his office without any order of court.³⁵ Provision is made by statute for

²⁶ *Wells v. Steckleberg*, 50 Neb. 670, 70 N. W. 242; *Graham v. Houghtalin*, 30 N. J. L. 552; *Shanks v. Seamonds*, 24 Iowa 131; 15 A. & E. Ency. of Law (2 ed.) 27; 21 Cyc. 124.

²⁷ See § 1343.

²⁸ *Jordan v. Secombe*, 33 Minn. 220, 22 N. W. 383.

²⁹ *Johnson v. Door County*, 158 Wis. 10, 147 N. W. 1011.

³⁰ *Andrews v. Blazzard*, 23 Utah 233, 63 Pac. 888; 15 A. & E. Ency. of Law (2 ed.) 69; 21 Cyc. 84.

³¹ See § 955.

³² *Bell v. Dingwell*, 91 Neb. 699, 136 N. W. 1128.

³³ *Richardson v. Koteck*, 123 Minn. 360, 143 N. W. 973.

³⁴ *Cox v. Manvel*, 50 Minn. 87, 52 N. W. 273.

³⁵ *Weldon v. Lytle*, 53 Mich. 1, 18 N.

leasing the real property of a ward under license in certain cases, and for the extension or renewal of existing leases.³⁶

1303. Partition of real estate of ward—Statute—When real estate is owned by a ward jointly or in common with others, the guardian may have partition thereof, either by proceedings therefor in the district court, or, in case the guardian and ward are not adversely interested in such real estate, by amicable agreement. In case of such partition by agreement, the probate court, upon approving the same, shall enter its order authorizing the guardian to execute all deeds and other instruments necessary to complete said agreement, and to deliver such papers upon receiving from said other joint or common owners full relinquishment of their interests in that part of said real estate apportioned to the ward.³⁷

1304. Improvement of real estate of ward—Statute—A guardian may, with the approval of the probate court, contract for any improvement of the real estate of his ward, including the erection or maintenance of a line fence or party wall.³⁸

1305. Contracts of guardian do not bind ward—Personal liability of guardian—Guardians cannot by their contracts bind either the persons or estates of their wards. They are personally liable on the contracts which they make in relation to the affairs of their wards unless it is expressly stipulated to the contrary.³⁹

1306. Guardian not liable on contracts of ward—A guardian is not liable on the contracts of his ward. He is not personally liable even for necessities furnished the ward without his order.⁴⁰ If the guardian makes reasonable provision for the support of his ward one who furnishes the ward necessities without the consent or authority of the guardian cannot recover for them either against the guardian or the estate.⁴¹ A guardian is not liable for services rendered or expenditures made in or about the settlement of the account of an administrator of an estate in which his ward is interested.⁴²

W. 533; 15 A. & E. Ency. of Law (2 ed.) 68; 21 Cyc. 86; Ann. Cas. 1917A, 1256.

³⁶ See § 955.

³⁷ G. S. 1913, § 7456.

³⁸ G. S. 1913, § 7457.

³⁹ Reynolds v. Garber-Buick Co., 183 Mich. 157, 149 N. W. 985; Thompson v. Thompson (Iowa) 160 N. W. 922; Shepard v. Hanson, 9 N. D. 249, 83 N. W. 20; Lusk v. Patterson, 2 Colo. App. 306, 30 Pac. 253; Andrus v. Blazzard, 23 Utah 233, 63 Pac. 888; Morse v. Hinckley, 124 Cal. 154, 56 Pac. 896; 15 A. & E. Ency. of Law (2 ed.) 70; 21 Cyc. 115; Woerner, Am. Law of Guard. § 57. See

Richardson v. Kotek, 123 Minn. 360, 143 N. W. 973 (liability of guardian on contract for sale or real property of ward); Matthews v. Mires, 135 Minn. 94, 160 N. W. 187 (case held not to fall within general rule).

⁴⁰ Camp v. Dill, 27 Ala. 553; Spring v. Woodworth, 4 Allen (Mass.) 326; 15 A. & E. Ency. of Law (2 ed.) 78; 21 Cyc. 117.

⁴¹ 15 A. & E. Ency. of Law (2 ed.) 78; 21 Cyc. 71.

⁴² Huntsman v. Fish, 36 Minn. 148, 80 N. W. 455.

1307. Collecting claims of ward—Compounding claims—Actions—Statute—Every guardian shall settle all accounts of his ward, demand, sue for, and receive all debts, claims and causes of action due to or in favor of said ward, or, with the approval of the court, he may compound or compromise for the same and execute proper discharge and satisfaction thereof. He shall appear for and represent his ward in all legal proceedings, unless another person is appointed for that purpose, and may, by power of attorney, appoint an attorney for the foreclosure by advertisement of any mortgage owned by his ward, or in which said ward has an interest.⁴³ It is the duty of a guardian to make reasonable effort to collect, if necessary by action, all claims of the ward.⁴⁴

1308. Arbitration of claims—A guardian has common-law power to submit to arbitration a claim either for or against his ward without leave of court, but for his own protection it is advisable for him to obtain such leave. The submission should be in the name of the ward.⁴⁵

1309. Compromise of claims—Under the present statute a guardian has no authority to compromise a claim in favor of his ward without leave of court.⁴⁶ An improvident and fraudulent settlement by a guardian of his ward's cause of action, though approved by the court in which the action is pending, may be vacated upon a showing of the facts, even though the defendant in the action is not affirmatively shown to have participated in the fraud.⁴⁷

1310. Payment of debts of ward—Sale of real estate—Statute—Every guardian appointed under the provisions of this chapter, whether for a minor or other person, shall pay all just debts due from his ward out of the personal property, if sufficient. If not, then the balance shall be paid from the proceeds of his real estate sold under license from the court.⁴⁸ It is the duty of a guardian to pay all the just debts of the ward if he has funds for the purpose and his failure to do so is a breach of his bond.⁴⁹ It is the duty of the guardian to pay the just debts of the ward though they are not reduced to judgment, but if there is any doubt as to the validity of the claim the guardian may refuse to pay

⁴³ G. S. 1913, § 7446, as amended by Laws 1915, c. 110 and Laws 1917, c. 425.

⁴⁴ *Huntsman v. Fish*, 36 Minn. 148, 30 N. W. 455. See *Penas v. Cherveney*, 135 Minn. 427, 161 N. W. 150.

⁴⁵ *Bean v. Farnam*, 6 Pick. (Mass.) 269; *Weston v. Stuart*, 11 Me. 326; *Hutchins v. Johnson*, 12 Conn. 376; 2 A. & E. Ency. of Law (2 ed.) 629; 21 Cyc. 74.

⁴⁶ See § 1307; 21 L. R. A. (N. S.) 338; 21 Cyc. 74.

⁴⁷ *Dasich v. La Rue Mining Co.*, 126 Minn. 194, 148 N. W. 45. See *Picciano v. Duluth, etc. Ry. Co.*, 102 Minn. 21, 112 N. W. 885.

⁴⁸ G. S. 1913, § 7452.

⁴⁹ *In re Hause*, 32 Minn. 155, 19 N. W. 973; *Racouillat v. Requena*, 36 Cal. 651; *Conant v. Kendall*, 21 Pick. (Mass.) 36; *Long v. Copeland*, 182 Mass. 332, 65 N. E. 384; 15 A. & E. Ency. of Law (2 ed.) 79.

it and force the creditor to reduce it to judgment in an action against the ward.⁵⁰

1311. Corporate stock—Voting—Liability—Statute—It is provided by statute that a guardian may vote corporate stock in his hands belonging to his ward, but that he is not personally liable thereon if he acts in good faith. Property of the ward in the hands of the guardian is liable on the stock as if the ward were competent.⁵¹

1312. Investment of funds—Statute—Whenever a guardian has funds in his hands belonging to his ward he may petition the probate court, setting forth the estate of his ward, real and personal, and the amount of money which he desires to invest, with the facts upon which such petition is based, and any circumstances tending to show the expediency of such investment. The court, if satisfied that such investment is advisable and for the best interest of the ward, may, without notice, order the guardian to make such investment.⁵² Special provision is made by statute as to the investment of funds by a trust company acting as guardian.⁵³ If a guardian neglects to invest funds of his ward for an unreasonable time he is chargeable with interest thereon after the lapse of a reasonable time.⁵⁴ A guardian is not required at his peril to keep trust funds invested at all times but the measure of his duty is to exercise reasonable diligence to keep them so invested.⁵⁵ A guardian is not authorized to invest trust funds in trade or speculation. If he does so he is liable absolutely for all losses and accountable for all gains, regardless of his good faith. The probate court should never authorize the investment of trust funds in any trade, business or speculation.⁵⁶ A petition of a ward to set aside an order authorizing his guardian to invest his money in a certain mortgage on real estate held to state facts justifying the relief sought, it appearing that the guardian owned the mortgage and that it was inadequate security.⁵⁷ In the absence of any statutory provision defining the securities in which a guardian may invest funds, it is advisable for probate courts not to authorize investments except in securities which are authorized for the investment of deposits by savings banks. This is a statutory requirement in the case of trust companies acting as guardians.⁵⁸ An order of court authorizing an investment is protection to the guardian if he is not otherwise negli-

⁵⁰ See *Long v. Copeland*, 182 Mass. 332, 65 N. E. 384.

⁵¹ G. S. 1913, § 6196.

⁵² G. S. 1913, § 7458.

⁵³ G. S. 1913, §§ 6412, 6415.

⁵⁴ *Crosby v. Merriam*, 31 Minn. 342, 17 N. W. 950; *Stude v. Gross* (Iowa) 162 N. W. 10.

⁵⁵ *Stude v. Gross* (Iowa) 162 N. W. 10.

⁵⁶ *King v. Talbot*, 40 N. Y. 76; *Martin v. Raborn*, 42 Ala. 648; *Tucker v. State*, 72 Ind. 242; *Stude v. Gross* (Iowa) 162 N. W. 10.

⁵⁷ *In re Granstrand*, 49 Minn. 438, 52 N. W. 41.

⁵⁸ G. S. 1913, § 6393, as amended by Laws 1917, c. 88; G. S. 1913, § 6415.

gent.⁵⁹ If a guardian makes an investment without an order of court and discloses the investment in an annual report, he cannot escape liability for loss on the theory that the court, by approving his report, ratified the investment.⁶⁰ A guardian merely continuing an investment of funds in the form in which they came into his hands is not relieved of liability for a loss. He must exercise an independent judgment.⁶¹ A guardian may make investment in foreign securities.⁶² The investment of funds is governed by the law of the domicile of the ward.⁶³

1313. Wages of minors—Statute—Any parent or guardian, claiming the wages of a minor in service shall so notify his employer, and, if he fails so to do, payment to the minor of wages so earned shall be valid.⁶⁴

1314. Taxes—It is the duty of a guardian to list both the real and personal property of his ward for taxation.⁶⁵ The personal property of a minor under guardianship shall be listed and assessed where the guardian resides; and of every other person under guardianship, where the ward resides.⁶⁶

1315. Gifts from ward to guardian—A gift from a ward to his guardian is presumptively invalid. The burden rests on the guardian to show the transaction to be righteous. This is true of a gift from a ward to an ex-guardian who retains a controlling influence over his former ward.⁶⁷

ACTIONS

1316. Limitation of actions—The ordinary limitation of six years applies to claims on contract against the ward.⁶⁸

1317. Actions by ward—Actions may be brought by a minor ward in his own name appearing by his general guardian. It is not necessary to appoint a guardian ad litem.⁶⁹ A minor may appear by a guardian ad litem though there is a general guardian competent to act.⁷⁰ The title of an action by a ward should be A. B., (a minor) (an insane person) (an incompetent person), by C. D., his (general guardian) (guardian ad litem). An error in this regard may be disregarded or corrected by amendment.⁷¹ The land of a minor under guardianship having been sold

⁵⁹ *Mumford v. Rood*, 36 S. D. 80, 153 N. W. 921; *In re Schandoney's Estate*, 133 Cal. 387, 65 Pac. 877.

⁶⁰ *Mumford v. Rood*, 36 S. D. 80, 153 N. W. 921.

⁶¹ *Mumford v. Rood*, 36 S. D. 80, 153 N. W. 291.

⁶² *Townsend v. Kendall*, 4 Minn. 412 (315, 323).

⁶³ *Lamar v. Micou*, 112 U. S. 452.

⁶⁴ G. S. 1913, § 3857.

⁶⁵ G. S. 1913, § 1994(3).

⁶⁶ G. S. 1913, § 2009.

⁶⁷ *Ashton v. Thompson*, 32 Minn. 25, 18 N. W. 918.

⁶⁸ *Gardner v. Young's Estate*, 163 Wis. 241, 157 N. W. 787.

⁶⁹ G. S. 1913, § 7446; *Patterson v. Melchior*, 102 Minn. 363, 113 N. W. 902. See *Dunnell*, Minn. Pl. (2 ed.) § 75.

⁷⁰ *Peterson v. Baillif*, 52 Minn. 386, 54 N. W. 185.

⁷¹ *Beckett v. Northwestern Masonic Aid Assn.*, 67 Minn. 298, 69 N. W. 923; *Richardson v. Kotek*, 123 Minn. 360, 143 N. W. 973.

and conveyed an action to recover the purchase price is within the jurisdiction of the district court, but not of the probate court. The general guardian refusing to collect the purchase price an action for its recovery may be maintained by the minor through a guardian ad litem.⁷²

1318. Actions against ward—An action will lie in the district court on all claims against a ward as though no guardianship existed.⁷³ That a minor or insane person may be sued in the district court, though he is under guardianship, is recognized by the statute providing for service of summons in such case.⁷⁴ In all actions against a ward it is the duty of his general guardian to appear for him.⁷⁵

1319. Actions by guardians—Counterclaims—It is provided by statute that every guardian shall sue for and receive all debts, claims and causes of action due to or in favor of his ward.⁷⁶ It is expressly provided by statute that a guardian may sue without joining the ward.⁷⁷ An action by a guardian in behalf of his ward should be entitled in the name of the ward, by the guardian, but a defect in this regard may be disregarded or corrected by amendment.⁷⁸ In an action by a guardian in his official capacity the defendant cannot interpose a counterclaim based on the personal liability of the plaintiff.⁷⁹ It is provided by statute that a general guardian may sue for the injury of his ward.⁸⁰ Under this statute an action for personal injury to a ward may be brought in his name as plaintiff by his general guardian.⁸¹ It is provided by statute that a guardian may sue for the seduction of his ward, though the ward is not living with or in the service of the guardian at the time of the seduction or afterwards and there is no loss of service.⁸² A guardian may sue in his own name on a note payable to himself, though the consideration paid for it was funds of his ward, and the note was taken or purchased by him for the benefit of the ward.⁸³ A guardian of a minor may sue for money collected for him as a guardian by an attorney

⁷² Peterson v. Baillif, 52 Minn. 386, 54 N. W. 185.

⁷³ Pfau v. Babb, 86 Minn. 395, 90 N. W. 1051; Clark v. Buck (Minn.) 188 N. W. 326. The provisions of G. S. 1913, §§ 7453, 7454, for presenting certain claims to the probate court for allowance, were repealed by Laws 1915, c. 342.

⁷⁴ G. S. 1913, § 7732.

⁷⁵ See § 1307.

⁷⁶ See § 1307.

⁷⁷ G. S. 1913, § 7676. Prior to the revision of 1905 there was no authority for a guardian to sue in his own name. Perine v. Grand Lodge, 48 Minn. 82, 50 N. W. 1022.

⁷⁸ Richardson v. Kotek, 123 Minn. 360, 143 N. W. 973.

⁷⁹ Huntsman v. Fish, 36 Minn. 148, 30 N. W. 455.

⁸⁰ G. S. 1913, § 7681. See Dunnell, Minn. Digest and Supplements, § 7300.

⁸¹ Patterson v. Melchior, 102 Minn. 363, 113 N. W. 902. See Patterson v. Melchior, 106 Minn. 437, 119 N. W. 402 (action by guardian—denial of amendment of answer so as to set forth that the guardian had not been appointed until after the commencement of the action held not an abuse of discretion).

⁸² G. S. 1913, § 7680. See Dunnell, Minn. Digest, §§ 8709–8716.

⁸³ McLean v. Dean, 66 Minn. 369, 69 N. W. 140.

though the minor has become of age.⁸⁴ A guardian has been held not entitled to recover on a contract for the support of his ward for life while his ward was detained in a state hospital for the insane, the provisions of the contract sought to be enforced being purely personal to the ward.⁸⁵ A guardian may have a deed canceled which was obtained from the ward while insane by a grantee with knowledge of his insanity. He is only required to tender a return of the part of the consideration which is left and if the consideration passed to another no tender is necessary.⁸⁶ Where an incompetent, prior to the appointment of a guardian, makes a conveyance through the fraud of the grantee, his guardian cannot ratify the conveyance and sue for damages for the fraud. He cannot ratify the conveyance of his ward, either directly or indirectly.⁸⁷

1320. Actions against guardians—Waste—Provision is made by statute for an action against a guardian for waste of real property.⁸⁸ The district court has jurisdiction of an action by a ward against his guardian and purchasers from him to set aside a fraudulent sale by the guardian.⁸⁹

1321. Pleading—Allegation of appointment of guardian—In alleging the appointment of a guardian it is not necessary to allege the particular steps in the proceeding whereby he was appointed. It is sufficient to allege generally that he was duly appointed by a designated court. The date of the appointment should be given but it is not essential.⁹⁰

1322. Attachment and execution—It seems to be an open question in this state whether the property of a ward is so far in the custody of the law that it is not subject to attachment and execution and the cases in other jurisdictions are in conflict. Our statutes make no express exemption and no provision against preferences in the payment of claims against wards. Their property is therefore probably subject to attachment and execution under the general statutes. When a judgment is recovered against a ward it is the duty of the guardian to pay it, without any order of court, if there are available funds for the purpose. If the personalty of the ward is insufficient his realty may be sold under a license from the probate court. If a guardian refuses to pay a judgment when he has available funds therefor he is liable on his bond to the judgment creditor.⁹¹

⁸⁴ *Huntsman v. Fish*, 36 Minn. 148, 30 N. W. 455.

⁸⁵ *Penas v. Cherveney*, 135 Minn. 427, 161 N. W. 150.

⁸⁶ *Jefferson v. Rust*, 149 Iowa 594, 128 N. W. 954. See *Merchants Trust & Savings Bank v. Schudel*, 141 Minn. 250, 169 N. W. 795.

⁸⁷ *King v. Siple*, 166 Mich. 258, 131 N. W. 572.

⁸⁸ G. S. 1913, § 8088.

⁸⁹ *Wilson v. Erickson*, 147 Minn. 260, 180 N. W. 93.

⁹⁰ *Patterson v. Melchior*, 102 Minn. 363, 113 N. W. 902. For form of allegation see *Dunnell*, Minn. Pl. (2 ed.) § 1382.

⁹¹ See G. S. 1913, § 7452 (§ 1310, *supra*): In *re Hause*, 32 Minn. 155, 19 N. W. 973; *Pflaum v. Babb*, 86 Minn. 395,

1323. Garnishment—A guardian is not subject to garnishment for the money or property of his ward before a final settlement of his account.⁹²

1324. Costs in actions by ward—Statute—When costs or disbursements are adjudged against an infant plaintiff, the guardian by whom he appears in the action shall be responsible for them, and judgment therefor may be entered against both infant and guardian.⁹³

ACCOUNTING

1325. Jurisdiction—Jurisdiction of probate courts over the accounting of guardians is exclusive.⁹⁴ The court appointing a guardian is the proper court for his accounting.⁹⁵ The probate court has jurisdiction to settle the accounts of a guardian of a minor after the ward becomes of age.⁹⁶ But it has no jurisdiction of an accounting between a guardian and his ward as to transactions occurring after the ward reaches maturity.⁹⁷ The district court has jurisdiction of an action by a ward against his guardian and purchasers from the latter of the ward's property, under a license from the probate court, to set aside the sale on the ground of fraud. That the ward might have relief in pending guardianship proceedings upon the accounting of the guardian does not affect the jurisdiction of the district court.⁹⁸ The probate court has jurisdiction to determine whether a guardian selling land under a license from the court made the sale to a figurehead for the purpose of profiting by a resale to the actual purchaser at an increased price, and, if it finds that the sale was so made, may compel the guardian to account for the full proceeds of such resale. Where such a claim of fraud has been presented to the probate court and litigated therein and dismissed on the merits, the judgment is a bar to a subsequent action in the district court on the same claim.⁹¹

1326. Nature of proceeding—Equitable rules—An accounting is an equitable, and not a legal, proceeding. It involves, not only items of debit and credit, but considerations as to the propriety of charges and invest-

90 N. W. 1051; *Gressly v. Hamilton County*, 136 Iowa 722 (N. W.); *Sturges v. Sturges*, 51 Or. 10, 93 Pac. 696; *Spence v. Miner*, 89 Neb. 610, 131 N. W. 1044, 132 N. W. 942; *Freeman, Execution*, (3 ed.) § 131; 15 Ann. Cas. 356; 11 A. & E. Ency. of Law (2 ed.) 641.

92 *Pugh v. Jones*, 134 Iowa 746; 20 Cyc. 1028; *Drake, Attachment* (7 ed.) § 502; *Freeman, Executions* (3 ed.) § 131; 13 Ann. Cas. 500.

93 G. S. 1913, § 7983.

94 *Jacobs v. Fouse*, 23 Minn. 51; *Bran-*

des v. Carpenter, 68 Minn. 388, 391, 71 N. W. 402; *Wilson v. Erickson*, 147 Minn. 260, 180 N. W. 93. See § 22.

95 *Peel v. McCarthy*, 38 Minn. 451, 38 N. W. 205.

96 *Jacobs v. Fouse*, 23 Minn. 51; *Curtis v. De Voe*, 121 Cal. 468, 53 Pac. 936.

97 *Curtis v. De Voe*, 121 Cal. 468, 53 Pac. 936.

98 *Wilson v. Erickson*, 147 Minn. 260, 180 N. W. 93.

91 *Wilson v. Erickson* (Minn.) 188 N. W. 994.

ments and allowances for compensation.⁹⁹ The rules of accounting applied in courts of equity when they had jurisdiction of the subject are applicable under our system.¹

1327. Death of guardian—Accounting by his representative—If a guardian dies before his final account and settlement his representative may be called to account for him by the probate court.²

1328. Who may demand an accounting—The sureties on a bond of a guardian may demand an accounting by him in the probate court.³

1329. Necessity before action on bond—An accounting in the probate court is ordinarily a prerequisite to an action on a guardian's bond to recover a balance due the ward from the guardian.⁴

1330. Annual accounting—Statute—Every guardian shall render to the court annually a verified account of his guardianship for the preceding year, containing an itemized statement of all property received by him at the beginning or remaining in his hands at the last settlement, what has since been received, what he has expended or invested since his last accounting, and a statement in detail of what remains in his hands, with the estimated value of each item thereof. Whenever it shall appear to the court to be for the best interest of the ward so to do, such court, upon its own motion, may, and upon the request of the guardian or any other person interested, shall, appoint a time for the hearing and settlement of such account, and cause three weeks' published notice thereof to be given. At the time and place of hearing, the court shall examine such account, hear all proper evidence offered in reference thereto, adjust and settle the same, and make an order allowing or disallowing it in whole or in part, and in such order shall specify the amount and description of the personal property remaining in the hands of the guardian.⁵ An annual accounting has not the force of a judgment, but is merely prima facie evidence of the state of the account. On the final accounting the entire period of the guardianship may be considered regardless of the annual accountings.⁶

1331. Final account—Notice—Statute—When the disability of any person under guardianship is removed, or he dies or the guardian resigns, the guardian shall render a final account of his guardianship to the probate court, and turn over all property of his ward in his posses-

⁹⁹ *Hantzch v. Massolt*, 61 Minn. 361, 364, 63 N. W. 1069.

¹ *In re Besondy*, 32 Minn. 385, 20 N. W. 366; *In re Belsel's Estate*, 110 Cal. 267, 40 Pac. 961, 42 Pac. 819.

² *Peel v. McCarthy*, 38 Minn. 451, 38 N. W. 205. See *Sweet v. Lowry*, 123 Minn. 13, 142 N. W. 882.

³ *Brandes v. Carpenter*, 68 Minn. 388, 391, 71 N. W. 402.

⁴ See § 1277.

⁵ G. S. 1913, § 7459. See *Watson v. Watson*, 65 Minn. 335, 68 N. W. 44 (right of appeal).

⁶ *Olsen v. Thompson*, 77 Wis. 666, 47 N. W. 20; *Des Moines Savings Bank v. Krell*, 176 Iowa 437, 156 N. W. 858; 15 A. & E. Ency. of Law (2 ed.) 114; 21 Cyc. 179.

sion to such ward or his legal representative. Upon the filing of such final account, with a petition for its settlement and allowance, the court shall make an order fixing a time and place for hearing thereon, and cause personal service thereof to be made upon said ward, if he is in the state, or in case of resignation, upon the guardian appointed in place of the guardian resigning if there be such newly appointed guardian, at least fourteen days before the date of hearing, and, if the ward be not in the state or is dead, service of said order shall be made by three weeks' published notice. Provided, if said nonresident ward is alive, personal service upon said ward in the state of his residence, or personal service upon the guardian of said ward appointed in the state of the residence of such ward at least fourteen days before the day of hearing shall be sufficient. The proof of the service without the state, as aforesaid, to be by the affidavit of the person making the same and made before an authorized officer having a seal.⁷ The statutory notice was held jurisdictional under a former statute, but the rule is now otherwise.⁸ When a guardian files an account it is his duty to have a hearing on it appointed. If he procures an order for a hearing he is charged with notice of its contents.⁹ A published notice under G. S. 1878, c. 59, § 47, has been held a sufficient notice to a guardian.¹⁰

1332. Vouchers—As a general rule, full items, with vouchers for all expenditures, should be required, and credits should not be allowed without them; but this is not indispensable, and, in a clear case, where there is no doubt of the expenditures having been made, or of the guardian's good faith, vouchers may be dispensed with. Each case necessarily depends upon its own facts. For small expenditures it is not customary to require vouchers. The matter of requiring vouchers rests in the discretion of the probate court.¹¹

1333. Charges and credits—Compensation of guardian—It is provided by statute that every guardian shall be allowed all necessary expenses in the care, management and settlement of the estate, including proper and reasonable fees paid to attorneys, and for his own services such fees as are provided by law or fixed by the court.¹² The guardian may be allowed credit for any necessary advances made by him for the support and education of the ward.¹³ Allowance may be made for necessary expenses incurred in the support and maintenance of the ward without a previous order of court and even before the appointment of the guardian.¹⁴ The criterion for determining whether expenses of past main-

⁷ G. S. 1913, § 7460.

⁸ *Jacobs v. Fouse*, 23 Minn. 51. See §§ 31, 35, 40.

⁹ *Brown v. Huntsman*, 32 Minn. 466, 21 N. W. 555.

¹⁰ *Brown v. Huntsman*, 32 Minn. 466, 21 N. W. 555.

¹¹ *Cutting v. Scherzinger*, 40 Or. 353, 68 Pac. 393; 15 A. & E. Ency. of Law (2 ed.) 112; 21 Cyc. 155.

¹² G. S. 1913, § 7298, as amended by Laws 1921, c. 210. See § 1047.

¹³ See § 1295.

¹⁴ *In re Besondy*, 32 Minn. 385, 20 N.

tenance shall be allowed is whether a court of equity would have allowed them in advance.¹⁵ A guardian may make a contract for the maintenance of his ward without a previous order of court and if it is reasonable the guardian should be allowed for payments thereunder.¹⁶ Where the ward is a member of the household of the guardian an allowance for his support depends upon the intention with which the support was given and the relationship between the guardian and his ward. If the guardian is the father of the ward he will not ordinarily be allowed anything for his support, but special circumstances may take the case out of the general rule. If the guardian is the stepfather of the ward he may be allowed for his support, unless the support was clearly given with the intention that it should be gratuitous. If the guardian is the mother of the ward she may be allowed for his support unless the support was clearly given with the intention that it should be gratuitous.¹⁷ It is the duty of a guardian to see to it that his ward is suitably maintained and if the income is insufficient for the purpose the principal may, upon order of the court, be applied to that purpose. If the principal of the personal estate is resorted to without a previous order of court the action of the guardian is usually but not necessarily ratified by the court. It is always the better and safer practice to procure an order of court for the use of the principal for it is the policy of the law not to resort to the principal of the estate for the maintenance of the ward except in case of necessity. A guardian acts at his peril in using the principal without an order of court.¹⁸ If a minor has property of his own and his father is dead, or is not able to support him, he may be maintained and supported out of the income of his own property. If such income is insufficient for his suitable maintenance his principal may be resorted to, but cautiously and only in case of real or substantial necessity. A mother may be allowed for the past and current maintenance of her children after the death of the father, out of the estate of the children, though she has a separate estate.¹⁹ It is a common, convenient and safe practice for a guardian to obtain an order of court authorizing a fixed amount for the weekly, monthly or annual maintenance of the ward. This avoids the necessity of keeping account of each expenditure, protects the guardian and tends to check extravagant

W. 366. See *Matthews v. Mires*, 135 Minn. 94, 160 N. W. 187.

¹⁵ *In re Besondy*, 32 Minn. 385, 20 N. W. 366; *In re Beisel's Estate*, 110 Cal. 267, 40 Pac. 961, 42 Pac. 819; 15 A. & E. Ency. of Law (2 ed.) 102; 21 Cyc. 65.

¹⁶ *In re Boyes' Estate*, 151 Cal. 143, 90 Pac. 454.

¹⁷ *In re Besondy*, 32 Minn. 385, 20 N. W. 366; *Boardman v. Ward*, 40 Minn. 399, 42 N. W. 202; *Unke v. Dahlmier*,

78 Minn. 320, 80 N. W. 1130; *Elken v. Elken*, 79 Minn. 360, 82 N. W. 667; 15 A. & E. Ency. of Law (2 ed.) 102; 21 Cyc. 68.

¹⁸ *In re Besondy*, 32 Minn. 385, 20 N. W. 366; *Cutting v. Scherzinger*, 40 Or. 353, 68 Pac. 393; 15 A. & E. Ency. of Law (2 ed.) 100; 21 Cyc. 65; 5 A. L. R. 632.

¹⁹ *In re Beisel's Estate*, 110 Cal. 267, 40 Pac. 961, 42 Pac. 819.

expenditures.²⁰ A guardian has been held properly charged with interest on funds which he failed to invest.²¹ The guardian may be charged on account of a fraudulent sale of property of the ward.²²

1334. Who may contest an account—A creditor of a ward may contest the account. Under a former statute it was held that a creditor of a spendthrift ward might contest an account without having his claim allowed by the probate court.²³

1335. Laches of ward in contesting account—The right of a ward to contest the account of his guardian may be lost by laches.²⁴

1336. Order allowing account—Discharge of guardian and his sureties—Statute—At the time and place so fixed for hearing the court shall examine such account, and hear all proper testimony offered for and against its allowance, and, if satisfied that such account should be allowed in whole or in part, the court shall so order. Upon such allowance the court shall make an order discharging the guardian, and, if no action upon such guardian's bond shall have been commenced within ninety days after such discharge, the court may discharge the sureties on the bond.²⁵ The order of allowance is conclusive on the guardian and his sureties in an action on his bond to recover the balance found due the ward.²⁶ An order of allowance held not to confirm a sale of personal property by the guardian contrary to an order of the court, though the guardian charged himself in the account with the proceeds of the sale.²⁷ The allowance of an account of a guardian and the establishment of a claim against him did not set in motion the statute of limitations in G. S. 1894, § 5927.²⁸ An order on an accounting requiring a guardian to pay over an estate without making an allowance for the dower interest of a mother of the ward therein has been sustained.²⁹

1337. Conclusiveness of settlement—Collateral attack—A final settlement of the accounts of a guardian is conclusive, unless set aside by direct attack, upon the ward, the guardian and his sureties, and all persons interested in the estate, if the court had jurisdiction. It has the force of a judgment and cannot be collaterally attacked for error, irregularity or fraud.³⁰

²⁰ *In re Boyes' Estate*, 151 Cal. 143, 90 Pac. 454.

²¹ *Crosby v. Merriam*, 31 Minn. 342, 17 N. W. 950. See § 1312.

²² *Wilson v. Erickson*, 147 Minn. 260, 180 N. W. 93.

²³ *In re Hause*, 32 Minn. 155, 19 N. W. 973.

²⁴ *Hanson v. Swenson*, 77 Minn. 70, 79 N. W. 598.

²⁵ G. S. 1913, § 7461.

²⁶ See § 1277.

²⁷ *Cox v. Manvel*, 56 Minn. 358, 57 N. W. 1062.

²⁸ *Holden v. Turrell*, 86 Minn. 214, 90 N. W. 395.

²⁹ *Hendri v. Sabin*, 86 Minn. 108, 90 N. W. 159.

³⁰ *Jacobson v. Anderson*, 72 Minn. 426, 75 N. W. 607; *Cross v. White*, 80 Minn. 413, 83 N. W. 393; *Brodrub v. Brodrub*, 56 Cal. 563; *Davis v. Hagler*, 40 Kan. 187, 19 Pac. 628; *Driskill v. Quinn* (Okla.) 170 Pac. 495; 15 A. & E.

1338. Settlement—Turning over estate—When a guardian has settled his accounts with the probate court and his guardianship has terminated he must turn over the estate to his successor, or to the ward, or other person entitled thereto. He cannot exonerate himself by turning it over to the court.³¹ An informal settlement has been sustained after a long lapse of time and acquiescence of wards.³²

1339. Vacation of order allowing account—A probate court may on motion set aside its order allowing an account procured through fraud. The fact that consent by the ward to such allowance was procured through the aid of a written consent and acquittance obtained from the ward after his majority by fraud does not prevent the court from re-examining the account *de novo*.³³

1340. Accounts and accounting of trust companies—Special provision is made by statute as to the accounts and accounting of trust companies acting as guardians.³⁴

RESIGNATION AND REMOVAL

1341. In general—Statutes—The statutes governing the removal and resignation of executors and administrators apply to the removal and resignation of guardians.³⁵ Prior to the enactment of the statute authorizing a guardian to resign his trust at any time, it was held that if a guardian tendered his resignation the probate court might enter an order removing him.³⁶ A guardian cannot be removed without notice to him of the time and place of hearing if his residence is known.³⁷ Where an effort is made in the probate court, upon petition of next of kin, to prevent a testamentary guardian from executing his trust, and the probate court decides that he is competent and suitable, upon appeal from such order the question of such guardian's right to act further may be considered, and the district court may permit an amendment of the petition of the next of kin, if necessary, to enable such question to be fully determined.³⁸ The removal or retention of a guardian is largely discretionary with the court hearing the application and its action will not be reversed on appeal except for a clear abuse of dis-

Ency. of Law (2 ed.) 115; 21 Cyc. 178; 12 R. C. L. 1165; 83 Am. Dec. 384; 9 Ann. Cas. 156; Ann. Cas. 1915D, 404.

³¹ *Jacobs v. Fouse*, 23 Minn. 51, 55; *Jacobson v. Anderson*, 72 Minn. 426, 75 N. W. 607.

³² *Hanson v. Swenson*, 77 Minn. 70, 79 N. W. 598. See *L. R. A.* 1916E, 863 (effect of settlement out of court).

³³ *Levi v. Longini*, 82 Minn. 324, 84 N. W. 1017, 86 N. W. 333. See Ann. Cas. 1917A, 648 (lapse of time as affecting opening of settlement of account).

³⁴ G. S. 1913, §§ 6415-6418. See *St. Paul Trust Co. v. Kittson*, 62 Minn. 408, 65 N. W. 74; *St. Paul Trust Co. v. Strong*, 85 Minn. 1, 88 N. W. 256.

³⁵ See §§ 1141-1143.

³⁶ *Brown v. Huntsman*, 32 Minn. 466, 21 N. W. 555.

³⁷ *McCloskey v. Plantz*, 76 Minn. 323, 79 N. W. 176.

³⁸ *Chadwick v. Dunham*, 83 Minn. 366, 86 N. W. 351.

cretion.³⁹ Before removing a guardian for failure to account courts frequently allowed him to show, if possible, that no prejudice to the estate has resulted from the delay and if so to allow him to file a belated account.⁴⁰ Mere unsuitableness, without misconduct of any kind, is a sufficient cause for the removal of a guardian. Acts of the guardian subsequent to the filing of the petition for his removal are relevant and material.⁴¹ The death, removal or resignation of a guardian terminates the guardianship, and where a successor is to be appointed, it must be in the county where the incompetent resides when such new appointment is made and upon notice the same as would be required in original guardianship.⁴²

SPECIAL GUARDIANS

1342. When and how appointed—Statute—When there shall be delay in appointing a guardian for the person or estate of a minor, or when it shall appear to the court to be necessary, it may appoint a special guardian for the minor until the cause of the delay or the necessity for such appointment shall cease and a guardian be appointed. Such special guardian may be appointed without notice, and no appeal therefrom shall be allowed. All provisions of law relating to guardians shall apply to such special guardian as far as applicable, and upon the filing and approval of his bond letters of guardianship shall issue to him.⁴³

1343. Powers—Statute—Such special guardian shall have the same power and perform the same duties as other guardians, but no special guardian appointed under § 7462 (1342, *supra*) shall institute any proceeding for selling or mortgaging any real estate of his ward or dispose of any of his personal property without license from the probate court.⁴⁴

TESTAMENTARY GUARDIANS

1344. Statute—The father with the written consent of the mother, and the mother with the written consent of the father, may by will appoint a guardian of their minor children, whether born at the time of making the will or afterwards, to continue during their minority or a less time, and if either parent dies without having appointed a testamentary guardian, the survivor may by will appoint such guardian. Such guardian, within thirty days after probate of the will, or after he has knowledge of his appointment, and in case of appeal within thirty days after final

³⁹ *In re Nelson*, 148 Iowa 118, 126 N. W. 973; *Rummels v. Clark*, 164 Iowa 659, 146 N. W. 462. See Ann. Cas. 1912B, 977.

⁴⁰ *In re Nelson*, 148 Iowa 118, 126 N. W. 973.

⁴¹ *Gray v. Parke*, 155 Mass. 433, 29 N. E. 641.

⁴² *Allis v. Morton*, 4 Gray (Mass.) 63; *Harding v. Weld*, 128 Mass. 587; *Willwerth v. Leonard*, 156 Mass. 277, 31 N. E. 299.

⁴³ G. S. 1913, § 7462.

⁴⁴ G. S. 1913, § 7463.

determination of such appeal, shall file with the probate court his acceptance of the trust and give bond to be approved by the court. Thereupon a certificate shall be issued to him, under the hand and seal of the court reciting his appointment by will, his acceptance and qualification. He shall then have the same powers and perform the same duties, with respect to the person and estate of the ward, as a guardian appointed by the probate court. Such guardian shall at all times be subject to the jurisdiction, direction and orders of the probate court, and may be removed by such court for good cause. If any guardian so appointed by will does not accept the trust and qualify within the time limited, he shall be deemed to have renounced the appointment, and the probate court may then appoint a guardian as in other cases.⁴⁵ Where, in proceedings instituted upon the petition of a testamentary guardian for his appointment to that trust, the next of kin appear and object to such appointment, and also file a petition setting forth that such guardian is not a suitable person to discharge the trust, a determination by the probate court that he is suitable and competent is reviewable, and, upon appeal being taken, is entitled to be heard upon its merits in the district court. On such appeal the right of the guardian to act further may be considered, and the district court may permit an amendment of the petition of the next of kin, if necessary, to enable such question to be fully determined.⁴⁶ To be valid for the purpose of appointing a guardian under the statute a will must be executed in the same manner as other wills.⁴⁷

GUARDIANS FOR NON-RESIDENTS

1345. Statute—Whenever a person liable to be put under guardianship is a non-resident and has property in this state, any friend of such person, or any one interested in his estate, in expectancy or otherwise, may petition the probate court of any county in which there is any estate of such non-resident for the appointment of a guardian for such absent person; and after such notice to all persons interested as the court shall order, and a full hearing and examination, the court may appoint a guardian. Such guardian shall have the same powers and duties with respect to any estate of the ward within this state, and to the person of the ward, if he comes to reside therein, as are prescribed for other guardians.⁴⁸ A probate court of this state may appoint a guardian for a non-resident minor, as respects any estate which the minor may have in the county where such court is established. If a general guard-

⁴⁵ G. S. 1913, § 7428. See 15 A. & E. Ency. of Law (2 ed.) 27; 21 Cyc. 16; 12 R. C. L. 1109; 45 L. R. A. (N. S.) 446.

⁴⁶ Chadwick v. Dunham, 83 Minn. 366, 86 N. W. 351.

⁴⁷ Wardwell v. Wardwell, 9 Allen (Mass.) 518.

⁴⁸ G. S. 1913, § 7440.

ian is appointed in such case, the appointment is good to the extent of the estate of the minor within the jurisdiction in which it is made.⁴⁹ To authorize such an appointment it is not necessary that there should first be a general guardian appointed in the state of the domicile of the minor.⁵⁰ The statutory notice is perhaps jurisdictional.⁵¹ Notice to the minor is not essential. The notice is within the discretion of the court. It should be given to natural guardians, relatives and next of kin as the circumstances of the particular case may require. The aim should be to give notice to those most interested in the minor or his estate so that they may have an opportunity to attend the hearing and give the court information as to the nature and value of the estate of the minor and as to the propriety or necessity of the appointment.⁵² In proceedings for the appointment of a guardian for a non-resident insane person who has property in this state, the representative of the estate including such property need not be given notice. The fact that the probate court orders such representative to be served with notice is not an adjudication of the question of his interest, and if, at the hearing, he is denied an opportunity to take part, he has no remedy by appeal.⁵³ A court cannot appoint a guardian of a minor whose domicile and property are in another state.⁵⁴ If the estate of the incompetent consists of personal property which is held in trust for him, the probate court of the county where the trustee resides has jurisdiction to appoint a guardian.⁵⁵

FOREIGN GUARDIANS

1346. Control of ward—If a foreign guardian and his ward come into this state the guardian may exercise control over the person or property of his ward, subject to the laws of this state. He may retake the ward here and remove him to the state of his domicile.⁵⁶

1347. License to sell or mortgage real property—A foreign guardian may be licensed by the probate court to sell or mortgage real estate of his ward in this state and he may act through a resident attorney in fact, duly appointed for that purpose.⁵⁷ The probate court of a county

⁴⁹ *Davis v. Hudson*, 29 Minn. 27, 11 N. W. 136; *West Duluth Land Co. v. Kurtz*, 45 Minn. 380, 47 N. W. 1134.

⁵⁰ *West Duluth Land Co. v. Kurtz*, 45 Minn. 380, 47 N. W. 1134.

⁵¹ *Davis v. Hudson*, 29 Minn. 27, 11 N. W. 136. See §§ 40, 1266.

⁵² *Kurtz v. St. Paul & Duluth R. Co.*, 48 Minn. 339, 51 N. W. 221; *Kurtz v. West Duluth Land Co.*, 52 Minn. 140, 53 N. W. 1132. See *Edgerly v. Alexander*, 82 Minn. 96, 84 N. W. 653.

⁵³ *Edgerly v. Alexander*, 82 Minn. 96, 84 N. W. 653.

⁵⁴ *Connell v. Moore*, 70 Kan. 88, 78 Pac. 164; *State v. Macy*, 93 Neb. 118, 139 N. W. 834.

⁵⁵ *Clarke v. Cordis*, 4 Allen (Mass.) 466.

⁵⁶ *Townsend v. Kendall*, 4 Minn. 412 (315).

⁵⁷ G. S. 1913, § 7364; *Townsend v. Kendall*, 4 Minn. 412 (315, 324); *Jordan v. Secombe*, 33 Minn. 220, 22 N. W. 383; *Menage v. Jones*, 40 Minn. 254, 41 N. W. 972. See § 1179.

in this state in which there is real estate of a ward residing out of this state, under guardianship by virtue of an appointment of a guardian in another state, is the "probate court having jurisdiction" upon an application by the guardian for a license to sell real estate of the ward. There being real estate of the ward in the county, and the record of the probate court showing a petition by the guardian from another state asking for license to sell the real estate, and notice and opportunity to be heard, the jurisdiction in the matter appears. On such hearing it is for the probate court to determine whether the guardian was duly appointed in such other state, and whether he has complied with the law of this state by filing an authenticated copy of his appointment, and its determination, except on appeal, is final.⁵⁸

1348. Dealing with property here—Removal of personal property—Actions to recover—Statute—Whenever the guardian of any non-resident ward, appointed as such in the state or district where said ward resides, shall have occasion to deal with property of his ward situated within this state, he may file in the probate court of the county in which such property may be an authenticated copy of his letters, and thereupon he shall be authorized to sue for and recover such property, or to receive and receipt for the same, and, if it be personalty, to remove it from the state, subject, however, to the rights therein of citizens of this state.⁵⁹ A bill in equity by a foreign guardian has been held not demurrable for failure to allege a filing of a copy of his letters as required by this statute.⁶⁰ A foreign guardian, upon filing for record with the register of deeds of the proper county an authenticated copy of his letters, may assign, release, satisfy, or foreclose any mortgage, judgment, or lien, belonging to the estate represented by him, on real or personal property, in the same manner as such representative appointed in this state could do. He may act through a duly appointed attorney in fact.⁶¹

GUARDIANS OF INSANE PERSONS AND INCOMPETENTS

1349. Jurisdiction—The probate courts have exclusive jurisdiction of the appointment of guardians for insane persons.⁶²

1350. Grounds for appointing guardian—Petition—Statute—The probate court may appoint a guardian or guardians of any person who, by reason of old age or loss or imperfection of mental faculties, is incompetent to have the management of his property, or one who by excessive drinking, gaming, idleness, or debauchery so spends or wastes his es-

⁵⁸ *Menage v. Jones*, 40 Minn. 254, 41 N. W. 972.

⁵⁹ *G. S. 1913*, § 7455. See §§ 740-742, 1180.

⁶⁰ *Pulver v. Leonard*, 176 Fed. 586.

⁶¹ *G. S. 1913*, § 7302. See §§ 740-742, 1180.

⁶² *State v. Wilcox*, 24 Minn. 143. See § 27.

tate as to be likely to expose himself or his family to want or suffering. Such appointment may be made upon the petition of the county board, or of any relative or friend of such person, which petition shall set forth the facts, and be verified by the affidavit of the petitioner that he believes the facts stated to be true.⁶⁸ This section provides the only statutory mode of determining the status of a person with respect to his capacity to manage his own business affairs.⁶⁴ To confer jurisdiction of the subject-matter it is not necessary that the petition state that it is made by the county board, or by a relative or friend of the incompetent, but it is sufficient if it is so made in fact. Such fact will be presumed unless the record affirmatively shows the contrary. Any defects in this regard or in the facts set forth in the petition are waived if not taken advantage of on the trial.⁶⁵ The fact that the petition does not state that the incompetent is a resident of the county is not fatal. The appointment of a guardian presumes a finding of such residence.⁶⁶ The petition need not state the cause of the incompetency.⁶⁷

1351. What constitutes incompetency—One may be competent to manage his property though he is subject to delusions or insane on some subjects.⁶⁸ Where a person has insufficient mental capacity for the just protection of his property, and his mental condition is such that he is controlled by the will of others in the disposition of his property, a guardian should be appointed. But the mere fact that he may become subject to the will of others and be influenced by them in disposing of his property is no ground for the immediate appointment of a guardian.⁶⁹

1352. Evidence of incompetency—Sufficiency—Evidence held sufficient to show incompetency, short of insanity, and to justify the appointment of a guardian.⁷⁰ A finding against incompetency held justified by the evidence.⁷¹ After the denial of a petition for the appointment of a guardian for an alleged incompetent on evidence presenting a very close case, the respondent assigned away his sole means of sup-

⁶⁸ G. S. 1913, § 7433.

⁶⁴ *Knox v. Haug*, 48 Minn. 58, 61, 50 N. W. 934.

⁶⁵ *Wilkowske v. Lynch*, 124 Minn. 492, 145 N. W. 378.

⁶⁶ *Raher v. Raher*, 150 Iowa 511, 129 N. W. 494.

⁶⁷ *In re Miller's Estate*, 173 Mich. 467, 139 N. W. 17.

⁶⁸ *Knox v. Haug*, 48 Minn. 58, 50 N. W. 934; *State v. Probate Court*, 83 Minn. 58, 85 N. W. 917.

⁶⁹ *Lang v. Lang*, 157 Iowa 300, 135 N. W. 604.

⁷⁰ *Schmidt v. Zeugner*, 90 Minn. 366, 96 N. W. 1134; *Swick v. Sheridan*, 107 Minn. 130, 119 N. W. 791; *Wilkowske v. Lynch*, 124 Minn. 492, 145 N. W. 378; *Prokosch v. Brust*, 128 Minn. 324, 151 N. W. 130. See *Merchants Trust & Savings Bank v. Schudel*, 141 Minn. 250, 169 N. W. 795.

⁷¹ *Doyle v. Doyle*, 74 Minn. 162, 77 N. W. 26; *Hanson v. Kalstarud*, 114 Minn. 489, 131 N. W. 477; *Wood v. Wood*, 137 Minn. 252, 163 N. W. 297; *Sterling v. Miller*, 138 Minn. 192, 164 N. W. 812; *Hallenberg v. Hallenberg*, 144 Minn. 39, 174 N. W. 443.

port for very unsatisfactory reasons. Held, that an order denying a new trial should be reversed.⁷²

1353. Who may be appointed guardians—Trust companies—The court has a large discretion in selecting the person to be appointed a guardian. It is not bound to appoint a person suggested by the incompetent.⁷³ It is expressly provided by statute that domestic trust companies may be appointed guardians of the estates of insane persons and the statute has been held valid.⁷⁴ National banks may be appointed guardians of the estates of insane persons when authorized by the Federal Reserve Board.⁷⁵

1354. Notice of hearing on petition—Statute—Upon the presentation of such petition the court shall make an order fixing a time and place for hearing the same, and cause personal service thereof to be made upon the person for whom a guardian is sought at least fourteen days prior to the date of such hearing. If such person is an inmate of a state hospital for the insane, a like notice shall be served upon the superintendent of such hospital. Provided, that when such insane or incompetent person or such spendthrift is a resident of this state but cannot be found therein and his whereabouts are unknown and have been unknown for more than one year prior to the presentation of such petition or when such person has been adjudged insane or incompetent by any court of any state and he has property within this state, which said facts shall be alleged in such petition, and in case of adjudication of insanity or incompetency in another state proof thereof shall be presented with said petition, the probate court may order that service of such order upon such person be made by publication in the same manner as other orders and citations of the probate court. The return of the sheriff of the county in which such property or some part thereof is situate to the probate court of said county on such order that such person cannot be found therein and that to the best of his knowledge such person has disappeared from the state and that his whereabouts are unknown, and have been unknown for more than one year, shall be evidence of such facts. Provided further, that in case said insane or incompetent person cannot be found within the state, said petition may only be filed in the county of his residence, and shall state the names of all his known next of kin, and in addition to such service by publication, personal service of said order shall be made on such of his next of kin as reside in this state, and notice thereof shall be given the non-resident next of kin in the manner which the probate court may order.⁷⁶ In some

⁷² Wood v. Wood, 140 Minn. 130, 167 N. W. 358.

⁷³ Wilkowske v. Lynch, 124 Minn. 492, 145 N. W. 378; 16 A. & E. Ency. of Law (2 ed.) 575; 22 Cyc. 1139.

⁷⁴ G. S. 1913, § 6410; Minnesota Loan

& Trust Co. v. Beebe, 40 Minn. 7, 41 N. W. 232.

⁷⁵ First Nat. Bank v. Union Trust Co., 244 U. S. 416.

⁷⁶ G. S. 1913, § 7434. For validating act where guardian is appointed with-

states a personal service on the alleged incompetent is jurisdictional. It has been held that a statutory provision for personal service on a resident incompetent out of the state is unconstitutional.⁷⁶

1355. Hearing on petition—Appointment of guardian—Statute—At the time fixed the court shall consider all competent evidence offered for and against the petition, and if it appears that a guardian should be appointed the court shall appoint not exceeding two persons as guardian or guardians of his person and estate.⁷⁷ The proceeding is not substantially different from that under the common-law writ *de lunatico inquirendo*, except that the hearing is before the court, instead of before commissioners with a jury.⁷⁸ In the determination of the question whether the appointment of a guardian of an alleged incompetent person is proper, the court is not controlled by the ordinary forms of procedure regulating the trial of actions at law. It is a special proceeding authorized by statute in response to the duty of the state to protect those who are incapable of fully protecting themselves. It is not adversary in nature, but rather one by the state in its character of *parens patriae*, and the manner and method of determining the facts, when jurisdiction has once vested in the court as required by law, rests in its sound judgment and discretion, controlled by the general rules of judicial procedure. The statutes providing for cross-examination of an adverse party in ordinary civil action is not applicable, but the court may examine the alleged incompetent, on oath or otherwise, for the purpose of testing his mental condition. Indeed, such an examination is ordinarily the best means of ascertaining such condition, especially where it is claimed that there is incompetency not amounting to insanity.⁷⁹ The proceeding not being adversary the alleged incompetent cannot be called for cross-examination as an adverse party under G. S. 1913, § 8377.⁸⁰ Persons not experts may give their opinion of the sanity of the alleged incompetent after testifying to the facts upon which their opinion is based.⁸¹ The court must base its decision wholly on the evidence submitted and not on its own personal knowledge of the condition of the alleged incompetent. It cannot disregard the testimony of experts simply because it is contrary to its personal knowledge of the condition of the alleged incompetent.⁸² The judgment or order finding the person

out personal notice for a resident incompetent who cannot be found, see G. S. 1913, § 7439; *Raher v. Raher*, 150 Iowa 511, 129 N. W. 494.

⁷⁶ *Raher v. Raher*, 150 Iowa 511, 129 N. W. 494.

⁷⁷ G. S. 1913, § 7435.

⁷⁸ *Knox v. Haug*, 48 Minn. 58, 50 N. W. 934; *McAllister v. Rowland*, 124 Minn. 27, 31, 144 N. W. 412.

⁷⁹ *Prokosch v. Brust*, 128 Minn. 324, 151 N. W. 130; *Wood v. Wood*, 137 Minn. 252, 163 N. W. 297.

⁸⁰ *Wood v. Wood*, 137 Minn. 252, 163 N. W. 297.

⁸¹ *Smith v. Sheridan*, 107 Minn. 130, 119 N. W. 791. See §§ 164, 165; *Dunnell*, Minn. Digest and Supplements, § 3316.

⁸² *State v. Probate Court*, 83 Minn. 58, 85 N. W. 917.

incompetent and appointing a guardian is admissible, but not conclusive, in any litigation, to prove the mental condition of the person at the time the judgment or order is made, or at any past time during which it finds him incompetent.⁸³ Such a judgment or order is not admissible against strangers to prove the form of the insanity of the ward, its transmissible character, or any evidentiary fact upon which the ultimate adjudicated fact of insanity is based.⁸⁴

1356. Filing petition in office of register of deeds—Subsequent contracts of ward void—Statute—As soon as the required notice shall have been given to the person for whom a guardian is asked, the petitioner or any person interested may cause a copy of the petition, and of the notice and proof of service thereof, to be filed for record with the register of deeds in any county in which real estate owned by the person proposed to be put under guardianship is situated; and, if a guardian be appointed on such petition, all contracts except for necessities, and all gifts, sales, and transfers of real or personal property, made by the ward after such filing before the termination of the guardianship, shall be void.⁸⁵ This statute has no application to proceedings for the commitment of an insane person to the state insane hospital.⁸⁶

1357. Special guardian for insane persons—Statute—The judge before whom any person examined on a petition for inquiry as to sanity is found to be insane, shall make special inquiry as to his property, and, when he has property within the jurisdiction of the court needing care and attention, shall appoint a special guardian of such property until he is discharged from the hospital for the insane, or a guardian is duly appointed by petition and qualified as required by law. Such guardian, in the performance of his duties, shall be governed by the general laws relating to guardians.⁸⁷

1358. Letters—Collateral attack—Letters of guardianship are not subject to collateral attack for error or irregularity or for jurisdictional defects not appearing on the face of the record. On collateral attack they are conclusive evidence of the insanity or incompetence of the ward and of the regularity of the proceedings resulting in their issuance.⁸⁸ An order appointing guardians of the person and estate of an incompetent held sufficient in form.⁸⁹

⁸³ *McAllister v. Rowland*, 124 Minn. 27, 144 N. W. 412.

⁸⁴ *Boston Safe Deposit & Trust Co. v. Bacon* (Mass.) 118 N. E. 906.

⁸⁵ *G. S. 1913*, § 7436; *Knox v. Haug*, 48 Minn. 58, 50 N. W. 934; *Thorpe v. Hanscom*, 64 Minn. 201, 66 N. W. 1. See § 1364.

⁸⁶ *Knox v. Haug*, 48 Minn. 58, 50 N. W. 934.

⁸⁷ *G. S. 1913*, § 7437.

⁸⁸ *Minnesota Loan & Trust Co. v. Beebe*, 40 Minn. 7, 41 N. W. 232; *State v. Lawrence*, 86 Minn. 310, 90 N. W. 769.

⁸⁹ *State v. Lawrence*, 86 Minn. 310, 90 N. W. 769.

1359. Bond—The guardian of an incompetent must give a bond for the faithful discharge of his trust.⁹⁰ In an action on the bond it is not necessary to prove the insanity or incompetency of the ward or the regularity of the appointment of the guardian.⁹¹

1360. Guardian a trustee—Fiduciary relation—A guardian of an incompetent person is a trustee in the sense that he occupies a fiduciary relation toward his ward.⁹² A guardian of an insane person cannot secure an inequitable advantage against his ward, or have the aid of a court to enforce a contract detrimental to the ward. If it appears that such a contract has been made between the guardian and a third party concerning the interest of the ward a court should decline to enforce it, whether there has been actual fraud or not.⁹³

1361. Nature of guardian's interest in ward's property—A guardian of an incompetent person has no legal title or personal interest in either the real or personal property of the ward. He has the right to its possession, but merely as the officer of the court appointing him. The property is in the custody of the law.⁹⁴

1362. Guardian's control of ward—Change of domicile—A guardian of an incompetent person is his custodian and may control him in any reasonable manner.⁹⁵ A guardian of an incompetent person has the right to remove him from one state to another, temporarily or permanently, subject to the power of a court of equity to restrain an improper removal. Such a removal must be made in good faith and for the benefit of the ward rather than for the mere convenience of the guardian. There must be strong reasons to justify taking a ward out of the jurisdiction of the court appointing the guardian.⁹⁶

1363. Contracts of guardian—As a general rule a guardian has no authority to bind the estate of his ward by contract, but a guardian of an insane person, clothed with the management and control of the ward's property and affairs, is authorized, without first obtaining the approval of the probate court, to employ an attendant for an invalid wife of the ward. When such employment is necessary and in good faith, the reasonable value of the services rendered thereunder is a valid claim against the estate of the ward. If the ward dies before payment the claim may be presented for allowance in the proceedings for the administration of his estate.⁹⁷ The contracts of a guardian in behalf of his

⁹⁰ See § 1277.

⁹¹ *Minnesota Loan & Trust Co. v. Beebe*, 40 Minn. 7, 41 N. W. 232.

⁹² *Wester v. Flygare*, 95 Minn. 214, 103 N. W. 1020. See § 1281.

⁹³ *Wester v. Flygare*, 95 Minn. 214, 103 N. W. 1020.

⁹⁴ *Pflaum v. Barr*, 86 Minn. 395, 398, 90 N. W. 1051. See § 1296.

⁹⁵ *State v. Lawrence*, 86 Minn. 310, 90 N. W. 769.

⁹⁶ *State v. Lawrence*, 86 Minn. 310, 90 N. W. 769.

⁹⁷ *Matthews v. Mires*, 135 Minn. 94, 160 N. W. 187.

ward are his personal contracts and a judgment against him therefor should be against him personally and not against the ward's estate.⁹⁸

1364. Contracts of ward void—While a person is under guardianship for insanity his deeds and other contracts, except for necessities, are absolutely void and not merely voidable, if made after record notice of the guardianship provided by G. S. 1913, § 7436.⁹⁹ The deed of an insane person not under guardianship is voidable only, but while he is under actual and subsisting guardianship he is conclusively presumed to be incompetent to make a valid deed concerning his estate, though he is in fact sane at the time he attempts to do so. If, however, at the time he made the deed, he was in fact of sound mind, and the contract fair, and the guardianship had been practically abandoned, the deed is valid, though the guardian had not been formally discharged by the court.¹

1365. Compromise of claims of ward—Under the present statute a guardian of an incompetent cannot compromise a claim of his ward without leave from the probate court.² An improvident and fraudulent settlement by a guardian of his ward's cause of action, though approved by the court in which the action is pending, may be vacated and set aside upon a showing of the facts, though it is not affirmatively shown that the defendant in the action participated in the fraud.³

1366. Admissions of ward—While a person is under guardianship for incompetency he cannot make any admissions that will bind his estate.⁴

1367. Appearance of ward by guardian—It is provided by statute that the guardian shall appear for and represent his ward in all legal proceedings, unless another person is appointed for that purpose.⁵

1368. Actions by ward—An action by an insane person may be brought in his name, appearing by a next friend or guardian ad litem appointed by the district court, or by a general guardian appointed by the probate court.⁶ Where an action is brought by an insane person, appearing by a guardian ad litem or next friend, the court has discretionary power to allow the action to proceed or not, and it may stay proceedings to await the due appointment of a general guardian, or it may dismiss the action.⁷

⁹⁸ *Sturgis v. Sturgis*, 51 Or. 10, 93 Pac. 696.

⁹⁹ *Schaps v. Lehner*, 54 Minn. 208, 212, 55 N. W. 911; *Thorpe v. Hanscom*, 64 Minn. 201, 66 N. W. 1. See § 1356.

¹ *Thorpe v. Hanscom*, 64 Minn. 201, 66 N. W. 1.

² See § 1307.

³ *Dasich v. La Rue Mining Co.*, 126 Minn. 194, 148 N. W. 45.

⁴ *Johanson v. Hoff*, 67 Minn. 148, 69 N. W. 705.

⁵ See § 1307.

⁶ *Plymton v. Hall*, 55 Minn. 22, 56 N. W. 351; *Patterson v. Melchior*, 102 Minn. 363, 113 N. W. 902. See § 1307.

⁷ *Plymton v. Hall*, 55 Minn. 22, 56 N. W. 351.

1369. Actions against ward—Judgment—Execution—An action will lie in the district court on all claims against an insane or incompetent ward as though no guardianship existed. There is now no provision for presenting such claims to the probate court for allowance. The action should be against the ward and not against the guardian.⁸ In such an action the guardian should appear for the ward.⁹ If judgment is recovered against an insane or incompetent ward it is the duty of his guardian to pay it without any order of court, if he has funds. If the personality of the ward is insufficient his realty may be sold under a license of the probate court. Execution may probably issue on a judgment against a ward.¹⁰

1370. Aid for children of insane ward—Statute—The duly appointed guardian of the property of any insane person who shall be pronounced incurably insane by the certificate of the superintendent of any state hospital for the insane of this state where such insane person shall be confined, shall have the power and authority to furnish aid for the support and maintenance of any female child of such insane person, who is over the age of eighteen years, or of any sick, maimed, deformed, or crippled male child of such insane person who is over the age of twenty-one years and unable to support himself in whole or in part, which aid shall be furnished in the manner and to the extent hereinafter provided. The amount of such aid shall in no case exceed the annual rents, profits, or income derived from the property of such insane person.¹¹

1371. Same—Petition—Notice—Statute—Before any such aid shall be furnished, the guardian of the property of such insane person, or any child of such insane person, shall make and file with the probate court having jurisdiction, a petition in writing, duly verified, setting forth all the facts entitling such child to such aid. Thereupon the judge of probate shall make an order fixing the time and place of the hearing on said petition, a copy of which order, with a copy of the petition, shall be personally served upon such guardian and the superintendent of the insane hospital where such insane person is confined, at least ten days prior to the time fixed for said hearing. Provided, that any case of guardianship now pending before any probate court where a guardian resides in a different county, all acts and transactions therein conducted under the direction of the court are hereby declared legal, valid and effectual for all purposes.¹²

1372. Same—Hearing on petition—Order—Allowance—Statute—At the time and place fixed for the hearing, witnesses shall be sworn before testifying, and the certificate of such superintendent shall be admissible

⁸ *Clark v. Buck* (Minn.) 188 N. W. 326.

⁹ See § 1307.

¹⁰ See §§ 1310, 1322.

¹¹ G. S. 1913, § 7449.

¹² G. S. 1913, § 7450, as amended by Laws 1919, c. 312.

in evidence on his signature alone; and if, after full investigation and hearing, the judge of probate shall find that such child is entitled to the aid herein provided, and that the allegations of the petition are true, he may make an order directing such guardian to furnish aid to such child for such time, and in such an amount, as the judge of probate shall deem necessary. The aid so furnished shall be allowed in the guardian's annual or final accounts as a part of his lawful disbursements.¹³

1373. Appointment of guardian for non-resident incompetent—Notice—In proceedings for the appointment of a guardian for a non-resident incompetent who has property in this state, the administrator, as such, of the estate embracing such property, is not a party in interest entitled to notice of such appointment. The fact that the probate court orders such administrator to be served with notice of such hearing is not an adjudication of the question of his interest; and if, at the hearing, he is prevented by the court from taking part therein he has no remedy by appeal.¹⁴

1374. Restoration of ward to capacity—Statute—Any person who has been so declared insane or incompetent, or his guardian, relative, or friend, may petition the probate court in which he was declared insane or incompetent to have his right to be restored to capacity judicially determined. Upon filing such petition the court shall fix a day for hearing, and cause personal notice thereof to be given to the guardian, if there be one in the state. Such guardian, relative, or friend, or any other person permitted by the court, may contest the right to the relief demanded. Witnesses may be called and examined at the request of any party interested or by the court on its own motion. If it be found that such person is of sound mind and capable of taking care of himself and his property, the court shall adjudge him restored to capacity; and unless it be a minor, the guardianship shall thereupon cease.¹⁵ The statute applies only to persons under guardianship. It does not apply to one committed to a state hospital for the insane.¹⁶ An order of the probate court granting or refusing an application under the statute, after a hearing on the merits, is a final adjudication of the application, and to all intents and purposes a judgment.¹⁷ The probate court must decide the question of the mental capacity of the ward wholly from the evidence and not from its own personal knowledge. It has no right to reject the testimony of witnesses upon its personal knowledge of the condition of the ward.¹⁸ Evidence held to justify a restoration of an

¹³ G. S. 1913, § 7451, as amended by Laws 1915, c. 245.

¹⁴ *Edgerly v. Alexander*, 82 Minn. 96, 84 N. W. 653.

¹⁵ G. S. 1913, § 7438.

¹⁶ *Northfoss v. Welch*, 116 Minn. 62,

68, 133 N. W. 82; *Aldrich v. Superior Court*, 120 Cal. 140, 52 Pac. 148.

¹⁷ *State v. Probate Court*, 83 Minn. 58, 85 N. W. 917.

¹⁸ *State v. Probate Court*, 83 Minn.

58, 85 N. W. 917.

incompetent to capacity.¹⁹ An order of the probate court denying an application for restoration to capacity held not justified by the evidence.²⁰ The probate court may order fees of witnesses and counsel incurred upon a hearing under the statute to be paid out of the estate of the incompetent, whether his application is granted or denied.²¹ Prior to Laws 1901, c. 147, the final order was not appealable, but only reviewable by certiorari.²² An order or judgment restoring an incompetent to capacity is conclusive as to his condition or status.²³ It terminates ipso facto the authority of the guardian.²⁴

1375. Removal of guardian—An order upon a petition of a person under guardianship for restoration to capacity, held not an order removing a guardian within the statute relating to appeals, though it results in the removal of a guardian.²⁵ In habeas corpus proceedings a court commissioner has no authority to make an order which practically removes a guardian of the person and property of an incompetent.²⁶

¹⁹ *Hallenberg v. Hallenberg*, 144 Minn. 39, 174 N. W. 443.

²⁰ *State v. Probate Court*, 83 Minn. 58, 85 N. W. 917.

²¹ *Kelly v. Kelly*, 72 Minn. 19, 74 N. W. 899.

²² *State v. Probate Court*, 83 Minn. 58, 85 N. W. 917.

²³ *Aldrich v. Barton*, 153 Cal. 488, 95 Pac. 900.

²⁴ *In re Scheuer's Estate*, 31 Mont. 606, 79 Pac. 244.

²⁵ *State v. Probate Court*, 83 Minn. 58, 85 N. W. 917.

²⁶ *State v. Lawrence*, 86 Minn. 310, 90 N. W. 769.

**COMMITMENT OF INSANE, FEEBLE-
MINDED AND INEBRIATE
PERSONS**

1376. Definitions—Statute—The word “defective” as used in this act shall include the feeble-minded, the inebriate and the insane. The term “feeble-minded persons” in this act means any person, minor or adult, other than an insane person, who is so mentally defective as to be incapable of managing himself and his affairs, and to require supervision, control and care for his own or the public welfare. The term “inebriate” as used in this act means any person incapable of managing himself or his affairs by reason of the habitual and excessive use of intoxicating liquors, drugs or other narcotics. The term “insane” as used in this act means any person of unsound mind other than one who may be properly described as only an inebriate or feeble-minded person.²⁷

1377. Voluntary admission to state institution—Statute—Any person who is defective and who desires to receive treatment at a state institution may voluntarily make application to the state board of control for admission thereto, in such form and manner as may be prescribed by the board, and the board may thereupon grant to such applicant admission to the appropriate state institution.²⁸

1378. Same—Detention and examination of voluntary patients—Statute—The superintendent of any state institution for defectives is authorized and empowered to detain any person admitted upon his own application as though he had been committed in the manner hereinafter provided, unless otherwise discharged by order of court. If any such person demands his release from such institution, the superintendent thereof shall, if he deems such release unsafe, within three days thereafter file a verified petition with the judge of probate of the county in which the institution is located, praying for the commitment of such defective as hereinafter provided.²⁹

1379. Petition for examination of defective—Warrant—Statute—When any person residing in this state shall be supposed to be defective any relative, guardian or reputable citizen of the county in which such supposed defective person resides or is found may file a verified petition in the probate court of the county, setting forth the name and residence of the supposed defective person and the facts necessary to bring such person within the purview of this act. Whereupon the probate judge shall, after investigation, if the petition be sufficient, direct that the alleged defective person be brought before him, and when necessary the court may issue a warrant directed to the sheriff or any constable of the county, or to any person named therein, requiring him to bring such defective person before the court for examination.³⁰ A warrant cannot be issued for a person who is not actually in the county, whether a legal resident of the county or not.³¹ The court may dispense with the issu-

²⁷ Laws 1917, c. 344 § 1.

²⁸ Laws 1917, c. 344 § 2.

²⁹ Laws 1917, c. 344 § 3.

³⁰ Laws 1917, c. 344 § 4.

³¹ *State v. Hense*, 135 Minn. 99, 160 N. W. 198.

ance of a warrant if the presence of the alleged insane person may be secured without it.³² Under the constitutional requirement of due process of law a person cannot be adjudged insane and committed to a hospital for the insane without notice and an opportunity to be heard.³³

1380. Appearance of county attorney—Statute—Whenever a judge of probate orders an examination he shall notify the county attorney of the time and place of said examination, who shall appear on behalf of the person to be examined and take such action as may be necessary to protect his rights. The court may, and on request of the county attorney, shall issue subpoenas for witnesses.³⁴

1381. Board of examiners—Composition—Notice to board of control—Statute—When such person is produced in court the probate judge shall designate two licensed physicians resident in the state who, with the probate judge, shall constitute a board to examine such person and determine as to his defectiveness. Where the proceeding is for the adjudication of feeble-mindedness the probate judge shall notify the state board of control of the filing of the petition and that a hearing will be had thereon not less than ten days thereafter, whereupon the board may, at its discretion, designate some person skilled in mental diagnosis to attend the hearing, examine the alleged defective and advise the board of examiners. Provided that if the alleged defective person is obviously feeble-minded or an inebriate the probate judge may dispense with the appointment of any board of examiners, with the consent of the county attorney, and may himself hear and determine the matter.³⁵ The appointment of three persons instead of two to act with the judge of probate as a board of examiners has been held not to render the proceedings void and subject to collateral attack.³⁶

1382. Hearing—Witnesses—Determination of sanity or insanity—Report—Statute—The board of examiners shall hear all proper testimony offered by any person interested and the court may cause witnesses to be subpoenaed. When the examination is completed, the board shall determine whether or not the person examined is a feeble-minded person, an inebriate or an insane person and shall file in the court a report of their proceedings, including the findings, upon such forms as the state board of control may authorize and adopt.³⁷ The statutory authority of the probate court to commit insane persons to a state hospital for the insane is within the constitutional grant of jurisdiction over the subject of

³² *State v. Kilbourne*, 68 Minn. 320, 71 N. W. 396.

³³ *State v. Billings*, 55 Minn. 467, 57 N. W. 206, 794; *State v. Kilbourne*, 68 Minn. 320, 71 N. W. 396; *In re Wellman*, 3 Kan. App. 100, 45 Pac. 726; *In*

re Lambert, 134 Cal. 626, 633, 66 Pac. 851; 43 Am. St. Rep. 531.

³⁴ Laws 1917, c. 344 § 5.

³⁵ Laws 1917, c. 344 § 6.

³⁶ *State v. Kilbourne*, 68 Minn. 320, 71 N. W. 396.

³⁷ Laws 1917, c. 344 § 7.

guardianship.³⁸ The proceeding is substantially one for the appointment of a guardian. Its object is to determine whether the person is in such a mental condition that he ought to be committed to a hospital for the insane, the superintendent of which is in a sense a common guardian for insane persons. The degree of the insanity is involved only so far as it shows the need of care in a hospital. The capacity of the person to make contracts or manage his property is not involved.³⁹ The proceeding is materially different from the common-law proceeding under the writ *de lunatico inquirendo*.⁴⁰ A person cannot be ordered to appear before the court for examination under this section unless he is actually within the county, whether a legal resident of the county or not.⁴¹ The alleged insane person may be questioned for the purpose of showing his mental condition.⁴² It is the duty of the judge to inquire into the property of the person examined and in case he is committed to report concerning it to the state board of control.⁴³ An order or judgment finding a person insane and committing him to a state hospital for the insane is admissible in collateral proceedings to prove his insanity, but it is not conclusive evidence.⁴⁴ It does not determine the degree of his insanity or that he is generally insane. It does not establish conclusively his insanity except as to his fitness for committal to a state hospital.⁴⁵ It is not admissible to prove the incompetency of a person to contract or manage his own business.⁴⁶ It does not establish conclusively that the person is so far insane as not to be responsible for his criminal acts.⁴⁷

1383. Commitment of feeble-minded person—Discharge—Statute—If the person examined is found to be feeble minded, the court shall order him committed to the care and custody of the state board of control, as guardian of his person. Thereafter the board shall have power whenever advisable to place him in an appropriate institution. If, at any time, after study and observation in such institution, the superintendent is of the opinion that a person so committed is not defective, or that his further residence therein is not required for his own or the public welfare, he shall so report to the state board of control and the board may thereupon discharge such person from its further care and custody.

³⁸ *State v. Wilcox*, 24 Minn. 143.

³⁹ *State v. Wilcox*, 24 Minn. 143, 148; *Knox v. Haug*, 48 Minn. 58, 50 N. W. 934.

⁴⁰ *Knox v. Haug*, 48 Minn. 58, 50 N. W. 934.

⁴¹ *State v. Hense*, 135 Minn. 99, 160 N. W. 198.

⁴² See *Prokosch v. Brust*, 128 Minn. 324, 151 N. W. 130.

⁴³ *Laws 1917*, c. 242 § 3.

⁴⁴ *Woodville v. Morrill*, 130 Minn. 92,

153 N. W. 131; 16 A. & E. Ency. of Law (2 ed.) 606; 22 Cyc. 1133. See § 164.

⁴⁵ *Knox v. Haug*, 48 Minn. 58, 50 N. W. 934; *Schaps v. Lehner*, 54 Minn. 208, 211, 55 N. W. 911; *Longbotham v. Longbotham*, 119 Minn. 139, 137 N. W. 387; *Woodville v. Morrill*, 130 Minn. 92, 153 N. W. 131.

⁴⁶ *Knox v. Haug*, 48 Minn. 58, 50 N. W. 934; *Schaps v. Lehner*, 54 Minn. 208, 211, 55 N. W. 911.

⁴⁷ *Ex parte Wright*, 74 Kan. 406, 89 Pac. 678.

Provided, that any parent, guardian, relative or friend of a person committed, as aforesaid, to the care and custody of the state board of control, may at any time file a petition for a hearing in the probate court of the county in which such person resided or was found when first committed to the care and custody of said board, to establish that further guardianship of the board is not required for the welfare of such person or the public; and upon payment of the necessary traveling expenses, by said petitioner from the place or institution to which said person is committed to the place of hearing, and giving security for the payment of necessary expenses for a return to such institution, if a return shall be ordered, the said probate court shall by order, require the attendance of such person upon said hearing. Upon filing with the said board of control, a certified copy of said order, it shall be the duty of said board to authorize and direct the attendance of such person at such hearing in compliance with the terms of said order. Notice of such hearing and proceedings thereupon shall be such as are prescribed in this chapter. If, upon said hearing, the contention of the petitioner is sustained, the probate court shall order the immediate discharge of such person and file a copy of such order with the state board of control and such person shall thereupon be discharged accordingly. If such contention is not sustained, such person shall be remanded to the care and custody of said board; provided, however, that the probate court may, in lieu of such immediate discharge or remand, permit such person to remain in the custody of a relative or friend who shall give security, to be approved by the court, for the safe care and custody of such person for his appearance in court whenever required, until discharged or remanded as herein provided.⁴⁸

1384. Commitment of inebriate or insane person—Warrants—Statute—If the person examined is found to be an inebriate or insane the judge shall issue duplicate warrants committing him to the custody of the superintendent of the proper state hospital or to the superintendent or keeper of any private licensed institution for the care of inebriates or insane persons.⁴⁹ A judgment or order of commitment is not subject to collateral attack for error or irregularity, or for want of jurisdiction not affirmatively appearing on the face of the record. The fact that it does not appear on the face of the record that a warrant was issued for the arrest of the alleged insane person, or that he was personally present at the hearing, is not sufficient to impeach a judgment or show want of jurisdiction.⁵⁰ Where a warrant of commitment showed on its face that the person committed was found insane and ordered committed by the probate judge on the certificate and recommendation of "two examiners in lunacy," instead of a finding of insanity by the jury after due

⁴⁸ Laws 1917, c. 344 § 8, as amended
by Laws 1919, c. 77.

⁴⁹ Laws 1917, c. 344 § 9.

⁵⁰ *State v. Kilbourne*, 68 Minn. 320,
71 N. W. 396. See *State v. Billings*, 55
Minn. 467, 57 N. W. 206, 794.

examination, as required by statute, it was held that the warrant was void on its face, and the person committed properly discharged from custody on habeas corpus.⁵¹

1385. Same—Executing warrant—Delivery of patient—Statute—A copy of such warrant shall be delivered to the sheriff of the county who together with such attendants as shall be designated by the judge of probate, shall deliver the warrant and the patient to the superintendent of the institution designated in such warrant.⁵²

1386. Temporary detention of patients—County to pay expenses—Statute—The probate judge, with the approval of the county board, may provide a place of temporary detention for defectives and make the necessary contracts therefor. Provided that this shall not authorize the construction of a hospital for that purpose. All expense necessarily incurred for such temporary detention of defectives shall be paid by the county.⁵³

1387. Commitment of patients to care of relatives or friends—Bond—Statute—Upon request of the relatives or friends of any person alleged or found to be insane, or inebriate, they may be permitted to take charge of such person; but in such case the probate judge, or, if such person has been committed to the hospital, the superintendent thereof, may require a bond from such relatives or friends, running to the state, to be approved by the judge or superintendent, as the case may be, conditioned upon the care and safe keeping of such person; provided that no person charged with or convicted of a crime shall be so discharged.⁵⁴

1388. Certificate of discharge or transfer—Mailing to judge of probate—Statute—Whenever any defective committed to a hospital under this act shall be discharged, or transferred to another institution, the superintendent, upon the day of such discharge or transfer, shall mail to the probate judge of the county from which such person was committed, a certificate stating the fact of such discharge or transfer and the date thereof and the date of commitment, which certificate shall be filed in said court.⁵⁵

1389. Fees—How audited and paid—Statute—The judge of probate shall allow and order paid the following fees for services provided for in this act: to each witness the sum of one dollar per day and actual disbursement for travel and board. To each examiner the sum of five dollars, and fifteen cents per mile for every mile traveled. To the person to whom the warrant of arrest is issued the sum of three dollars per day and actual disbursements and necessary board and lodging of himself and alleged defective while making the arrest. To the person, other than a nurse or hospital attendant, authorized to convey the de-

⁵¹ State v. Billings, 55 Minn. 467, 57 N. W. 206, 794.

⁵² Laws 1917, c. 344 § 10.

⁵³ Laws 1917, c. 344 § 11.

⁵⁴ Laws 1917, c. 344 § 12.

⁵⁵ Laws 1917, c. 344 § 13.

fective to the place of commitment the sum of three dollars per day and all necessary disbursements for travel and for the support of himself, the alleged defective and authorized assistants. Such amounts shall be audited by the judge of probate and judgment entered of record therefor and shall be paid by the county treasurer upon the written order of the judge of probate and filed with the county auditor who shall issue his warrant on the county treasurer in payment of said sums, and upon payment thereof said judgment shall be satisfied of record by the judge of probate. The examiner designated by the board of control shall be paid by the state.⁵⁶

1390. Procedure when defective is found to reside in another county—Statute—Whenever the alleged defective is found to have his legal residence in some other county he may nevertheless be examined and if found to be defective committed in like manner as persons residing in the county. The necessary costs and expenses of such examination and commitment shall be certified by such court to the auditor of the county in which the examination is held, who shall certify the same to the county auditor where the said alleged defective is found to be a legal resident and shall be paid as other claims against such county.⁵⁷ A probate court has jurisdiction to examine and commit to the proper hospital any insane person within its county regardless of where his legal residence may be, but it has no jurisdiction to examine and commit a person not actually within its county, whether a legal resident of the county or not.⁵⁸

1391. Same—Procedure where residence is contested—Appeal—Statute—Whenever the auditor of the county to which costs and expenses have been certified denies that such person has a legal residence in his county, he shall send such certificate with a statement of his claim in reference thereto to the state board of control who shall immediately investigate and determine the question of residence and certify its findings to the auditor of each of said counties. Such decision shall be final unless an appeal is taken therefrom within thirty days after its filing. Such appeal may be to the district court of the county from which such person was committed.⁵⁹

1392. Court commissioner may act when probate judge unable—Statute—Whenever the judge of probate is unable to act upon any petition concerning an alleged defective the court commissioner shall perform all his duties in such case and the authority herein granted to the judge of probate shall be exercised by said court commissioner.⁶⁰

⁵⁶ Laws 1917, c. 344 § 14. See *State v. Wilcox*, 24 Minn. 143.

⁵⁷ Laws 1917, c. 344 § 15.

⁵⁸ *State v. Hense*, 135 Minn. 99, 100 N. W. 198.

⁵⁹ Laws 1917, c. 344 § 16.

⁶⁰ Laws 1917, c. 344 § 17.

1393. Board of control to prepare blank forms—Statute—For the purpose of securing uniformity in the practice of examination and commitment of defectives, the state board of control is hereby authorized and empowered to prescribe forms of blanks which shall be used.⁶¹

1394. Penalty for false petition or report—Statute—Whoever for a corrupt consideration or advantage, or through malice shall make or join in or advise the making of any false petition or report aforesaid, or shall knowingly or wilfully make any false representation for the purpose of causing such petition or report to be made shall be deemed guilty of a felony and punished by imprisonment in the state prison for not more than one year or by a fine of not more than five hundred dollars.⁶²

⁶¹ Laws 1917, c. 344 § 18.

⁶² Laws 1917, c. 344 § 19.

**DEPENDENT, NEGLECTED AND
DELINQUENT CHILDREN**

1395. Commitment and care—The probate courts, except in a few of the larger counties, are invested with jurisdiction over the care and commitment of dependent, neglected and delinquent children. For this purpose they act as juvenile courts.⁶⁸

⁶⁸ Laws 1917, c. 397; Laws 1917, c. 223; Laws 1919, c. 828. . .

FORMS

NOTE

The probate practice forms and record books in use in this state vary somewhat in the several counties. The practitioner should follow the forms customarily used in the court in which the proceedings are had, in order to avoid question as to their sufficiency and to facilitate their entry in the record books. The following forms are designed for use only where there is no settled practice in the county where the proceedings are had. In the forms for bonds, deeds, mortgages and leases, seals are omitted, as authorized by G. S. 1913, § 5704. The official forms prepared by the Attorney General for inheritance tax proceedings, and by the Board of Control for proceedings for the commitment of insane, feeble-minded and inebriate persons, are omitted. An index to the forms will be found in the general index under the title "Forms."

1396. General title of proceedings in estates of decedents.

State of Minnesota	Probate Court
County of	
In re Estate of	[Petition] for [appointment of
.....	administrator].
Deceased.	

1397. General title of proceedings in guardianship.

State of Minnesota	Probate Court
County of	
In re Guardianship of	[Petition] for [appointment of
.....	guardian].
[A Minor.] [An Insane Person.]	

1398. General form of order for hearing petition and for personal notice.

[Title as in §§ 1396, 1397.]

The petition of , [representative of the above named decedent], praying [state substance of prayer], having been filed herein on 19 ,

It is ordered that the same be heard before the Court at its court room in the Court-House in the city of , county, state of

Minnesota, on 19 , at o'clock in the forenoon, and that notice thereof be given by serving a copy of this order upon , [personally] [in the manner of the service of a summons in a civil action], at least days prior to said day of hearing.

Dated 19 .

.....

Judge.

1399. General form of order for hearing and for published notice.

[Title as in §§ 1396, 1397.]

The petition of , [representative of the above named decedent], praying [state substance of prayer], having been filed herein on 19 ,

It is ordered that the same be heard before the Court at its court room in the Court-House, in the city of , county, state of Minnesota, on 19 , at o'clock in the forenoon, and that notice thereof be given by publishing this order in the , a [daily] [weekly] newspaper published in said county, once each week for three successive weeks, the last publication to be at least days prior to said day of hearing [and by mailing a copy of this order at least days prior to said day of hearing, postage prepaid, to each of the heirs, devisees and legatees of said decedent whose names and addresses appear from the files herein or are otherwise known].

Dated 19 .

.....

Judge.

1400. General form of order for hearing petition and for published notice by citation.

[Title as in §§ 1396, 1397.]

The petition of , [representative of the above named decedent], praying [state substance of prayer], having been filed herein on 19 ,

It is ordered that the same be heard before the Court at its court room in the Court-House in the city of , county, state of Minnesota, on 19 , at o'clock in the forenoon, and that notice thereof be given by publishing a citation to all persons interested therein in the , a [daily] [weekly] newspaper published in said county, once each week for three successive weeks, the last publication to be at least days prior to said day of hearing [and by serving a copy of said citation upon , (personally) (in the manner of the service of a summons in a civil action), at least days prior to said day of hearing] [and by mailing a copy of said citation at least days

prior to said day of hearing, postage prepaid, to each of the heirs, devisees and legatees of said decedent whose names and addresses appear from the files herein or are otherwise known]. Let citation issue accordingly.

Dated 19 .

.....

Judge.

1401. General form of citation as notice of hearing on petition.

[Title as in §§ 1396, 1397.]

The State of Minnesota to all persons interested in the [estate] [or state substance of prayer in petition] of the above named [decedent] [ward]:

The petition of , [representative of the above named decedent], praying that [state substance of prayer], having been filed in this Court,

You are hereby cited and required to show cause, if any you have, before this Court at its court room in the Court-House in the city of , county, state of Minnesota, on 19 , at o'clock in the forenoon, why said petition should not be granted.

Witness the [Honorable ,] Judge of said Court and the seal thereof this day of 19 .

[Seal of court.]

.....

[Judge.] [Clerk.]

.....

Attorney for petitioner.

[Office and post office address.]

1402. General form of order denying petition.

[Title as in §§ 1396, 1397.]

The petition of , filed herein on 19 , praying [state substance of prayer], coming on for hearing on this day pursuant to an order of this Court made on 19 , and proof of the due service of the [citation] [notice] to all persons interested in such [matters] required by said order having been filed, and it appearing to the satisfaction of the Court from said petition and the evidence received on the hearing [and from the files, records and prior proceedings of this (administration) (guardianship)], that [state facts justifying denial of petition],

It is ordered that said petition be and the same is hereby denied.

Dated 19 .

.....

Judge.

1403. Same—Short form.

[Title as in §§ 1396, 1397.]

The petition of _____, filed herein on _____ 19____, praying [state substance of prayer], coming on for hearing on this day and having been duly considered by the Court,

It is ordered that said petition be and the same is hereby denied.

Dated _____ 19____.

.....

Judge.

1404. General form of order granting petition.

Same as in § 1402 down to "that": that [all the allegations of said petition are true] [state the facts found],

It is ordered that [state the relief granted].

Dated _____ 19____.

.....

Judge.

1405. General form of verification of petition.

[Venue.]

being duly sworn, says that he is the petitioner of the foregoing petition; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

.....

Petitioner.

[Jurat as in § 1406.]

1406. General form of jurat.

Subscribed and sworn to before me this _____ day of _____, 19____.

.....

[Judge of Probate,
County, Minnesota.]

[Notary Public,
County, Minnesota.]

My commission expires _____ 19____.]

[Seal.]

1407. General form of acknowledgment of bonds or other instruments.

[Venue.]

On this day of , 19 , before me personally appeared
[and and] to me known to be the person[s] described
in, and who executed the foregoing instrument, and acknowledged that
[he] [they] executed the same as [his] [their] free act and deed.

.....

[Judge of Probate,
County, Minnesota.]

[Seal.]

[Notary Public,
County, Minnesota

My commission expires 19 .]

1408. General form of justification of sureties on probate bonds.

[Venue.]

and , being duly sworn, each for himself says that he
is one of the sureties mentioned in the foregoing bond; that he is a
resident and freeholder of the state of Minnesota; and that he is worth
\$ [double the amount of the bond] above his debts and liabilities
and exclusive of his property exempt from execution.

.....
.....

[Jurat as in § 1406.]

1409. Subpœna.

State of Minnesota

County of

Probate Court

The State of Minnesota to :

You are hereby required to appear before the above named Court
at its court room in the Court-House in the city of ,
county, state of Minnesota, on 19 , at o'clock in the fore-
noon, then and there to give evidence and testify in the matter of .

Witness the [Honorable] Judge of said Court and the seal
thereof this day of 19 .

[Seal of court.]

.....

[Judge.] [Clerk.]

1410. Affidavit of service of subpœna.

[Venue.]

being duly sworn, says that on 19 , in the city of
 , county, state of Minnesota, he served the [attached]
[foregoing] subpœna on , [personally, by handing to and leav-
ing with him a copy thereof] [by leaving a copy thereof for him at his
house of usual abode, with , a person of suitable age and discre-

tion, then resident therein]; and at the same time and place paid him \$ for his expenses in traveling to and from said Court and one day's attendance as a witness.

[Jurat as in § 1406.]

1411. Return of sheriff on service of subpoena.

I, , sheriff of county, state of Minnesota, hereby certify and return that on 19 , in the city of [continue as in § 1410].

Dated, 19

Fees:

.....

.....

.....

1412. Affidavit of service of order, notice or citation.

[Title as in §§ 1396, 1397.]

[Venue.]

 , being duly sworn, says that on 19 , in the city of , county, state of Minnesota, he served the foregoing [order] [notice] [citation] on , named therein, [personally, by handing to and leaving with him a copy thereof] [by leaving a copy thereof for him at his house of usual abode, with , a person of suitable age and discretion then resident therein.]

[Jurat as in § 1406.]

For other forms see Dunnell, Minn. Pr. §§ 2454-2461.

1413. Affidavit of mailing copy of order or citation.

[Title as in §§ 1396, 1397.]

[Venue.]

 , being duly sworn says that on 19 , at the city of , in the county and state aforesaid, he mailed a copy of the [order] [citation] hereto attached, in the above entitled matter, to all the devisees and legatees named in said will and all the known heirs of said decedent, at their last known address, after exercising due diligence in ascertaining the correctness of said addresses, by placing a true and correct copy thereof in a sealed envelope addressed to the following named persons, postage prepaid, and depositing the same in the post office in said city.

Name.	Street or post office.	City.	State.
.....
.....
.....
.....

[Jurat as in § 1406.]

1414. Affidavit of publication.

[Title as in §§ 1396, 1397.]

[Venue.]

, being duly sworn, says that he is the [publisher and printer]
[foreman of the publisher and printer] of the , a [daily] [week-
ly] newspaper, printed and published in the city of , in the coun-
ty and state aforesaid; that the [notice] [order] [citation], a copy of
which is hereto attached, was published in said newspaper once each
week for [three] successive weeks and on the same day of each week;
that the first publication thereof was on 19 , and the last publi-
cation thereof on 19

[Jurat' as in § 1406.]

.....

Printer's fees, \$

1415. Certificate for copies of records.

State of Minnesota

Probate Court

County of

I, , [Judge] [Clerk] of the above named Court, do hereby
certify that I have compared the annexed copy of with the orig-
inal thereof now on file and of record in the office of said Court and have
found it to be a true and correct transcript of the whole thereof.

Witness my hand and the seal of said Court this day of
19 .

.....

[Judge.] [Clerk.]

[Seal of court.]

See § 12.

See §§ 1743, 1744, for certificates under act of Congress.

1416. Order continuing hearing.

[Title as in §§ 1396, 1397.]

The hearing on the petition of , praying for , is hereby
continued to 19 , at o'clock in the forenoon of said day.

Dated 19 .

.....

Judge.

1417. Same—Another form.

[Title as in §§ 1396, 1397.]

On the application of

It is ordered that the hearing of the above entitled matter be and the
same is hereby [adjourned] [continued] to 19 , at o'clock
in the forenoon.

Dated, 19 .

.....

Judge.

1418. Appointment of guardian ad litem for minors.

[Title as in § 1396.]

The petition of _____, filed herein on _____ 19____, praying for [state substance of prayer], and it appearing that _____, residing at _____, is a minor and is interested in the matter of said petition and has no general or testamentary guardian, and that _____, residing at _____, is a suitable and competent person to act as special guardian for said minor in the matter of said petition and has consented to act as such, [upon the application _____],

It is ordered [continue as in § 1527].

1419. Petition for probate of will and for letters testamentary.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That on _____ 19____, _____ died in the city of _____, in the county of _____, state of _____, and at the time of his death resided and was domiciled in [said county] [_____ county, state of Minnesota] and left property [therein] [in the latter county] subject to administration.

II. That said decedent left a will, dated _____ 19____, [and a codicil dated _____ 19____,] wherein your petitioner was named as sole executor thereof, [which your petitioner believes was the last will of said decedent and presents herewith and files for original probate in this Court,] [which has been filed in this Court and which your petitioner believes is the last will of said decedent and hereby presents for original probate in this Court].

III. That said decedent died possessed of personal property of the probable value of \$ _____, and real property of the probable value of \$ _____.

IV. That said personal property is of the following general character and probable value:

	Value.
Household goods.....
Wearing apparel and jewelry.....
Cash
Money deposited in banks.....
Bills receivable.....
Choses in action, etc.....
Leasehold interests.....
Interest in firm of.....
Corporate stock.....
Bonds, notes and mortgages.....
Stock of merchandise.....

	Value.
Horses, cattle and other live stock.....
Farm implements.....
Automobiles, carriages, etc.....
Miscellaneous
Total, \$	

V. That said real property is of the following general character, location and probable value:

Location	Value.
Homestead
Improved city property.....
Unimproved city property.....
Improved farm lands.....
Unimproved farm lands.....
Timber lands.....
Mineral lands.....
Oil lands.....
Total, \$	

VI. That the names, ages, relationship and places of residence of the heirs, devisees and legatees of said decedent, so far as known to your petitioner, are as follows:

Name.	Age.	Relationship to decedent.	Place of residence.
.....
.....
.....

VII. That your petitioner is the [surviving husband] [son] of said decedent, is over twenty-one years of age, and is a competent and suitable person to act as such executor.

VIII. That the residence and post office address of your petitioner is No. , in the city of , county, state of Minnesota.

Wherefore your petitioner prays that said will [and codicil] may be proved and allowed herein and that letters testamentary thereon be issued to him, or some other suitable person, by this Court.

Petitioner.

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

Copies must be prepared for county treasurer and attorney general where there may be inheritance taxes. See G. S. 1913, § 2289.

1420. Petition for probate of will and for letters of administration with the will annexed.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That on 19 , died in the city of , in the county of , state of , and at the time of his death resided and was domiciled in [said county] [county, state of Minnesota] and left property [therein] [in the latter county] subject to administration.

II. That said decedent left a will, dated 19 , [and a codicil dated 19], wherein , residing at , was named as sole executor thereof, but the said [died on 19 , without having been judicially appointed such executor] [refuses to act as such executor and has never applied for letters testamentary on said will].

III. [That your petitioner believes said will to be the last will of said decedent and presents and files the same herewith for original probate in this Court.] [That said will has been filed in this Court and your petitioner, believing it to be the last will of said decedent, hereby presents it for original probate in this Court.]

[Continue as in paragraphs III.—VIII. of § 1419.]

Wherefore your petitioner prays that said will [and codicil] may be proved and allowed herein and that letters of administration with the will annexed on said estate be issued to him, or some other suitable person, by this Court.

.....
Petitioner.

.....
Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

Copies must be prepared for county treasurer and attorney general where there may be inheritance taxes. See G. S. 1913, § 2289.

1421. Order for hearing and for citation on petition for probate of will.

[Title as in § 1396.]

The petition of , praying for the allowance and admission to probate of a certain instrument as the last will of the above named decedent, and for letters [testamentary] [of administration] thereon, having been filed herein on 19 , together with said instrument,

It is ordered [continue as in § 1400].

1422. Citation on petition for probate of will and for letters testamentary or of administration thereon.

[Title as in § 1396.]

The State of Minnesota to all persons interested in the allowance and probate of the last will of the above named decedent and the granting of letters [testamentary] [of administration] thereon:

The petition of _____, praying for the allowance and admission to probate of a certain instrument as the last will of said decedent and for letters [testamentary] [of administration] thereon, having been filed in this Court on _____ 19____, together with said instrument,

You are hereby cited [continue as in § 1401.]

1423. Order admitting will to probate and appointing an executor or administrator—Long form.

[Title as in § 1396.]

The petition of _____, filed herein on _____ 19____, praying that a certain instrument, dated _____ 19____, therewith presented and filed, be proved and allowed as the last will of the above named decedent, and that letters [testamentary] [of administration] thereon be issued to the petitioner, coming on for hearing on this day pursuant to an order made by this Court on _____ 19____, and proof of the due service of the citation to all persons interested in such matters required by said order having been filed, and _____ [one of the subscribing witnesses to said instrument, there being no contest on the probate of said instrument] and _____, [the subscribing witnesses to said instrument], having been sworn and examined on behalf of the petitioner and [his] [their] testimony reduced to writing, subscribed by [him] [them] [and the testimony of other witnesses, namely, _____ and _____ and _____], having been received, reduced to writing, subscribed by them and filed], and it appearing to the satisfaction of the Court from said petition and testimony that said decedent died on _____ 19____, in the city of _____, in the county of _____, state of _____, and at the time of his death resided and was domiciled in [said county] [_____ county, Minnesota], and left estate in [said] [the latter county] subject to administration, and that said instrument is the valid last will of said decedent, duly executed by him and attested, according to the law of [this State], and that at the time of its execution by the decedent he was of lawful age and of sound mind [and not subject to duress, fraud or undue influence in relation thereto], and that the petitioner is a competent and suitable person to act as [executor of said will, being named therein as executor thereof] [administrator with the will annexed of said estate, no person being named in said will as executor thereof],

It is ordered that said instrument be and the same is hereby allowed and admitted to probate as the last will of said decedent, and that the

petitioner be and he is hereby appointed [executor of said will] [administrator with the will annexed of said estate], and that letters [testamentary] [of administration with the will annexed] be issued to him accordingly, upon his filing an oath as required by law and a bond in the penal sum of \$, with sufficient sureties, conditioned for the faithful discharge of all the duties of his trust according to law and approved by the Judge of this Court.

Dated 19 ,

.....

Judge.

1424. Same—Short form.

[Title as in § 1396.]

The petition of , filed herein on 19 , praying that the instrument therewith presented and filed, dated 19 , be proved and allowed as the last will of the above named decedent, and that the petitioner be appointed [executor thereof] [administrator with the will annexed of said estate], coming on for hearing on this day pursuant to an order made by this Court on 19 , and proof of the due service of the citation to all persons interested in such matters required by said order having been filed, and it appearing to the satisfaction of the Court from the evidence submitted at the hearing that all the allegations of said petition are true and that said instrument is the valid last will of said decedent, duly executed by him and attested, according to law, and that at the time of its execution by the decedent he was of lawful age and sound mind, [and not subject to duress, fraud or undue influence in relation thereto],

It is ordered that [continue as in preceding form, § 1423].

This form is sufficient, being sustained by the presumptions of regularity and jurisdiction attaching to the orders of the court.

See §§ 7, 8, 34. The practice of setting out the facts as in the longer form grew up at a time when probate courts were regarded as inferior courts not enjoying such presumptions.

1425. Order disallowing will.

[Title as in § 1396.]

The petition of filed herein on 19 , praying that the instrument therewith presented and filed, dated 19 , purporting to be the last will of the above named decedent, be proved and allowed, and that the petitioner be appointed [executor thereof] [administrator with the will annexed of the estate of said decedent], coming on for hearing on this day pursuant to an order made by this Court on 19 , and proof of the due service of the citation to all persons interested in such matters required by said order having been filed, and it appearing to the satisfaction of the Court from the evidence submitted at the hearing for and against the probate of said instrument [that

the same was not executed as the last will of said decedent according to the law of [this state], in this, that [specify defect] [was executed by the said decedent while subject to undue influence in relation thereto exerted upon him by],

It is ordered that said instrument be and the same is hereby disallowed and refused probate as the last will of said decedent and said petition denied.

Dated 19 Judge.

1426. Proof of will—Testimony of subscribing witness.

[Title as in § 1396.]

[Venue.]

I, , being first duly sworn in open court as a witness in behalf of the proponent of the will herein mentioned testify as follows: That I was one of the subscribing witnesses to the instrument now shown to me, dated 19 , purporting to be the last will of , now deceased, late of the city of , in the county of , state of Minnesota, which is marked as filed in this Court on 19 , and which is now here presented for probate in this Court; that I am years of age and my residence and address is No. in the city of , in the county of , state of Minnesota; that at the time said instrument was executed [and long prior thereto] I was acquainted with the said decedent, and with the other subscribing witness thereto; that on 19 , in the city of in the county of , state of Minnesota, said instrument was [(signed) (sealed) and executed by said decedent in my presence and at the same time in the presence of said , and said decedent then and there acknowledged, declared and published to us, the said witnesses, that said instrument was his last will] [shown to us, the said witnesses, while we were together in the presence of said decedent, with his signature thereto plainly visible to us, and said decedent then and there acknowledged, declared and published to us, the said witnesses, that the said instrument had been signed by him and that it was his last will]; that thereupon, at the request of said decedent, we, the said witnesses, then and there, in the presence of said decedent and of each other, severally subscribed said instrument as witnesses thereto; that at the time of the execution of said instrument as aforesaid said decedent was over twenty-one years of age and of sound and disposing mind, and in making said instrument acted freely, without being subject to duress, fraud or undue influence in relation thereto, as I verily believe.

Subscribed and sworn to before me the day of , 19 .

[Seal of court.]

Judge of Probate.

1427. Objections to probate of will under G. S. 1913, § 7270.

[Title as in § 1396.]

The undersigned contests the admission to probate of the instrument presented to this Court for probate by _____, on _____ 19____, as the last will of the above named decedent, and for grounds of contest alleges:

I. That the contestant is a [son] and heir of said decedent [or state other facts giving the contestant a right to object to the probate].

II. That at the time said instrument was executed said decedent was not of sound mind.

III. That said instrument was not executed by said decedent in accordance with the statutes of this state regulating the execution of wills, in this, that [specify defect].

IV. That said instrument was executed by said decedent while subject to undue influence [and fraud] in relation thereto exerted upon him by _____, his [wife].

V. That said instrument has been wholly revoked by said decedent personally, [burning] [tearing] [canceling] [obliterating] [destroying] it, with the intent and for the purpose of wholly revoking it as his last will.

VI. That said instrument has been wholly revoked by a subsequent will of said decedent, dated _____ 19____, which is the last will of said decedent, and is herewith presented for probate as such and filed by this contestant.

VII. That said instrument has been wholly revoked by the subsequent marriage of said decedent to _____, on _____ 19____.

VIII. That the residence and post office address of the contestant is No. _____ in the city of _____, _____ county, state of Minnesota.

.....
Contestant.

.....
Attorney for Contestant.

[Office and post office address.]

[Venue.]

being duly sworn, says that he is the contestant in the foregoing instrument; that he has read said instrument and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

[Jurat as in § 1406.]
Contestant.

1428. Certificate of probate of will under G. S. 1913, § 7272.

[Title as in § 1396.]

I, _____, Judge of the above named Court, hereby certify that the annexed instrument, dated _____ 19____, was duly proved in and allowed and admitted to probate by said Court, on _____ 19____, as the last will of _____, deceased, late of _____ county, state of Minnesota.

In witness whereof I have hereunto set my hand and affixed the seal of said Court this _____ day of _____ 19____.

.....
Judge.

[Seal of court.]

1429. Adjournment under G. S. 1913, § 7273.

[Title as in § 1396.]

The petition of _____, filed herein on _____ 19____, praying for the allowance, as the last will of the above named decedent, of a certain instrument, dated _____ 19____, therewith presented and filed, coming on for hearing on this day pursuant to an order of this Court made on _____ 19____, and another written instrument, dated _____ 19____, signed by said decedent, purporting to be a [subsequent will of said decedent] [(codicil to) (partial revocation of) said first named will] having been presented to the Court on the hearing in opposition to said first named will by _____, and filed herein,

It is ordered that the hearing in this matter be and the same is hereby adjourned to _____ 19____, at _____ o'clock in the forenoon, in the court room of this Court in the Court-House in the city of _____ county, state of Minnesota; and it is further ordered that a notice of this adjournment, setting forth the reason of said adjournment and the grounds of opposition to said first named will, be published once each week for three successive weeks, the last publication to be at least _____ days prior to the date set for said adjourned hearing, in the _____, a [weekly] newspaper published in _____ county, state of Minnesota.

Dated _____ 19____.

.....
Judge.

1430. Notice of adjourned hearing under G. S. 1913, § 7273.

[Title as in § 1396.]

To all persons interested in the allowance of the last will of the above named decedent:

Notice is hereby given that the hearing on the petition of _____, filed herein on _____ 19____, praying for the allowance, as the last will of said decedent, of a certain instrument therewith presented and filed,

has been adjourned to 19 , at o'clock in the forenoon, in the court room of this Court in the Court-House in the city of , county, state of Minnesota, for the reason that at the original hearing on 19 , another instrument in writing dated 19 , signed by said decedent, was presented to this Court by , and filed herein, in opposition to said first named will, purporting to be a [subsequent will of said decedent] [(codicil to) (partial) (revocation of) said first named will]. The grounds of opposition to said first named will are that [it has been wholly revoked by the last named will] [state other grounds according to the facts]. At said adjourned hearing proof will be taken upon both of said instruments, and all matters pertaining thereto, and the Court will determine which of said instruments, if either, [or both,] shall be allowed as the last will of said decedent, or whether letters of administration shall be issued on his estate to the person or persons entitled thereto by law.

Witness the Judge of said Court and the seal thereof this day of 19 .

.....

Judge.

[Seal of court.]

1431. Petition for probate of lost will.

[Title as in § 1396.]

[Same as in § 1419 or § 1420, except paragraph II.]

II. That on 19 , said decedent made a last will, which was in existence and unrevoked at the time of his death, but since his death has been accidentally lost and cannot be found after diligent search and inquiry therefor by your petitioner, the provisions of which were as follows: [Set out provisions.]

1432. Order for hearing and for citation on petition for proof of lost will.

[Title as in § 1396.]

The petition of , praying for the allowance and admission to probate of a certain lost instrument as the last will of the above named decedent and for letters [testamentary] [of administration] thereon, having been filed herein on 19 ,

It is ordered [continue as in § 1400.]

1433. Citation on petition for probate of lost will.

[Title as in § 1396.]

The State of Minnesota to all persons interested in the allowance and probate of the last will of the above named decedent and the granting of letters [testamentary] [of administration] thereon:

The petition of , praying for the allowance and admission to probate of a certain lost instrument as the last will of said decedent and

for letters [testamentary] [of administration] thereon, having been filed in this Court on 19 , and it being alleged in said petition that the provisions of said lost instrument are as follows: [Set out provisions as in petition],

You are hereby cited [continue as in § 1401].

1434. Order admitting lost will to probate.

[Title as in § 1396.]

The petition of , filed herein on 19 , praying that a certain instrument executed by the above named decedent on 19 , in existence and unrevoked at the death of said decedent but accidentally lost after his death and never found, be proved and allowed as the last will of said decedent, and that the petitioner be appointed [executor thereof] [administrator with the will annexed of said estate], coming on for hearing on this day pursuant to an order of this Court made on 19 , and proof of the due service of the citation to all persons interested in such matters required by said order having been filed, and and , the subscribing witnesses to said instrument having been sworn and examined on behalf of the petitioner and their testimony reduced to writing subscribed by them and filed, and the testimony of other witnesses, namely, and and , having been received, reduced to writing, subscribed by them and filed, and it being clearly and distinctly proved to the Court by clear and satisfactory evidence of said witnesses [and by a draft of said will received in evidence on the hearing], that the provisions of said will were as follows: [Set out provisions of will.]

And it likewise further appearing to the satisfaction of the Court that said decedent died on 19 , in the city of , in the county of , state of , and that he was then a resident of [said county] [county, Minnesota], and left estate in said county subject to administration, and that said instrument was the valid last will of said decedent, duly executed by him and attested, according to the law of [this state], and that at the time of its execution by the decedent he was of lawful age and sound mind, [and not subject to duress, fraud or undue influence in relation thereto], and that said instrument was in existence and unrevoked at the time of the death of said decedent, and was accidentally lost after his death and has never been found, though diligent search and inquiry has been made therefor, and that said petitioner is a competent and suitable person to act as [executor of said will, being named therein as such by the decedent] [administrator with the will annexed of said estate, no person being named in said will as executor thereof],

It is ordered that said instrument as so proved be and the same is hereby admitted to probate as the last will of said decedent [continue as in § 1423]

1435. Certificate of probate of lost will under G. S. 1913, § 7281.

[Title as in § 1396.]

I, _____, Judge of the above named Court, hereby certify that a certain instrument, dated _____ 19____, was duly proved in and allowed and admitted to probate by said Court, on _____ 19____, as the last will of _____ deceased, late of _____ county, state of Minnesota; that said will was in existence and unrevoked at the time of the death of said decedent, but after his death was accidentally lost and has never been found, though diligent search and inquiry has been made therefor; and that the provisions of said will as proved and allowed as aforesaid were as follows: [Set out specifically provisions of will as proved.]

In witness whereof I have hereunto set my hand and affixed the seal of said Court this _____ day of _____ 19____.

[Seal of court.]

.....

Judge.

1436. Letters testamentary.

[Title as in § 1396.]

The last will of _____, deceased, having been duly proved, allowed and recorded in this court, _____, who is named in the will as such, is hereby appointed executor thereof.

Witness the Judge of said Court and the seal thereof this _____ day of _____, 19____.

[Seal of court.]

.....

Judge.

1437. Petition for revocation of probate and for probate of later will.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That on _____ 19____, _____ died in the city of _____, in the county of _____, state of Minnesota, and at the time of his death resided and was domiciled in said county and left property therein subject to administration.

II. That on _____ 19____, this Court admitted to probate a certain instrument, dated _____ 19____, as the last will of said decedent, and on the same day appointed _____ executor thereof and issued to him letters testamentary thereon, and thereupon the said _____ duly qualified and is now acting as such executor.

III. That said instrument was in fact not the last will of said decedent; that since its admission to probate as aforesaid another and later will of said decedent, dated _____ 19____, has been discovered, wherein

your petitioner was named as sole executor thereof, which your petitioner believes is the last will of said decedent and presents and files herewith for original probate in this Court.

[Continue as in § 1419.]

Wherefore your petitioner prays that the orders admitting said first mentioned instrument to probate and appointing said executor thereon be set aside, and said letters testamentary, be revoked, and that the instrument herewith presented, dated 19 , be proved and allowed as the last will of said decedent and that letters testamentary thereon be issued to your petitioner, or some other suitable person, by this Court.

.....
Petitioner.

.....
Attorney for Petitioner.

[Office and post office address.]
[Verification as in § 1405.]

1438. Order for hearing and for citation on petition to revoke probate.

[Title as in § 1396.]

The petition of , praying that the orders of this Court made on 19 , admitting a certain instrument, dated 19 , to probate as the last will of the above named decedent and appointing executor thereof, be set aside, and that the letters testamentary thereon issued to said be revoked, and that a later instrument, dated 19 , presented with said petition and filed therewith, be admitted to probate and letters testamentary thereon be issued to the petitioner, having been filed herein on 19 ,

It is ordered [continue as in § 1400].

1439. Citation on petition to revoke probate and for probate of later will.

[Title as in § 1396.]

The State of Minnesota to all persons interested in the probate of the last will of the above named decedent and the granting of letters testamentary thereon:

The petition of , praying that the orders of this Court made on 19 , admitting a certain instrument, dated 19 , to probate as the last will of said decedent and appointing executor thereof be set aside, and that the letters testamentary thereon issued to said be revoked, and that a later instrument, dated 19 , presented with said petition and filed therewith, be admitted to probate as the last will of said decedent and letters testamentary thereon be issued to the petitioner, having been filed in this Court on 19 ,

You are hereby cited [continue as in § 1401].

1440. Order revoking prior probate and admitting later will to probate.

[Title as in § 1396.]

The petition of _____, filed herein on _____ 19____, praying that the orders of this Court made on _____ 19____, admitting a certain instrument, dated _____ 19____, to probate as the last will of the above named decedent and appointing _____ executor thereof, be set aside, and that the letters testamentary thereon issued to said _____ be revoked, and that a later instrument, dated _____ 19____, presented with said petition and filed therewith, be admitted to probate as the last will of said decedent, and that letters testamentary thereon be issued to the petitioner, coming on for hearing on this day pursuant to an order of this Court made on _____ 19____, and proof of the due service of the citation to all persons interested in such matters required by said order having been filed, and _____ and _____, the subscribing witnesses to said later instrument, having been sworn and examined on behalf of the petitioner and their testimony reduced to writing, subscribed by them and filed, and the testimony of _____ and _____ and _____, having been received, reduced to writing, subscribed by them and filed, and it appearing to the satisfaction of the Court from said petition and testimony and the files, records and prior proceedings of this administration, that said decedent died on _____ 19____, in the city of _____, in the county of _____, state of Minnesota, and at the time of his death resided and was domiciled in said county and left estate therein subject to administration, and that said later instrument, dated _____ 19____, is the valid last will of said decedent, duly executed by him and attested, according to the law of [this state], and that at the time of its execution by the decedent he was of lawful age and of sound mind [and not subject to duress, fraud or undue influence in relation thereto], and that the petitioner is a competent and suitable person to act as executor of said will, being named therein as executor thereof,

It is ordered that the orders of this Court made on _____ 19____, admitting a certain instrument, dated _____ 19____, to probate as the last will of said decedent and appointing _____ executor thereof be and the same are hereby set aside, and that the letters testamentary thereon issued by this Court to said _____, on _____ 19____, be and the same are hereby revoked, and that said later instrument, dated _____ 19____, be and the same is hereby allowed and admitted to probate as the last will of said decedent [continue as in § 1423].

1441. Petition by executor for probate of foreign will and for letters testamentary thereon under G. S. 1913, § 7276.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That on 19 , died in the city of , in the county of , state of , and at the time of his death resided and was domiciled in [said county] [county, state of].

II. That said decedent left a last will wherein your petitioner was named sole executor thereof.

III. That on 19 , said will was duly proved in and allowed by the Court in and for county, state of , and letters testamentary thereon were duly issued by said Court to your petitioner on said day; that all of said proceedings were within the jurisdiction of said Court and in accordance with the laws then in force in said state; that said allowance of said will and said letters are still in force; and that your petitioner duly qualified and is now acting thereunder as such executor.

IV. That your petitioner herewith presents a duly authenticated copy of said will and of said probate thereof [and of said letters].

V. That said decedent died possessed of certain property situated in [this county] [this and other counties of this state] upon which said will is operative, the general character and probable value of which are as follows:

[Describe property as in § 1419.]

VI. That the names, ages, relationship and places of residence of the heirs, devisees and legatees of said decedent, so far as known to your petitioner, are as follows:

Name.	Age.	Relationship to decedent.	Place of residence.
.....
.....
.....
.....

VII. That your petitioner is the [surviving husband] [son] of said decedent, is over twenty-one years of age, and is a competent and suitable person to act as such executor in this state.

VIII. That the residence and post office address of your petitioner is No. , in the city of , county, state of .

Wherefore your petitioner prays that said will be allowed and admitted to probate by this Court; that said copies of said will and the probate thereof be ordered filed and recorded in this Court as provided by

General Statutes 1913, § 7276; and that letters testamentary thereon for this state be issued to him by this Court.

.....
Petitioner.

.....
Attorney for Petitioner.
[Office and post office address.]
[Verification as in § 1405.]

1442. Petition by creditor for probate of foreign will and for letters of administration with the will annexed under G. S. 1913, § 7276.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That on 19 , died in the city of , in the county of , state of , and at the time of his death resided and was domiciled in [said county] [county, state of].

II. That said decedent left a last will wherein one was named sole executor thereof.

III. That on 19 , said will was duly proved in and allowed by the Court in and for county, state of , and letters testamentary thereon were duly issued by said Court to the said on said day; that all of said proceedings were within the jurisdiction of said Court and in accordance with the laws then in force in said state; that said allowance of said will and said letters are still in force.

IV. That the said duly qualified as such executor under said letters and is still acting as such in said state but has failed and refused to present said will for probate in this state.

V. That your petitioner herewith presents a duly authenticated copy of said will and of said probate thereof [and of said letters].

VI. That said decedent died possessed of certain property situated in [this county] [this and other counties of this state] upon which said will is operative, the general character, location and probable value of which are as follows:

[Describe property as in § 1419.]

VII. That the names, ages, relationship and places of residence of the heirs, devisees and legatees of said decedent, so far as known to your petitioner, are as follows:

Name.	Age.	Relationship to decedent.	Place of residence.
.....			
.....			
.....			
.....			

VIII. That the names and places of residence of the creditors of said estate in this state, so far as known to your petitioner, are as follows:

Name of creditor.	Place of residence.
.....
.....
.....
.....

IX. That your petitioner has a claim against said estate amounting to \$ _____, growing out of [describe basis of claim in general terms].

X. That your petitioner [has been] [is] unable to present and collect his said claim in the domiciliary administration of said estate in the state of _____, for the reason that [state reason].

XI. That your petitioner is over twenty-one years of age, and is a competent and suitable person to act as administrator of said estate in this state.

XII. That the residence and post office address of your petitioner is No. _____, in the city of _____, county, state of _____.

Wherefore your petitioner prays that said will be allowed and admitted to probate by this Court; that said copies of said will and the probate thereof be ordered filed and recorded in this Court as provided by General Statutes 1913, § 7276; and that letters of administration with the will annexed on the estate of said decedent in this state be issued to him, or some other suitable person, by this Court.

.....
Petitioner.

.....
Attorney for Petitioner.
[Office and post office address.]
[Verification as in § 1405.]

1443. Order for hearing and for citation on petition for probate of foreign will under G. S. 1913, § 7276, and for letters.

[Title as in § 1396.]

Authenticated copies of the last will of the above named decedent and of the probate thereof by the _____ Court, in and for _____ county, state of _____, on _____ 19 _____, having been presented to this Court on this day by _____, together with his petition praying that said will be allowed and admitted to probate by this Court and that said copies be ordered filed and recorded herein as provided by statute, and that letters [testamentary] [of administration with the will annexed] thereon be granted to the petitioner,

It is ordered [continue as in § 1400].

1444. Citation on petition for probate of foreign will under G. S. 1913, § 7276, and for letters.

[Title as in § 1396.]

The State of Minnesota to all persons interested in the allowance and probate of the last will of the above named decedent and the granting of letters [testamentary] [of administration] thereon:

Authenticated copies of the last will of said decedent and of the probate thereof by the _____ Court, in and for, _____ county, state of _____, on _____ 19____, having been presented to this Court [on this day] by _____, together with his petition praying that said will be allowed and admitted to probate by this Court, and that said copies be ordered filed and recorded in this Court as provided by statute, and that letters [testamentary] [of administration with the will annexed] thereon be granted to the petitioner,

You are hereby cited [continue as in § 1401].

1445. Order admitting foreign will to probate under G. S. 1913, § 7276, and appointing executor or administrator.

[Title as in § 1396.]

The petition of _____, praying that the last will of _____, deceased, late of _____ county, state of _____, be allowed and admitted to probate by this Court and that authenticated copies of said will and the probate thereof by the _____ Court, in and for _____ county, state of _____, presented with such petition, be ordered filed and recorded in this Court as provided by statute, and that the petitioner be appointed [executor thereof] [administrator with the will annexed of the estate of said decedent] in this state, coming on for hearing on this day pursuant to an order made by this Court on _____ 19____, and proof of the due service of the citation to all persons interested in such matters required by said order having been filed, and it appearing to the satisfaction of the Court from the evidence submitted on the hearing and from an examination of the copies of said will and the probate thereof presented with said petition that they are duly authenticated, and that said probate was granted by a court of competent jurisdiction, and that all the allegations of said petition are true,

It is ordered that said will be and the same is hereby allowed and admitted to probate and that said copies of said will and the said foreign probate thereof be filed and recorded in this Court, as provided by General Statutes, 1913, § 7276, and that said petitioner be, and he is hereby appointed [executor of said will in this state] [administrator with the will annexed of the estate of said decedent in this state], and that letters [testamentary] [of administration with the will annexed] be issued to him accordingly, upon his filing an oath as required by law and a bond in the penal sum of \$ _____, with sufficient sureties, conditioned

for the faithful discharge of all the duties of his trust according to law and approved by the Judge of this Court.

Dated 19 .

.....
Judge.

1446. Certificate of probate of foreign will under G. S. 1913, § 7276.

[Title as in § 1396.]

I, Judge of the above named Court hereby certify that the annexed authenticated copy of the last will of , deceased, late of county, state of , the original of which was duly proved and allowed as the last will of said decedent by the Court in and for county, state of , on 19 , was duly proved in and allowed and admitted to probate by this Court on 19 , as the last will of said decedent, and, together with the annexed authenticated copy of said foreign probate, was ordered filed and recorded in this Court.

In witness whereof I have hereunto set my hand and affixed the seal of said Court this day of , 19 .

.....
Judge.

[Seal of court.]

1447. Letters testamentary or of administration on foreign will under G. S. 1913, § 7277.

[Title as in § 1396.]

The last will of deceased, late of county, state of , having been duly allowed and admitted to probate by this Court and duly authenticated copies of said will and the probate thereof by Court in and for county, state of , having been filed in this Court pursuant to an order made therein on 19 , is hereby appointed [executor of said will] [administrator with the will annexed of the estate of said decedent] in this state.

Witness the Judge of said Court and the seal thereof this day of , 19 .

.....
Judge.

[Seal of court.]

1448. Petition for letters of administration on estate of intestate.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That on 19 , died in the city of in the county of , state of , and at the time of his death resided and was domiciled in [said county] [county, state of Minnesota] and left property [therein] [in the latter county] subject to administration.

II. That said decedent died without leaving any will, as your petitioner verily believes, after diligent search and inquiry therefor.

III. That the names, ages, relationship and places of residence of the heirs of said decedent, so far as known to your petitioner, are as follows:

Name.	Age.	Relationship to decedent.	Place of residence.
.....			
.....			
.....			
.....			

IV. That said decedent died possessed of personal property of the probable value of \$, and real property of the probable value of \$

V. That said personal property is of the following general character and probable value:

[As in § 1419.]

VI. That said real property is of the following general character, location and probable value:

[As in § 1419.]

VII. That your petitioner is the [surviving husband] [son] of said decedent, is over twenty-one years of age, and is a competent and suitable person to administer the estate of said decedent.

VIII. That the residence and post office address of your petitioner is No. , in the city of , county, state of Minnesota.

Wherefore your petitioner prays that letters of administration on said estate be granted to him, or some other suitable person, by this Court.

.....
Petitioner.

.....
Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

Paragraph V. may be omitted if desired, not being required by the statute, but it is good practice to insert it.

Copies must be prepared for the county treasurer and the attorney general where there may be inheritance taxes. See G. S. 1913, § 2289.

1449. Order for hearing and for citation on petition for letters of administration.

[Title as in § 1396.]

The petition of _____, praying that letters of administration be granted to [him] [or some other suitable person], on the estate of the above named decedent, having been filed herein on _____ 19 ,

It is ordered [continue as in § 1400].

1450. Citation on petition for letters of administration.

[Title as in § 1396.]

The State of Minnesota to all persons interested in the granting of letters of administration on the estate of the above named decedent:

The petition of _____, praying that letters of administration be granted to [him] [or some other suitable person] on the estate of said decedent, having been filed in this Court on _____ 19 ,

You are hereby cited [continue as in § 1401].

1451. Objections to appointment of administrator under G. S. 1913, § 7289.

[Title as in § 1396.]

The undersigned contests the petition of _____, filed herein on _____ 19 , praying for letters of administration on the estate of the above named decedent, and for grounds of contest alleges:

I. That the contestant is a [son] and heir of said decedent [or state other facts giving the contestant a right to object].

II. That said petitioner is not a competent or suitable person to administer said estate in this, that [state ground].

III. That said petitioner is not a competent or suitable person to administer said estate in this, that [state any other ground].

IV. That the residence and post office address of the contestant is No. _____, in the city of _____, county, state of Minnesota.

.....

Contestant.

.....

Attorney for Contestant.

[Office and post office address.]

[Verification as in § 1427.]

1452. Order for letters of administration.

[Title as in § 1396.]

The petition of _____, filed herein on _____ 19 , praying that letters of administration be granted to him on the estate of the above named decedent, coming on for hearing on this day pursuant to an order of this Court made on _____ 19 , and proof of the due service of the

citation to all persons interested in such matter required by said order having been filed, and it appearing to the satisfaction of the Court from said petition, and the evidence received on the hearing, that all the allegations of said petition are true,

It is ordered that said petitioner be and he is hereby appointed administrator of said estate, and that letters of administration issue to him accordingly, upon his filing an oath as required by law and a bond in the penal sum of \$, conditioned for the faithful discharge of all the duties of his trust according to law and approved by the Judge of this Court.

Dated 19

.....

Judge.

1453. Letters of administration—General or special.

[Title as in § 1396.]

is hereby appointed [special] administrator of the estate of , deceased.

Witness the Judge of said Court and the seal thereof this day of , 19 .

.....

Judge.

[Seal of court.]

1454. Letters of administration with the will annexed.

[Title as in § 1396.]

The last will of , deceased, having been duly proved, allowed and recorded in this Court, [and there being no one named in the will as executor] [, named in the will as executor, refusing to accept the trust], is hereby appointed administrator with the will annexed of the estate of said decedent.

Witness the Judge of said Court and the seal thereof this day of , 19 .

Dated 19 .

.....

Judge.

1455. Petition for appointment as administrator de bonis non.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That on 19 , was duly appointed by this court sole [executor] [administrator with the will annexed] [administrator] of the estate of , deceased.

II. That thereupon said duly qualified as such [executor] [administrator] and continued to act as such until 19 , when he [died] [was removed by this Court] [resigned], leaving a part of said estate unadministered.

III. That there remains unadministered of said estate within the jurisdiction of this Court personal property of the [appraised] [probable] value of \$, and real property of the [appraised] [probable] value of \$.

IV. That your petitioner is [a son] [one of the principal creditors] of said decedent, is over twenty-one years of age and a competent and suitable person to be appointed administrator of said estate not already administered.

V. That the residence and post office address of your petitioner is No. , in the city of , county, state of Minnesota.

Wherefore your petitioner prays that letters of administration [with the will annexed] on said estate, not already administered, be granted to him, or some other suitable person, by this Court.

.....

Petitioner..

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1456. Order for hearing and for citation on foregoing petition—Citation.

The foregoing petition may be granted without notice. If notice is desired the forms under §§ 1445, 1450, may be used with adaptation.

1457. Order for letters of administration de bonis non.

[Title as in § 1396.]

The petition of , filed herein on 19 , praying for letters of administration on the estate of the above named decedent not already administered, coming on for hearing on this day [pursuant to an order made by this Court on 19 , and proof of the due service of the citation to all persons interested in such matter required by said order having been filed,] and it appearing to the satisfaction of the Court from said petition and the evidence received on the hearing, and from the files, records and prior proceedings of this administration, that all the allegations of said petition are true,

It is ordered that said petitioner be and he is hereby appointed administrator of said estate, not already administered, and that letters of administration on said estate, not already administered, be issued to him accordingly, upon his filing an oath as required by law and a bond in the penal sum of \$, with sufficient sureties, conditioned

for the faithful discharge of all the duties of his trust according to law and approved by the Judge of this Court.

Dated 19 .

.....
Judge.

1458. Same—Upon resignation of prior representative.

[Title as in § 1396.]

The resignation of , as [administrator] of the estate of the above named decedent, filed herein on 19 , having this day been accepted by this Court, and the letters of administration on said estate granted to him by this Court on 19 , having this day been revoked by this Court, and said estate not being fully administered, and there being no other person acting as executor or administrator of said estate,

It is ordered that , residing at No. , in the city of , county, state of Minnesota, be and he is hereby appointed [continue as in § 1457].

1459. Same—Upon removal of prior representative.

[Title as in § 1396.]

The letters [testamentary] [of administration] on the estate of the above named decedent, granted to , by this Court on 19 , having this day been revoked by this Court, and said estate not being fully administered, and there being no other person acting as executor or administrator of said estate,

It is ordered that , residing at No. , in the city of , county, state of Minnesota, be and he is hereby appointed [continue as in § 1457].

1460. Letters of administration de bonis non.

[Title as in § 1396.]

is hereby appointed administrator of the estate, not already administered, of , deceased.

Witness the Judge of said Court and the seal thereof this day of , 19 .

.....
Judge.

[Seal of court.]

1461. Petition for appointment as special administrator.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That on 19 , died [testate] [intestate] in the city of , in the county of , state of Minnesota, and at the time of his death resided and was domiciled in said county and left property therein subject to administration.

II. That on 19 , a petition was filed in this Court by for letters [testamentary] [of administration] on the estate of said decedent.

III. That a considerable delay will necessarily occur before such letters can be granted by reason of the fact that [state cause of delay].

IV. That a part of said estate consists of [state nature of property needing immediate attention].

V. That it is necessary that a special administrator should be appointed to collect, take charge of and preserve said estate until [an executor] [a general administrator] thereof is appointed.

VI. That your petitioner is the [son] [one of the principal creditors] of said decedent, is over twenty-one years of age, and is a competent and suitable person to act as special administrator of said estate.

VII. That the residence and post office address of your petitioner is No. , in the city of , county, state of Minnesota.

Wherefore your petitioner prays that letters of special administration on said estate be granted to him, or some other suitable person, by this Court.

.....

Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1462. Order for hearing and for citation on foregoing petition—Citation.

The foregoing petition may be granted without notice. If notice is desired the forms under §§ 1449, 1450, may be used with adaptation.

1463. Order for letters of special administration.

[Title as in § 1396.]

The petition of , filed herein on 19 , praying for letters of special administration on the estate of the above named decedent, coming on for hearing on this day [pursuant to an order made by this Court on 19 , and proof of the due service of the citation

to all persons interested in this matter required by said order having been filed,] and it appearing to the satisfaction of the Court that all the allegations of said petition are true and that it is necessary and expedient that a special administrator of said estate should be appointed,

It is ordered that said petitioner be and he is hereby appointed special administrator of said estate and that letters of special administration thereon be issued to him accordingly, upon his filing an oath as required by law and a bond in the penal sum of \$, with sufficient sureties, conditioned for the faithful discharge of all the duties of his trust according to law and approved by the Judge of this Court.

Dated 19 .

.....

Judge.

1464. Notice to administrator of appointment under G. S. 1913, § 7287.

[Title as in § 1396.]

To :

Take notice that on 19 , you were appointed by this Court administrator of the estate of the above named decedent, and that if you neglect for thirty days after this notice is served upon you to file the oath and bond required by law and the order of this court appointing you, such neglect will be deemed a refusal on your part to serve as such administrator and some other person will be appointed as such.

Dated 19 .

.....

Judge.

[Seal of court.]

1465. Renunciation of executorship.

[Title as in § 1396.]

The undersigned, named in the last will of the above named decedent, dated 19 , as executor thereof, hereby renounces his right to letters testamentary thereon and declines to act as such executor.

Dated 19 .

.....

1466. Resignation of representative.

[Title as in § 1396 or § 1397.]

I, the undersigned, [administrator of the estate of the above named decedent] [executor of the last will of the above named decedent] [guardian of the person and estate of the above named ward], appointed as such by this Court on 19 , hereby resign my trust as

such [administrator] [executor] [guardian], and respectfully request the Court to accept my resignation, settle and allow my account, and discharge me from such trust.

Dated 19 .

.....

1467. Order accepting resignation of representative and discharging him.

[Title as in § 1396 or § 1397.]

The resignation of , [administrator of the estate of the above named decedent], having been filed herein on 19 , and his final account having this day been settled and allowed,

It is ordered that such resignation be and the same is hereby accepted and that said [administrator] be and he is hereby discharged from further liability as such [administrator], without further order, as soon as he has turned over to his successor in said trust all the property of said estate remaining in his hands, as shown by said final account, as allowed, and his successor has filed in this Court a receipt therefor.

Dated 19 .

.....

Judge.

1468. Petition for removal of representative.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That he is interested in the estate of the above named decedent in this, that [state relationship of petitioner to decedent or other facts giving the petitioner a status to make the petition].

II. That ever since 19 , , has been and now is the [administrator] of the estate of the above named decedent, duly qualified and acting as such under letters of administration duly issued to him by this Court on that day.

III. That said is unsuitable to act as such administrator by reason of the fact that [state ground].

IV. That said estate has not been fully administered.

V. That the residence and post office address of your petitioner is No. , in the city of , county, state of Minnesota.

Wherefore your petitioner prays that said [administrator] be removed and his letters of administration revoked.

.....

Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1469. Order for hearing and for citation on petition for removal of representative.

[Title as in § 1396.]

The petition of _____, praying for the removal of _____, as [administrator] of the estate of the above named decedent, having been filed herein on _____ 19 _____,

It is ordered that the same be heard before the Court at its court room in the Court-House in the city of _____, _____ county, state of Minnesota, on _____ 19 _____, at _____ o'clock in the forenoon, and that notice thereof be given by serving a citation upon said _____, personally or by leaving a copy thereof at his usual place of abode with some person of suitable age and discretion then resident therein [and by serving copies of said citation upon _____ and _____, bondsmen of said (administrator), in like manner]. Let citation issue accordingly.

Dated _____ 19 _____.

.....
Judge.

1470. Citation on petition for removal of representative.

[Title as in § 1396.]

The State of Minnesota to _____, [administrator] of the estate of the above named decedent:

The petition of _____, praying for your removal, as such administrator, having been filed in this Court,

You are hereby cited and required to appear before this Court at its court room in the Court-House in the city of _____, _____ county, state of Minnesota, on _____ 19 _____, at _____ o'clock in the forenoon, and show cause why you should not be removed as such [administrator].

Witness the Judge of said Court and the seal thereof this day of _____ 19 _____.

.....
Judge.

[Seal of court.]

1471. Order revoking letters.

[Title as in § 1396.]

The petition of _____, praying for the removal of _____, [administrator] of the estate of the above named decedent, filed herein on _____ 19 _____, coming on for hearing on this day pursuant to an order of this Court made on _____ 19 _____, and proof of the due service of the citation to said administrator [and his bondsmen] required by said order having been filed, and it appearing to the satisfaction of the Court from said petition, and from an examination of said [administrator], and from other evidence received on the hearing, and from the files, rec-

ords and prior proceedings of this [administration] [guardianship], that all the allegations of said petition are true, [or state the facts rendering the representative unsuitable], and that said [administrator] is not a suitable person to act as such [administrator],

It is ordered that the letters of [administration] [guardianship] granted to said [administrator] on said estate by this Court on 19 , be and the same are hereby revoked, and said is hereby ordered to file a final account of his said [administration] [guardianship] on or before 19 , and that the same be settled and allowed before the Court at its court room in the Court-House in the city of , county, state of Minnesota, on 19 , at o'clock in the forenoon.

Dated 19 .

.....

Judge.

1472. Order suspending representative.

[Title as in § 1396.]

It appearing to the satisfaction of the Court from credible information that , [administrator] of the estate of the above named decedent, is wasting, embezzling and mismanaging said estate,

It is ordered that the powers of said [administrator] be and they are hereby suspended pending an investigation of the matter, and that a citation issue to him, notifying him of such suspension and requiring him to show cause before this Court at its court room in the Court-House in the city of , county, state of Minnesota, on 19 , at o'clock in the forenoon, why his letters should not be revoked.

It is further ordered that said citation be personally served on said on or before 19 .

Dated 19 .

.....

Judge.

1473. Citation to representative to show cause why his letters should not be revoked.

[Title as in § 1396.]

The State of Minnesota to , [administrator] of the estate of the above named decedent:

It having been made to appear to this Court that you are wasting, embezzling and mismanaging said estate, and an order having been made by the Court suspending your powers as such [administrator] pending an investigation of the matter,

You are hereby cited and required to show cause, if any you have, before this Court at its court room in the Court-House in the city of county, state of Minnesota, on 19 , at

o'clock in the forenoon, why your letters of administration should not be revoked.

Witness the Judge of said Court and the seal thereof this day of

19

Dated 19 .

.....

Judge.

1474. Order restoring powers of representative.

[Title as in § 1396.]

The powers of , as [administrator] of the estate of the above named decedent, having been suspended by an order of this Court made on 19 , pending an investigation of his management of said estate, and it appearing to the satisfaction of the Court on such investigation that said [administrator] has not been guilty of any conduct in the management of said estate justifying his removal,

It is ordered that his powers as such [administrator] be and the same are hereby restored.

Dated 19 .

.....

Judge.

1475. Petition for revocation of letters of administration by one having prior right to appointment.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I.-IV. as in § 1448.

V. That on 19 , this Court appointed , [a creditor] of said decedent, as administrator of the estate of said decedent, and on the same day letters of administration were accordingly issued to said , as such administrator, and thereupon said duly qualified and is now acting as such administrator.

VI. That your petitioner is the [son] of said decedent and ever since the latter's death has been and now is suitable and qualified to act as such administrator, and has a right to appointment as such prior to that of said .

VII. That from 19 to 19 , your petitioner was absent from the state and did not learn of the death of said decedent until 19 , and had no personal notice or knowledge of the pendency of the proceedings wherein said administrator was appointed, and did not learn of his appointment until 19 , [or otherwise excuse failure to oppose appointment of acting [administrator]].

Wherefore your petitioner prays that said letters of administration

to said be revoked, and that letters of administration on the estate of said decedent be granted to your petitioner.

.....

Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1476. Order for hearing and for citation on petition for revocation of letters.

[Title as in § 1396.]

The petition of , praying that the letters of administration on the estate of the above named decedent heretofore issued by this Court to be revoked and that letters of administration on said estate be granted to the petitioner on the ground of prior right thereto, having been filed in this Court on 19 ,

It is ordered [continue as in § 1400 and provide for personal service of the citation on the acting administrator].

1477. Citation on petition for revocation of letters.

[Title as in § 1396.]

The State of Minnesota to [acting administrator] and all persons interested in the estate of the above named decedent:

The petition of , praying that the letters of administration on the estate of said decedent heretofore issued by this Court to be revoked, and that letters of administration on said estate be granted to the petitioner on the ground of prior right thereto, having been filed in this Court,

You are hereby cited [continue as in § 1401].

1478. Order revoking letters of administration and appointing person with prior right.

[Title as in § 1396.]

The petition of , filed herein on 19 , praying that the letters of administration on the estate of the above named decedent heretofore issued by this Court to be revoked, and that letters of administration on said estate be granted to the petitioner on the ground of prior right thereto, coming on for hearing on this day pursuant to an order of this Court made on 19 , and proof of the due service of the citation required by said order having been filed, and it appearing to the satisfaction of the Court from said petition, and from the evidence received on the hearing, and from the files, records and prior proceedings of this administration, that [all the allegations of said petition are true] [or state the facts proved],

It is ordered that the letters of administration on the estate of the above named decedent heretofore issued to be and the same are hereby revoked, and that said petitioner be and he is hereby appointed administrator of said estate, and that letters of administration thereon be issued to him accordingly, upon his filing an oath as required by law and a bond in the penal sum of \$, with sufficient sureties, conditioned for the faithful discharge of all the duties of his trust according to law and approved by the Judge of this Court.

Dated 19 .

.....
Judge.

1479. General bond of executor or administrator—Oath.

[Title as in § 1396.]

Know all men by these presents that we, , as principal, and and , as sureties, all residents of county, state of Minnesota, are bound unto , Judge of the above named Court, and his successors in office, in the sum of dollars, to the payment of which to the said Judge or his successors in office, we jointly and severally bind ourselves, our heirs, executors and administrators, by these presents.

The condition of this obligation is such that whereas the said has been appointed by said Court [executor of the last will] [administrator with the will annexed of the estate] [administrator of the estate] [administrator of the estate not already administered] [special administrator of the estate] of the above named decedent,

Now, therefore, if the said shall faithfully discharge all the duties of his trust as such [executor] [administrator] according to law, then this obligation shall be void; otherwise to remain in full force.

In witness whereof we have hereunto set our hands this day of 19 .

.....
.....
.....

Executed in presence of

.....
.....

[Acknowledgment as in § 1407.]

[Justification of sureties as in § 1408.]

I hereby approve the foregoing bond and the sureties thereon.

Dated 19 .

.....
Judge.

OATH OF REPRESENTATIVE

[Venue.]

I, , do swear that I will faithfully and justly perform all the duties of the office and trust which I now assume as representative of the estate of , deceased, to the best of my ability. So help me God.

.....

[Jurat as in § 1406.]

1480. Same with surety company as surety.

[Title as in § 1396.]

Know all men by these presents that we , of as principal, and , a corporation with its principal office at , county, state of , duly authorized by law and its articles of incorporation to contract as surety on bonds and holding the certificate of the Insurance Commissioner of the state of Minnesota showing that it is authorized to contract as surety on bonds in the state of Minnesota, as surety, are bound unto , Judge of the above named Court, and his successors in office, in the sum of dollars, to the payment of which to the said Judge or his successors in office, we jointly and severally bind ourselves, our heirs, executors and successors, by these presents.

The condition [continue as in preceding form to testimonium clause].

In witness whereof said principal has hereunto signed his name and said surety has signed its name and affixed its corporate name [and seal] by its duly authorized officer, this day of 19 .

[Corporate seal.]

.....
.....

By [President.]

It is usual but clearly not necessary to affix the corporate seal.

[Acknowledgment of principal as in § 1407.]

[Venue.]

On this day of 19 , before me appeared , to me personally known, who, being by me duly sworn, did say that he is the [president] [or other officer or agent] of , a corporation; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was executed in behalf of said corporation by authority of its board of directors; and the said acknowledged said instrument to be the free act and deed of said corporation.

[Jurat as in § 1406.]

.....

I hereby approve the foregoing bond and the surety thereon.

Dated 19 .

.....
Judge.

[Oath of representative as in § 1479.]

1481. Bond of sole or residuary legatee under G. S. 1913, § 7417.

[Title as in § 1396.]

Know all men by these presents that we, , as principal, and
and , as sureties, all residents of county, state
of Minnesota, are bound unto , Judge of the above named Court,
and his successors in office, in the sum of dollars, to the payment
of which to the said Judge or his successors in office, we jointly and
severally bind ourselves, our heirs, executors and administrators, by
these presents.

The condition of this obligation is such that whereas said has
been appointed by the above named Court [executor of the last will and
estate] [administrator with the will annexed of the estate] of the above
named decedent and is also the [sole] [residuary] legatee under said
will,

Now, therefore, if the said shall pay all the debts and leg-
acies of said testator according to law, [so far as there are assets of said
estate for that purpose], then this obligation shall be void; otherwise
to remain in full force.

In witness whereof we have hereunto set our hands this day
of 19 .

.....
.....
.....

Executed in presence of

.....
.....

[Acknowledgment as in § 1407.]

[Justification of sureties as in § 1408.]

I hereby approve the foregoing bond and the sureties thereon.

Dated 19 .

.....

[Oath of representative as in § 1479.]

1482. Petition for additional bond under G. S. 1913, § 7422.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That he is [a creditor of the above named estate] and personally interested therein.

II. That the sureties of the [administrator] of said estate have become insolvent.

Wherefore your petitioner prays that said [administrator] be ordered to give an additional bond with sufficient sureties.

.....
Petitioner.

.....
Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1483. Order for citation on petition under G. S. 1913, § 7422.

[Title as in § 1396.]

The petition of _____, praying that _____ the [administrator] of the estate of the above named decedent be required to give an additional bond, having been filed in this Court on _____ 19 _____,

It is ordered that a citation issue to said [administrator] requiring him to appear before this Court at its court room in the Court-House in the city of _____, _____ county, state of Minnesota, on _____ 19 _____, at _____ o'clock in the forenoon, and show cause why he should not give an additional bond; and it is further ordered that such citation be personally served on said [administrator] [and his bondsmen] at least _____ days prior to said day of hearing.

Dated _____ 19 _____.

.....
Judge.

1484. Citation for additional bond under G. S. 1913, § 7422.

[Title as in § 1396.]

The State of Minnesota to _____, [administrator] of the estate of the above named decedent:

The petition of _____, having been filed in this Court, representing that the sureties on your bond have become insolvent and praying that you be required to give an additional bond,

You are hereby cited and required to appear before this Court at its court room in the Court-House in the city of _____, in _____ county,

state of Minnesota, on 19 , at o'clock in the forenoon, and show cause why you should not give an additional bond.

Witness the Judge of said Court and the seal thereof this day of 19 .

.....
Judge.

[Seal of court.]

.....

Attorney for Petitioner.

[Office and post office address.]

1485. Order for additional bond under G. S. 1913, § 7422.

[Title as in § 1396.]

The petition of , filed herein on 19 , representing that the sureties of the [administrator] of the estate of the above named decedent have become insolvent and praying that said [administrator] be required to give an additional bond, coming on for hearing on this day pursuant to an order of this Court made on 19 , and it appearing to the satisfaction of the Court on the hearing that all the allegations of said petition are true and that the sureties on the bond of said [administrator] filed herein on 19 , have become insolvent,

It is ordered that said [administrator], within days from the date of this order, file an additional bond in the penal sum of \$, with sufficient sureties, conditioned as provided by law and approved by the Judge of this Court.

Dated 19 .

.....
Judge.

1486. Additional bond.

[Title as in § 1396.]

[Same as in § 1479 down to "Now, therefore"], and whereas the above named Court on 19 , made an order requiring said [executor] [administrator] to file an additional bond,

Now, therefore, [continue as in § 1479].

1487. Petition of surety for discharge under G. S. 1913, § 7423.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That on 19 , was appointed representative of the above named decedent by this Court and thereupon gave a bond for the faithful discharge of said trust, which was filed in this Court on 19 , and is still in force, and said estate is not yet fully administered.

II. That your petitioner is one of the sureties on said bond but de-

sires to be discharged from further liability as such, as provided by General Statutes, 1913, § 7423.

Wherefore your petitioner prays that said representative be ordered to furnish a new bond and that the petitioner be discharged from further liability as such surety.

.....

Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

**1488. Order granting foregoing petition and requiring new bond—
Discharge of surety.**

[Title as in § 1396.]

The petition of _____, having been filed in this Court on 19____, praying to be discharged from further liability as surety on the bond of _____, representative of the above named decedent, filed herein on 19____,

It is ordered that said representative furnish a new bond in the penal sum of \$_____, with sufficient sureties, conditioned as provided by law and approved by the Judge of this Court, within ten days after personal service of this order upon him, and that said _____, be and he is hereby discharged from all liability as such surety for any act or omission of said representative committed after the time such new bond is approved and filed herein.

Dated 19____.

.....

Judge.

1489. Petition for leave to sue on probate bond.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That on 19____, _____ was appointed by this Court [administrator] of the estate of the above named decedent.

II. That thereupon said _____ duly qualified as such administrator and on 19____, filed in this Court his bond in the penal sum of \$_____, with _____ and _____, as sureties, conditioned for the faithful discharge of all the duties of his trust as such administrator according to law, and approved by the Judge of this Court, and at all the times hereinafter mentioned said bond was in full force and effect and said _____ was acting as such [administrator].

III. That your petitioner is one of the [heirs] [or state other facts

giving the petitioner a status to make the petition] and his residence and post office address is No. , in the city of county, state of Minnesota.

IV. That [allege facts constituting a breach of the bond resulting in prejudice to petitioner].

Wherefore your petitioner prays leave to sue said , and and , on said bond.

.....
Petitioner.

.....
Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1490. Leave to sue on probate bond.

[Title as in § 1396.]

The petition of , filed herein on 19 , praying for leave to sue on the bond of the [administrator] of the estate of the above named decedent, having been considered by the Court, and it appearing to the satisfaction of the Court that all the allegations thereof are true.

It is ordered that said petitioner be and he is hereby granted leave to sue in his own name and for his own benefit and and and , on the bond of the said , filed herein on 19 .

Dated 19 .

.....
Judge.

1491. Order limiting time to settle estate.

[Title as in § 1396.]

Letters [testamentary] [of administration] on the estate of the above named decedent having been this day granted by this Court to .

It is ordered that said [executor] [administrator] be and he is hereby allowed months from the date hereof for the settlement of said estate.

Dated 19 .

.....
Judge.

1492. Petition for extension of time for settlement of estate.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That he is the [administrator] of the estate of the above named decedent duly appointed as such by this Court on 19 .

II. That the time limited by this Court on 19 , for the settlement of said estate will expire on 19 .

III. That your petitioner [cannot advantageously] [is unable to] settle said estate within the time so limited for the reason that [state pendency of actions or other cause], and it would therefore be for the best interests of said estate and all persons interested therein that the time for the settlement thereof be extended.

Wherefore your petitioner prays that the time for the settlement of said estate be extended months from 19 , or for such further period as to the Court may seem best.

.....

Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1493. Order extending time for settlement of estate.

[Title as in § 1396.]

The petition of , [administrator] of the estate of the above named decedent, praying for an extension of time in which to settle said estate, having been filed herein on 19 , and it appearing to the satisfaction of the Court from said petition and from an examination of the petitioner and from the prior proceedings in this administration, that all the allegations of said petition are true and that there should be an extension of time as therein prayed,

It is ordered that the time for the settlement of said estate be and the same is hereby extended for months from 19 .

Dated 19 .

.....

Judge.

1494. Petition for allowance to widow pending administration under G. S. 1913, § 7243[3].

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That she is the widow of , deceased, late of county, state of Minnesota.

II. That said decedent died [testate] [intestate] on 19 , and on 19 , letters [testamentary] [of administration] on his estate were duly issued by this Court to , a resident of this county.

III. [That in the last will of said decedent which was duly admitted

to probate by this Court on 19 , the testator made no provision for your petitioner specifically in lieu of all other allowances.]

IV. That said decedent left surviving him, besides your petitioner, [three] children, whose names and ages are as follows:

Name.	Age.
.....
.....
.....

V. That said children all reside with your petitioner in the city of , county of, , state of Minnesota, and, with your petitioner, constitute the surviving family of said decedent.

VI. That your petitioner and said children are entirely dependent on the estate of said decedent for their maintenance during the settlement of such estate and the sum of \$ per month is a reasonable amount for their maintenance, according to their circumstances, pending such settlement.

Wherefore your petitioner prays for the allowance to her of said amount for the maintenance of herself and said children during the settlement of said estate.

.....
Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1495. Order for allowance to widow pending administration under G. S. 1913, § 7243[3].

[Title as in § 1396.]

The petition of , widow of the above named decedent, praying for an allowance for the maintenance of herself and her children during the settlement of this estate, having been filed herein on 19 , and it appearing to the satisfaction of the Court from said petition and an examination of the petitioner, and from the files, records and prior proceedings of this administration, that all the allegations of said petition are true, and that the sum of \$ per month is a reasonable amount for the maintenance of said petitioner and her children during the settlement of said estate,

It is ordered that the sum of \$ per month out of the estate of said decedent be and the same is hereby allowed to the petitioner for the maintenance of herself and her children, constituting the family of said decedent, during the settlement of said estate, and the representative of said decedent is hereby ordered to pay that amount out of [the personal assets of] said estate to the petitioner on the first day of each

month, during the settlement of said estate, beginning 19 . ,
and continuing until the distributive share of the petitioner in the residue of the personal estate of said decedent is assigned to her, if the estate is solvent, and if the estate is insolvent until one year from 19 .

Dated 19 .

.....

Judge.

1496. Order appointing appraisers of estate.

[Title as in § 1396.]

Letters [of administration] [testamentary] on the estate of the above named decedent having been granted to , and it appearing that said decedent left an estate which should be appraised, [on application of said representative],

It is ordered that and , of said county, be and they are hereby appointed appraisers of said estate and authorized to appraise the same according to law, upon the inventory thereof to be presented to them by said representative.

Dated 19 .

.....

Judge.

1497. Inventory and appraisalment of estate.

[Title as in § 1396.]

OATH OF APPRAISERS

[Venue.]

and , each for himself, do solemnly swear that I will faithfully and justly perform all the duties of the office and trust which I now assume as appraiser of the estate of , deceased, to the best of my ability. So help me God.

.....

.....

[Jurat as in § 1406.]

INVENTORY AND APPRAISEMENT

The following is a true and full inventory of all the real and personal property of the estate of the above named decedent, [situated in this state,] which has come into my possession or knowledge, after diligent search and inquiry therefor.

.....

[Executor.] [Administrator.]

Class 1.	Real Estate.	Value.
Homestead of decedent.		
.....	
Other real estate.		.....
.....	
.....	
.....	
.....	
Total, \$		.....
Class 2.	Furniture and household goods.	Value.
.....	
.....	
.....	
.....	
.....	
Total, \$		.....
Class 3.	Wearing apparel and ornaments.	Value.
.....	
.....	
.....	
.....	
Total, \$		.....
Class 4.	Stocks in banks and other corporations.	Value.
.....	
.....	
.....	
Total, \$		.....
Class 5.	Mortgages, bonds, notes and other written evidence of debt.	Value.
.....	
.....	
.....	
.....	
Total, \$		.....
Class 6.	All other personal property.	Value.
.....	
.....	
.....	
.....	
Total, \$		.....
Total real estate, \$		.....
Total personal estate, \$		.....
Total estate, \$		.....

CERTIFICATE OF APPRAISERS

We, the duly appointed appraisers of the estate of the above named decedent, do hereby certify that, having first taken and subscribed the foregoing oath, we have appraised all the property described in the above inventory, exhibited to us by the representative of said decedent, and have classed the different items under their respective heads, and have set down opposite to each item, in figures, the value thereof in money, as by us determined, and have footed up by itself the amount of each class, and the total of said estate.

Dated 19 .

.....

Appraisers.

VERIFICATION BY REPRESENTATIVE

[Venue.]

being duly sworn, says that he is the representative of the above mentioned estate, that he has read the foregoing inventory and knows the contents thereof, and that the same is true of his own knowledge, save as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

[Jurat as in § 1406.]

.....

Copies must be prepared for the county treasurer and the attorney general where there may be inheritance taxes. See G. S. 1913, § 2289.

1498. Petition for setting apart homestead and personal property under G. S. 1913, § 7307.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That she is the surviving wife of the above named decedent.

II. That said decedent left surviving him [three] children whose names and ages are as follows:

Name.

Age.

.....

III. That said decedent also left surviving him [three] grandchildren, the issue of , a deceased child of said decedent, whose names and ages are as follows:

Name.

Age.

.....

IV. That at the time of his death said decedent owned and occupied, as the homestead of himself and his family, the following described real property, situated in _____ county, state of Minnesota.

V. That the following is a description of the personal property left by said decedent, and the value thereof according to the inventory and appraisal heretofore returned to this Court, which the petitioner hereby selects and to which she is entitled as such surviving wife under the provisions of General Statutes, 1913, § 7243[1]:

Description.	Appraised value.
.....
.....
.....
.....
	Total, \$

Wherefore your petitioner prays that said homestead be set apart and assigned to the persons entitled thereto and that said personal property be allowed and assigned to her by this Court, as provided by statute.

.....
Petitioner.

.....
Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1499. Order setting apart homestead and personal property under G. S. 1913, § 7307.

[Title as in § 1396.]

The petition of _____, surviving wife of the above named decedent, praying to have the homestead of said decedent set apart and certain personal property of said decedent assigned to her, having been filed herein on _____ 19____, and it appearing to the satisfaction of the Court from said petition [and from an examination of said petitioner and the representative of said decedent,] and from the files, records and prior proceedings of this administration, that all the allegations of said petition are true,

It is ordered that the homestead of said decedent, as hereinafter described, be and the same is hereby set apart and assigned to said petitioner for the term of her natural life, remainder to [name children and grandchildren if any] [children and grandchildren of said decedent]; and that the personal property of said decedent selected by said petitioner in and by said petition and hereinafter described be and the same is hereby allowed and assigned to said petitioner, and the representative

of said decedent is hereby ordered to deliver all of said property, real and personal, to said petitioner immediately.

The homestead so set apart is described as follows:

.....
.....

The personal property so selected, allowed and assigned is described as follows:

Description.	Appraised value.
.....
.....
.....
.....

Total, \$

Dated '19 .

.....
Judge.

1500. Petition by guardian of minors for setting aside homestead and personal property under G. S. 1913, § 7307.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That he is, and ever since , 19 , has been, the general guardian of the person and estate of the following described minor children of the above named decedent, duly qualified and acting as such under letters of guardianship duly issued to him on that date by [this Court] [the Probate Court for county, Minnesota].

II. That said decedent left no surviving spouse, no surviving adult children and no surviving issue of any deceased child of his, but left surviving him [three] minor children whose names and ages are as follows:

Name.	Age.
.....
.....
.....

III. That at the time of his death said decedent owned and occupied, as the homestead of himself and his family, the following described real property situated in county, state of Minnesota.

.....
.....

IV. That the following is a description of the personal property, left by said decedent, and the value thereof according to the inventory and

appraisal heretofore returned to this Court, which the petitioner, as such guardian, hereby selects on behalf of said minor children and to which they are entitled under the provisions of General Statutes 1913, § 7243:

Description.	Appraised value.
.....
.....
.....
.....
.....
	Total, \$

Wherefore your petitioner, as such guardian, prays that said homestead be set apart and assigned to said minor children and that said personal property be allowed and assigned to said minor children as provided by statute.

.....
Petitioner.

.....
Attorney for Petitioner.
[Office and post office address.]
[Verification as in § 1405.]

1501. Order setting apart homestead and personal property to children.

[Title as in § 1396.]

The petition of _____, guardian of the person and estate of the minor children of the above named decedent, praying to have the homestead of said decedent set apart and certain personal property of said decedent assigned to said children, having been filed herein on 19____, and it appearing to the satisfaction of the Court from said petition [and from an examination of said petitioner and the personal representative of said decedent] and from the files, records and prior proceedings of this administration, that all the allegations of said petition are true,

It is ordered that the homestead of said decedent, as hereinafter described, be and the same is hereby set apart and assigned to

_____ children of said decedent, and that the personal property of said decedent, selected by said petitioner on behalf of said children in and by said petition and hereinafter described, be and the same is hereby allowed and assigned to said children, and the representative of said decedent is hereby ordered to deliver all of said property, real and personal, to said guardian for said children immediately.

The homestead so set apart is described as follows:

.....
.....

The personal property so selected, allowed and assigned is described as follows:

Description.	Appraised value.
.....
.....
.....
.....
	Total, \$
Dated 19 .	.....
	Judge.

1502. Order limiting time to present claims under G. S. 1913, § 7320.

[Title as in § 1396.]
Letters [testamentary] [of administration] having been this day granted to , by this Court in the above named estate,
It is ordered that the time within which creditors may present claims against said estate to this Court for allowance be, and the same is hereby limited to months from the date hereof; and that the day of , 19 , at o'clock in the forenoon, in the court room of this Court in the Court-House in the city of , in county, state of Minnesota, be and the same is hereby fixed as the time and place when and where proofs will be heard and such claims examined and adjusted by this Court.
Dated 19 .

.....
Judge.
Let the foregoing order be published as provided by law in the , a [weekly] [daily] newspaper published in county, state of Minnesota.
Dated 19 .

.....
Judge.
See § 43. The latter order need not be published.

1503. Same—No debts—Limitation of three months.

[Title as in § 1396.]
Letters [testamentary] [of administration] having been this day granted to , by this Court on the above named estate, and it appearing by the affidavit of said representative that there are no debts against said estate,
It is ordered that the time within which creditors may present claims against said estate to this Court for allowance be, and the same is hereby limited to three months [continue as in § 1502].

1504. Affidavit of no debts under G. S. 1913, § 7320.

[Title as in § 1396.]

[Venue.]

being duly sworn, says that he is the representative of the above named decedent, duly appointed and qualified as such in the above named Court; that he is acquainted with the condition of the estate of said decedent and there are no debts or claims against said estate, so far as he knows and as he verily believes.

[Jurat as in § 1406.]

1505. Petition for extension of time to present claim under G. S. 1913, § 7322.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That he has a valid claim, arising upon contract, against the estate of the above named decedent, which he desires to present to and have allowed by this Court.

II. That he failed to present said claim within the time allowed by the order of this Court made on 19 , for the reason that [state reason and show that he moved with due diligence after learning of his default].

III. That an itemized written statement of said claim, duly verified, which he desires this Court to receive, hear and allow, is hereto attached, marked Exhibit A, and made a part hereof.

IV. [That an affidavit of his attorney, , excusing the neglect of said attorney to present said claim within the time required as aforesaid, is hereto attached, marked Exhibit B, and made a part hereof.]

V. That the final account of the representative of said decedent has not been settled and a period of one year and six months has not expired since notice of the order of this Court limiting the time to present claims in said estate was given.

VI. That the residence and address of your petitioner is No. in the city of , county, state of .

Wherefore your petitioner prays that said claim be received, heard and allowed at such time as the Court may order.

.....
Petitioner.

.....
Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1506. Order for hearing on petition for extension of time to present claims under G. S. 1913, § 7322.

[Title as in § 1396.]

The petition of _____, a claimant against the estate of the above named decedent, praying that his claim be received, heard and allowed after the time limited for the presentation of claims, having been filed herein on _____ 19 _____,

It is ordered that the same be heard before the Court at its court room in the Court-House in the city of _____, _____ county, state of Minnesota, on _____ 19 _____, at _____ o'clock in the forenoon, and that if said petition be granted, that said claim be then and there received, examined and allowed or disallowed by the Court without further notice, and that copies of said petition and accompanying exhibits and of this order be [personally] served upon, _____, representative of said decedent at least _____ days prior to said day of hearing [in the manner of the service of a summons in a civil action].

Dated _____ 19 _____.

.....
Judge.

1507. Statement of claim—Verification—Allowance or disallowance.

[Title as in § 1396.]

STATEMENT OF CLAIM

The undersigned, residing at No. _____ in the city of _____, state of _____, hereby presents the following claim, arising upon contract, belonging to him, against the estate of the above named decedent:

Nature of claim.

Amount
of claim.

For [groceries] sold and delivered by the claimant to said decedent, at his request, between _____ 19 _____, and _____ 19 _____, [at the agreed price of \$ _____,] [of the reasonable value of \$ _____,] as will more fully appear by an itemized statement of account hereto attached, marked Exhibit A, and made a part hereof. The amount now due to claimant therefor is... \$ _____

[Said claim was duly assigned to the claimant herein by the said _____, on _____ 19 _____, for a valuable consideration.]

.....
By, _____, [Agent of Claimant].

For other forms see § 1508. Forms may be readily prepared by adapting forms of complaints found in Dunnell, Minn. Pl. [2 ed.] under the appropriate heads. A statement of claim need not be as full and exact as a complaint or contain all the facts essential to a cause of action. See § 890.

VERIFICATION OF CLAIM

[Venue.]

being duly sworn, says that he is the [above named claimant] [agent of the above named claimant and has personal knowledge of all the facts of the foregoing claim]; that the foregoing claim is a valid claim against the estate of the above named decedent and justly due to said claimant; that the balance due thereon is \$, with legal interest on that amount from 19 ; that no payments have been made thereon that are not credited; and that there are no offsets thereto known to affiant; [that the reason why this affidavit is not made by the claimant personally is that he is absent from the state].

[Jurat as in § 1406.]

.....

ORDER ALLOWING CLAIM

The foregoing claim of , having been filed in this Court on 19 , and it appearing to the satisfaction of the Court that it was duly presented to the Court in the manner and within the time required by law and the order of the Court made on 19 ; that it arises upon contract, belongs to said claimant, and is a valid claim against the estate of the above named decedent to the amount of \$ [subject, however, to a certain offset thereto filed herein on 19 , by the representative of said decedent, which the Court finds to be a valid offset to the amount of \$,] [and the representative of said decedent making no objection thereto,]

It is ordered that said claim be and the same is hereby allowed against said estate in the amount of \$, with interest thereon at the rate of 6 per cent. per annum from the date hereof until paid, [and disallowed to the amount of \$].

Dated 19 .

.....

Judge.

ORDER WHOLLY DISALLOWING CLAIM

The foregoing claim of , having been filed in this Court on 19 , and it appearing to the satisfaction of the Court that it [was duly presented to the Court in the manner and within the time required by law and the order of the Court made on 19 ; that it arises upon contract and belongs to said claimant, but that it] is not a valid claim against the estate of the above named decedent in any amount for the reason that [state reason], it is therefore ordered that said claim be and the same is hereby wholly disallowed.

Dated 19 .

.....

Judge.

1508. Various statements of claim.

Nature of claim.

Amount
of claim.

On a promissory note made and delivered by the above named decedent to [claimant] on 19 , which is hereby attached, marked Exhibit A, and made a part hereof, the amount now due claimant thereon being..... \$

On a promissory note secured by a real estate mortgage, copies of which are hereto attached, marked Exhibit A and B, respectively, and made a part hereof. Said mortgage is recorded in the office of the register of deeds for county, Minnesota, in Book A of Mortgages, on page . The amount now due claimant on said note is..... \$

For the breach by said decedent of a certain written contract entered into by said decedent and the claimant on 19 , which is hereto attached, marked Exhibit A, and made a part hereof. The claimant has suffered damages from said breach in the amount of..... \$

For services rendered as a [household servant] [clerk] [or otherwise according to the facts] by claimant for the above named decedent, at his request, [on 19 ,] [between 19 and 19 ,] [at the agreed price of \$,] as will more fully appear by an itemized statement of account hereto attached, marked Exhibit A, and made a part hereof. The amount now due claimant for such services is.... \$

See Dunnell, Minn. Pl. [2 ed.] § 1951.

1509. Verification by corporation.

[Title as in § 1396.]

{Venue.}

being duly sworn, says that the , the above claimant, is a corporation; that he is the [president] thereof and personally acquainted with all the facts of said claim, that said claim [continue as in § 1507].

1510. Verification by partnership.

[Title as in § 1396.]

[Venue.]

being duly sworn, says that the , the above named claimant is a partnership, doing business under the above firm name; that the members of said firm are ; that he has personal knowledge of all the facts of the foregoing claim; that said claim [continue as in § 1507].

1511. Statement of offset or objections by representative.

[Title as in § 1396.]

Now comes the representative of the above named decedent and makes and files the following objections and offset to the claim of filed herein on 19 .

I. As an objection to the allowance of said claim said representative alleges that [state objection].

II. As an offset to said claim said representative alleges that [set out facts constituting an offset].

Wherefore said representative prays that said claim be [wholly disallowed] [allowed only in the amount of \$, and disallowed in the amount of \$] [allowed subject to a deduction in the amount of said offset].

.....
Representative.

.....
Attorney for Representative.

[Office and post office address.]

[Verification as in § 1405.]

1512. Presentation of claim against representative under G. S. 1913, § 7985.

[Title as in § 1396.]

To ,

[Administrator] of the estate of the above named decedent.

The undersigned has a claim against you in your capacity as [administrator] of the estate of the above named decedent in the sum of \$, with interest thereon at per cent. per annum from 19 , which he hereby presents to you and demands payment thereof. Said claim arises out of the following facts: [Set out the ultimate facts.]

.....
Claimant.

[Address.]

.....
Attorney for Claimant.

[Office and post office address.]

[Venue.]

, being first duly sworn, says that he is the claimant making and presenting the foregoing claim; that the facts therein stated are true; that the amount of said claim, to wit, \$, is justly due to him thereon; that no payments have been made thereon that are not credited; and that there are no offsets thereto known to the affiant.

.....
[Jurat as in § 1406.]

1513. Petition for compromise or arbitration of claim in favor of estate.

[Title as in § 1396.]

To the above named Court.

Your petitioner respectfully represents:

I. That he is the [administrator] of the estate of the above named decedent duly appointed as such by this Court on 19 .

II. That said estate has a claim against , a resident of , county, state of , for the sum of \$, arising out of [state the ultimate facts].

III. That there is a controversy between your petitioner and said , respecting the facts and amount [validity] of said claim and there is reasonable doubt respecting the same.

IV. That it is probable that a compromise of said claim may be made on [state terms].

V. That it is for the best interests of said estate, and of all persons interested therein, that a compromise of said claim on said terms should be made, or the claim submitted to arbitration.

Wherefore your petitioner prays that he be authorized to compromise said claim on said terms or submit it to arbitration.

.....

Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1514. Order for compromise or arbitration of claims.

[Title as in § 1396.]

The petition of , representative of the above named decedent, praying for authority to compromise or submit to arbitration a certain claim of said estate against , having been filed herein on 19 , and it appearing to the satisfaction of the Court from said petition, and from an examination of said representative, that all the allegations of said petition are true, and that it is for the best interests of said estate and of all persons interested therein, that said claim should be compromised or submitted to arbitration as prayed,

It is ordered that said representative be and he is hereby authorized to compromise said claim for a sum not less than \$, or to submit the same to arbitration, as he may deem best.

Dated 19 .

.....

Judge.

1515. Petition for compounding claim of estate.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That he is the [administrator] of the estate of the above named decedent, duly appointed as such by this Court on 19 .

II. That said estate has a claim in the sum of \$, appraised at that amount in the inventory and appraisalment herein, against , a resident of , county, state of , arising out of [state ultimate facts].

III. That said is unable to pay all his debts in full and offers to enter into a composition agreement with his creditors if they will agree with him and with each other to accept per cent. of their respective claims in full satisfaction and discharge thereof and to release him from the balance.

IV. That said percentage is a just and fair dividend of the effects of said , and it is for the best interests of said estate and all persons interested therein that your petitioner enter into said agreement and accept said percentage in behalf of said estate.

Wherefore your petitioner prays that he be authorized to enter into said agreement and accept said percentage of said claim in behalf of said estate.

.....

Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1516. Order for compounding claim of estate.

[Title as in § 1396.]

The petition of , representative of the above named decedent, praying for authority to compound a certain claim of said estate against , having been filed herein on 19 , and it appearing to the satisfaction of the Court from said petition, and from an examination of said representative, that all the allegations of said petition are true, and that it is for the best interests of said estate, and of all persons interested therein, that said claim should be compounded as prayed,

It is ordered that said representative be and he is hereby authorized to enter into the composition agreement mentioned in said petition, and to accept per cent. of said claim in full satisfaction and discharge

thereof, and to release said from the balance thereof, on behalf
of said estate.

Dated 19 .

.....
Judge.

1517. Petition by representative for sale of personal property.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That he is the [administrator of the estate] of the above named
decendent, duly appointed as such by this Court on 19 .

II. That the claims against said estate, so far as they can be ascer-
tained by your petitioner, amount to approximately \$.

III. That the expenses of administration of said estate will amount
approximately to \$.

IV. [That the pecuniary legacies in the last will of said decendent pay-
able out of the personal assets of said estate amount to \$].

V. That your petitioner has in his hands of said estate cash amount-
ing to \$.

VI. That it is necessary, and for the best interests of said estate and
all persons interested therein, to sell certain personal property of said
estate to pay said claims, expenses of administration [and legacies], and
your petitioner proposes for sale for said purposes the following per-
sonal property of said estate [for which he has received advantageous
offers as indicated] :

Description of property.	Appraised value.	Price offered.
.....		
.....		
.....		
.....		

Wherefore your petitioner prays that he be licensed to sell said prop-
erty, or any part thereof, for said purposes, in such manner and upon
such terms as to the Court may seem best.

.....
Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1518. Order authorizing representative to sell personal property.

[Title as in § 1396.]

The petition of _____, representative of the above named decedent, praying for a license to sell certain personal property belonging to the estate of said decedent hereinafter described, having been filed herein on _____ 19____, and it appearing to the satisfaction of the Court from said petition and from an examination of said representative and from the files, records and prior proceedings of this administration, that all the allegations of said petition are true, and that it is necessary and for the best interests of said estate and of all persons interested therein that said property should be sold as prayed,

It is ordered that said petitioner be and he is hereby licensed to sell the following described personal property of said estate, or any part thereof, for the purposes mentioned in said petition [for cash] [at private sale without notice] [at the price mentioned in said petition as offered therefor] [at the best price obtainable] [for a total amount not less than _____ dollars] [at a price not more than _____ per cent. below its appraised value] [at public auction, upon such notice as he may deem proper, to the highest bidder for cash] [as he may deem best].

Property authorized to be sold:

.....
.....
.....
.....

Dated _____ 19____.

.....
Judge.

1519. Petition of representative to sell real estate of decedent under G. S. 1913, § 7348.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That he is the [executor] [administrator] of the [will and] estate of the above named decedent, duly appointed as such by this Court on _____ 19____.

II. That the personal property of said decedent which has come into his hands as such representative is of the following character and value:

Description.	Value.
.....
.....
.....
.....
Total, \$	

III. That he has disposed of [a part of] said personal property as follows:

Disposition.	Value.
.....
.....
.....
.....
Total, \$	

IV. That there remains in his hands personal property of said decedent undisposed of amounting in value to \$.

V. That the further expenses of administration of said estate will amount to at least \$, as your petitioner verily believes.

VI. That the debts outstanding against said decedent, so far as they can be ascertained by your petitioner, are as follows:

Name of creditor.	Residence.	Amount.
.....
.....
.....
.....
Total, \$		

VII. That the legacies given by said decedent in his last will and remaining unpaid are as follows:

Name of legatee.	Residence.	Amount of legacy.
.....
.....
.....
.....
Total, \$		

VIII. That the description, location, condition and value of all the real estate, other than his homestead, of which said decedent died possessed, are as follows:

Description.	Location.	Condition.	Value.
[1]
[2]
[3]
[4]
Total, \$			

IX. That the names and places of residence of all the persons interested in said real estate are as follows:

Name.	Place of residence.
.....
.....
.....
.....

X. That it is necessary to sell the following described tracts out of the above mentioned real estate in order to pay said debts, legacies and expenses of administration, on account of the insufficiency of the personal estate therefor, and for the best interests of said estate:

Tracts proposed to be sold.

- [1]
- [2]
- [3]
- [4]

XI. [That your petitioner has received an advantageous offer for the purchase of said tracts, to wit: (State amount of offer)].

XII. [That said tract No. 4 was devised by said decedent in his last will and not charged in such devise with the payment of debts.] [That said tract No. 4 has been sold by (heirs) (devisees) of said decedent.] [That none of said tracts was devised by said decedent in his last will or charged with the payment of his debts in a devise]. [That none of said tracts has been sold by heirs or devisees of said decedent.]

Wherefore your petitioner prays for a license to sell said tracts at [public auction] [private sale] for said purposes according to the statutes in such case made and provided.

.....
Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1520. Petition of representative to mortgage real estate under G. S. 1913, § 7348.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I.-IX. as in § 1519.

X. That owing to the insufficiency of the personal assets of said estate for the purpose it is necessary and for the best interests of said estate, and of all persons interested therein, that a part of said real estate should be mortgaged to raise money for the purpose of [state purpose]; that the amount necessary to raise by such means is \$, and the particular tract of said real estate proposed to be mortgaged is described as follows:

Description of tract proposed to be mortgaged.

.....
.....

XI. That said interests will be better protected by mortgaging said property than by selling it for the reason that [state reason].

Wherefore your petitioner prays for a license to mortgage said proposed tract, or such other real estate of said decedent as to the Court may seem best, for the sum of \$ _____, with interest at the rate of _____ per cent. per annum, from the date of such mortgage, for the purpose above stated.

.....
Petitioner.

.....
Attorney for Petitioner.
[Office and post office address.]
[Verification as in § 1405.]

1521. Petition of representative to lease real estate under G. S. 1913, § 7348.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents;

I.-IX. as in § 1519.

X. That it is necessary and for the best interests of said estate, and of all persons interested therein, that the real estate of said decedent, hereinafter described, should be leased for a term of _____ years for the reason that [state reason].

XI. That said interests will be better protected by leasing said property than by selling it for the reason that [state reason].

XII. That the property proposed to be leased is described as follows:

.....
.....

XIII. That the name of the lessee, term, rental and general conditions of the proposed lease are as follows:

.....
.....

Wherefore your petitioner prays for a license to lease said property as herein proposed or as the Court may direct.

.....
Petitioner.

.....
Attorney for Petitioner.
[Office and post office address.]
[Verification as in § 1405.]

1522. Order for hearing and for citation on petition of representative to sell, mortgage or lease real estate of decedent.

[Title as in § 1396.]

The petition of _____, representative of the above named decedent, praying for a license to [sell] [mortgage] [lease] certain real estate of said decedent, having been filed in this Court on _____ 19 _____,

It is ordered [continue as in § 1400].

1523. Citation on petition of representative to sell, mortgage or lease real estate of decedent.

[Title as in § 1396.]

The State of Minnesota to all persons interested in the estate of the above named decedent:

The petition of _____, representative of said decedent, praying for a license to [sell] [mortgage] [lease] certain real estate of said decedent, having been filed in this Court on _____ 19 _____,

You are hereby cited [continue as in § 1401].

1524. Order of license to sell real estate under G. S. 1913, § 7353.

[Title as in § 1396.]

The petition of _____, representative of the above named decedent, filed herein on _____ 19 _____, praying for a license to sell certain lands of said decedent [at public auction] [at private sale,] coming on for hearing on this day, pursuant to an order made by this Court on _____ 19 _____, and proof of the due service of the citation to all persons interested in the estate of said decedent required by said order having been filed, and it appearing to the satisfaction of the Court from said petition and the evidence submitted on the hearing, and from the prior proceedings in this administration, that all the allegations of said petition are true and that it is necessary and for the best interest of said estate and all persons interested therein, for the reasons and purposes stated in said petition, to sell at [private sale] [public auction] the following described tracts of land of said decedent,

[Repeat descriptions as in petition]

- [1]
- [2]
- [3]
- [4]

It is ordered that the petitioner be and he is hereby licensed and authorized to sell said tracts of land for cash at [public auction] [private sale without notice, for an amount not less than their full appraised value] [the offer mentioned in said petition], according to the statutes

in such case made and provided, [separately in the order in which they are arranged above] [separately or in such combination or order as he may deem expedient] [but tract No. (4), shall not be sold until after the sale of the other tracts, having been devised by said decedent and not charged in such devise with the payment of debts] [but tract No. (4) shall not be sold until after the sale of the other tracts, having been sold by (heirs) (devisees) of said decedent].

[And it is further ordered that before the sale of said land or any part thereof the same shall be reappraised as provided by statute, and
and , residents of county, Minnesota, are hereby appointed appraisers and authorized to make such appraisement.]

Dated 19 .

.....

Judge.

1525. Order of license to mortgage real estate under G. S. 1913, § 7353.

[Title as in § 1396.]

The petition of , representative of the above named decedent, filed herein on 19 , praying for a license to mortgage certain real estate of said decedent, coming on for hearing on this day pursuant to an order made by this Court on 19 , and proof of the due service of the citation to all persons interested in the estate of said decedent required by said order having been filed, and it appearing to the satisfaction of the Court, from said petition and the evidence submitted on the hearing, and from the prior proceedings in this administration, that all the allegations of said petition are true, and that it is necessary and for the best interests of said estate and of all persons interested therein that the real estate of said decedent hereinafter described be mortgaged as prayed in said petition, and that said interests will be better protected by mortgaging said property than by selling it,

It is ordered that the petitioner be and he is hereby licensed and authorized to mortgage the [describe property as in petition], of said decedent, for a term not to exceed years, for an amount not to exceed \$, and at a rate of interest not to exceed per cent. per annum; that the proceeds of said mortgage shall only be used for the purpose of ; that before executing said mortgage the petitioner shall file a bond in the penal sum of \$, with sufficient sureties, conditioned as provided by law and approved by the Judge of this Court, [and before delivering said mortgage he shall submit it to the Judge of this Court for his approval].

Dated 19 .

.....

Judge.

1526. Order of license to lease real estate under G. S. 1913, § 7353.

[Title as in § 1396.]

The petition of _____, representative of the above named decedent, filed herein on _____ 19____, praying for a license to lease certain real estate of said decedent, coming on for hearing on this day pursuant to an order made by this Court on _____ 19____, and proof of the due service of the citation to all persons interested in the estate of said decedent required by said order having been filed, and it appearing to the satisfaction of the Court, from said petition and the evidence received on the hearing, and from the prior proceedings in this administration, that all the allegations of said petition are true, and that it is necessary and for the best interests of said estate and of all persons interested therein that the real estate of said decedent hereinafter described be leased as prayed in said petition, and that said interests will be better protected by leasing said property than by selling it,

It is ordered that the petitioner be and he is hereby licensed and authorized to lease the [describe property as in petition], of said decedent, to _____, [and his assigns], for the term of [not more than] _____ years, at an [annual] [monthly] rental of [not less than] \$ _____, payable in advance, [state any other conditions imposed] [and on such further conditions as to the petitioner may seem best] [and before said lease is delivered it shall be submitted to the Judge of this Court for his approval].

Dated _____ 19____.

.....

Judge.

1527. Order appointing a guardian ad litem.

[Title as in § 1396.]

The petition of _____, [administrator] of the estate of the above named decedent, praying for a license to sell certain real estate of said decedent, having been filed in this Court on _____ 19____, and it appearing that _____, residing at _____, is a minor without any general or testamentary guardian and is interested in said estate as an heir of said decedent, and that _____, residing at No. _____, in the city of _____, _____ county, state of Minnesota, is a suitable and competent person to act as special guardian for said minor in the matter of said petition and has consented to act as such,

It is ordered that said _____ be and he is hereby appointed special guardian of said minor for the sole purpose of appearing and caring for the interests of said minor in the proceedings on said petition.

Dated _____ 19____.

.....

Judge.

I, the undersigned, do hereby consent to act as special guardian for , the minor mentioned in the foregoing order, in the proceedings therein specified.

Dated 19 .

.....

**1528. Oath of representative before sale of real estate under
G. S. 1913, § 7354.**

[Title as in § 1396.]

[Venue.]

I, , representative of the above named decedent, do solemnly swear that in disposing of the real estate of said decedent, which I have been licensed to do by an order of the above named Court made on 19 , I will use my best judgment in fixing on the time and place of sale thereof and will exert my utmost endeavors to dispose of the same advantageously to all persons interested therein. So help me God.

.....

[Jurat as in § 1406.]

1529. Bond before sale or mortgage under G. S. 1913, §§ 7354, 7419.

[Title as in § 1396.]

Know all men by these presents that we, , as principal, and and , as sureties, all residents of county, state of Minnesota, are bound unto , Judge of the above named Court, and his successors in office, in the sum of dollars, to the payment of which to the said Judge or his successors in office, we jointly and severally bind ourselves, our heirs, executors and administrators, by these presents.

The condition of this obligation is such that whereas the said , as representative of the above named decedent, has been licensed by an order of the above named Court, made on 19 , to [sell] [mortgage] the following described tract of land situated in county, state of Minnesota, of which said decedent died possessed:

[Describe tracts as in petition.]

.....
.....
.....
.....

Now, therefore, if the said shall faithfully discharge all his duties under said order of license, and shall faithfully account for and

pay over according to law all moneys received on account thereof, then this obligation shall be void; otherwise it shall remain in full force.

In witness whereof we have hereunto set our hands this day
of 19 .

.....
.....
.....

Executed in presence of:

.....
.....

[Acknowledgment as in § 1407.]

[Justification of sureties as in § 1408.]

I hereby approve the above bond and the sureties thereon.

Dated 19 .

.....
Judge.

**1530. Bond to representative under G. S. 1913, § 7363, on sale of land
subject to liens or charges.**

[Title as in § 1396.]

Know all men by these presents that we, , as principal, and
 and , as sureties, all residents of county, state
of Minnesota, are bound unto , representative of the above
named decedent, and his successors in said trust, in the sum of
dollars, to the payment of which to the said , or his successors
in said trust, we jointly and severally bind ourselves, our heirs, execu-
tors and administrators, by these presents.

The condition of this obligation is such that whereas, on 19 ,
said representative, acting under a license granted to him by the above
named Court, sold to said , the [describe land], belonging to the
estate of said decedent, subject to [a certain mortgage thereon executed
by said decedent to , on 19 , for the sum of dol-
lars and interest],

Now, therefore, if the said shall save the estate of said dece-
dent and said representative and his successors in said trust harmless
against all demands, costs, charges and expenses by reason of said
[mortgage], then this obligation, which is given in pursuance of Gen-
eral Statutes, 1913, § 7363, shall be void; otherwise to remain in full
force.

In witness whereof we have hereunto set our hands this day
of 19 .

.....
.....
.....

Executed in presence of:

.....
.....
.....

[Acknowledgment as in § 1407.]

[Justification of sureties as in § 1408.]

I hereby approve the foregoing bond and the sureties thereon.

Dated 19

.....
Judge.

1531. Bond to representative under G. S. 1913, § 7361, on sale of interest of decedent in land contract.

[Title as in § 1396.]

Know all men by these presents that we, , as principal, and and , as sureties, all residents of county, state of Minnesota, are bound unto , [administrator] of the estate of the above named decedent, and his successors in said trust, in the sum of dollars, to the payment of which to the said , or his successors in said trust, we jointly and severally bind ourselves, our heirs, executors and administrators, by these presents.

The condition of this obligation is such that whereas the interest of said decedent in and to the [describe land], under a written contract for the purchase of said land entered into between said decedent and , the owner of said land, on 19 , has been sold to said , by said [administrator], under a license granted to him by the above named Court on 19 , subject to certain payments due and to become due upon said contract,

Now, therefore, if the said shall make all payments due under said contract at the time of said sale on 19 , or which shall hereafter become due thereunder, and fully indemnify and save harmless all persons entitled to the interest of said decedent in said land against all demands, costs, charges and expenses by reason of said contract, then this obligation, which is given in pursuance of General Statutes, 1913, § 7361, shall be void; otherwise to remain in full force:

In witness whereof we have hereunto set our hands this day of 19 .

.....
.....
.....

Executed in presence of:

.....

[Acknowledgment as in § 1407.]

[Justification of sureties as in § 1408.]

I hereby approve the foregoing bond and the sureties thereon.

Dated 19 .

.....
 Judge.

1532. Bond to prevent sale under G. S. 1913, § 7352.

[Title as in § 1396.]

Know all men by these presents that we, , as principal, and
 and , as sureties, are bound unto , Judge of the
 above named Court, and his successors in office, in the sum of
 dollars, to the payment of which to the said Judge or his successors in
 office, we jointly and severally bind ourselves, our heirs, executors and
 administrators, by these presents.

The condition of this obligation is such that whereas , repre-
 sentative of the above named decedent, has petitioned said Court for
 license to sell certain real estate of said decedent to pay debts and leg-
 acies of said decedent and the expenses of the administration of the es-
 tate of said decedent,

Now, therefore, if the said shall pay all the debts, legacies
 and expenses of administration of said estate, so far as personal prop-
 erty of said estate is insufficient therefor, within such time as said Court
 may direct, then this obligation shall be void; otherwise it shall remain
 in full force.

In witness whereof we have hereunto set our hands this day.
 of 19

.....

Executed in presence of:

.....

[Acknowledgment as in § 1407.]

[Justification of sureties as in § 1408.]

I hereby approve the above bond and the sureties thereon.

Dated 19 .

.....
 Judge.

1533. Notice of sale at public auction under G. S. 1913, § 7355.

[Title as in § 1396.]

Notice is hereby given that by virtue and in pursuance of an order made by the above named Court on 19 , the undersigned will, on 19 , at [10] o'clock in the forenoon, at the front door of the Court-House, in the city of , in county, state of Minnesota, sell at public auction to the highest bidder for cash the following tracts of land, of which said decedent died possessed:

[Describe tracts separately as in petition.]

.....
.....
.....
.....

.....
Representative of the above
named Decedent.

.....
Attorney for Representative.
[Office and post office address.]

1534. Reappraisement on private sale under G. S. 1913, § 7356.

[Title as in § 1396.]

OATH OF APPRAISERS

[Venue.]

and , each for himself, solemnly swear that I will faithfully appraise at their full cash value the lands described in an order for the sale thereof made by the above named Court on 19 , in the above entitled matter. So help me God.

.....
.....

[Jurat as in § 1406.]

REAPPRAISEMENT

We, the undersigned appraisers appointed to reappraise the following described tracts of land of the above named [decedent] [ward] by an order of license for the sale thereof made by the above named Court on 19 , do hereby certify that, having first taken and subscribed the foregoing oath, we appraise said tracts separately at their full cash value as follows:

Description of tracts [as in order].	Appraised value.
[1] .....	.....
[2] .....	.....
[3] .....	.....
[4] .....	.....
	Total, \$
Dated 19 .	.....

	Appraisers.

1535. Report of sale of real estate at public auction and petition for confirmation under G. S. 1913, § 7368.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully reports and represents:

I. That on 19 , as representative of the above named decedent, and under and in pursuance of an order of license therefor, made by this Court on 19 , he duly offered and sold at public auction the following described tracts of land, of which said decedent died possessed, [separately and in the following order,] to the purchasers indicated below, they being the highest bidders therefor, for cash, at the prices indicated:

Description of tract.	Name of purchaser.	Price.
[1]
[2]
[3]
[4]
	Total, \$	

II. That before fixing the time and place of said sale he took, subscribed and filed in this Court the oath required by law and executed and filed in this Court a bond as required by law, which was duly approved by the Judge of this Court.

III. That he gave three weeks' published notice of said sale, as required by law, in a duly qualified newspaper published in county, Minnesota, where said tracts of land are situated, as will more fully appear from the affidavit of publication hereto attached, marked "Exhibit A," and made a part hereof, and said sale was made at the time and place specified in said notice, and in accordance therewith.

IV. That said sale was in all respects regularly, legally, and fairly conducted and the sums for which said tracts were sold were not disproportionate to their value, and your petitioner was in nowise interested, directly or indirectly, in the purchase of said real estate.

Wherefore your petitioner prays that said sales be confirmed by this Court and that he be ordered to execute deeds of said tracts to the purchasers thereof upon their complying with the terms of said sale on their part.

.....

Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405, adding "and report."]

1536. Report of sale of real estate at private sale and petition for confirmation under G. S. 1913, § 7368.

[Title as in § 1396.]
To the above named Court:
Your petitioner respectfully reports and represents:

I. That on 19 , as representative of the above named decedent, and under and in pursuance of an order of license therefor made by this Court on 19 , he sold at private sale the following described tracts of land, of which said decedent died possessed, [separately and in the following order] [or otherwise according to the facts], to the purchasers indicated below, for cash, at the prices indicated:

Description of tract.	Name of purchaser.	Price.
[1]
[2]
[3]
[4]
		Total, \$

II. That before making any of said sales he took, subscribed and filed in this Court the oath required by law and executed and filed in this Court a bond as required by law, which was duly approved by the Judge of this Court, and caused said lands to be reappraised as provided by law, and the reappraisal to be filed in this Court.

III. That said sales were in all respects regularly, legally and fairly made and the sums for which said tracts were sold were the highest offered therefor, and not less than the appraised value thereof according to said reappraisement, and not disproportionate to the value thereof, and your petitioner was in nowise interested, directly or indirectly, in the purchase of said real estate.

Wherefore your petitioner prays that said sales be confirmed by this Court and that he be ordered to execute deeds of said tracts to the pur-

chasers thereof upon their complying with the terms of said sale on their part.

.....
Petitioner.

.....
Attorney for Petitioner.
[Office and post office address.]
[Verification as in § 1405, adding "and report."]

**1537. Order confirming sale of real estate at public auction under
G. S. 1913, § 7368.**

[Title as in § 1396 or § 1397.]

The report of _____, [representative of the above named decedent] [guardian of the person and estate of the above named ward], on a sale of real estate of said [decedent] [ward] made by said [representative] [guardian] at public auction on _____ 19____, under a license granted to him by this Court on _____ 19____, having been filed herein on _____ 19____, and it appearing to the satisfaction of the Court from an examination of such report and said [representative] [guardian], and from the files, records and prior proceedings of this [administration] [guardianship], that all the allegations of the report are true and that said sale was in all respects regularly, legally and fairly conducted, and that the amounts bid for the tracts sold were not disproportionate to their value, or not sufficiently so to warrant the expense of a new sale,

It is ordered that said sale be and the same is hereby in all things confirmed, and said [representative] [guardian] is hereby authorized and directed to execute and deliver to the purchasers at said sale deeds conveying to them all the right, title, interest and estate of said [decedent] [ward] in and to the tracts purchased by them, respectively, upon their complying with the terms of said sale on their part, [but before delivery said deeds shall be submitted to the Judge of this Court for his approval].

Dated _____ 19____.

.....
Judge.

**1538. Order confirming sale of real estate at private sale under
G. S. 1913, § 7368.**

[Title as in § 1396 or § 1397.]

The report of _____, [representative of the above named decedent] [guardian of the person and estate of the above named ward], on certain sales of real estate of said [decedent] [ward] made by said [representative] [guardian] at private sale on _____ 19____, under a license granted to him by this Court on _____ 19____, having been filed herein on _____ 19____, and it appearing to the satisfaction of the Court from an examination of such report and said [representative] [guardian], and from the files, records and prior proceedings of this [administration] [guardianship] that all the allegations of the report are true, and that said sales were in all respects regularly, legally and fairly made, and that the sums for which the several tracts were sold were the highest offered therefor, and not less than the appraised value thereof according to the reappraisement thereof, duly made as required by statute, and not disproportionate to the value thereof,

It is ordered that said sales be and they are hereby in all things confirmed, and said [representative] [guardian] is hereby authorized and directed to execute and deliver to the purchasers at said sales deeds conveying to them all the right, title, interest and estate of said [decedent] [ward] in and to said tracts purchased by them, respectively, upon their complying with the terms of said sales on their part, [but before delivery said deeds shall be submitted to the Judge of this Court for his approval].

Dated _____ 19____.

.....

Judge.

1539. Deed of representative under license from court.

Whereas, under and in pursuance of an order of license duly made by the Probate Court of _____ county, state of Minnesota, on _____ 19____, authorizing me as the [administrator] of the estate of _____, deceased, duly appointed as such [administrator] by said Court on _____ 19____, to sell at [public auction] [private sale without notice] the real estate of said decedent hereinafter described and conveyed, I did, as such [administrator], on _____ 19____, at a [public auction] [private sale], sell to _____, [he being the highest bidder therefor], said real estate for the sum of _____ dollars,

Now, therefore, in pursuance of an order made by said Court on _____ 19____, confirming said sale and authorizing and directing this conveyance, I, as such [administrator], in consideration of the sum of _____ dollars, to me in hand paid by the said _____, the receipt of

which is hereby acknowledged, do hereby grant, bargain, sell and convey unto said _____, his heirs and assigns, all the right, title, interest and estate of said _____, deceased, in and to the following described real estate [describe tract as in an ordinary deed according to plat or government survey].

In witness whereof I have hereunto set my hand this _____ day of 19 ____.

.....
Administrator of the Estate
of _____, deceased.

Executed in presence of:

.....
.....

[Venue.]

On this _____ day of _____ 19 __, before me personally appeared _____, known to me to be the person whose name is subscribed to the foregoing instrument as the [administrator] of the estate of _____, deceased, and acknowledged to me that he, as such [administrator] executed the same.

.....
[Jurat as in § 1406.]

I hereby approve the foregoing deed and in witness thereof I have hereunto affixed the seal of the Court this _____ day of _____ 19 ____.

.....
Judge.

[Seal of Court.]

[Backed as in the case of an ordinary deed.]

1540. Mortgage of representative under license from court.

Whereas, under and in pursuance of an order of license duly made by the Probate Court of _____ county, state of Minnesota, on _____ 19 __, authorizing me as the [administrator] of the estate of _____, deceased, duly appointed as such [administrator] by said Court on _____ 19 __, to mortgage the real estate of said decedent hereinafter described, upon the terms and conditions specified in this instrument, I have, as such [administrator], after filing the special bond required by statute, obtained a loan from _____, the grantee herein, of _____ dollars, for the term of _____ years from the date hereof, with interest thereon at the rate of _____ per cent. per annum,

Now, therefore, I, as such [administrator], in pursuance of such order of license, in consideration of the sum of _____ dollars, to me in hand paid by the said _____, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto said _____, his heirs

and assigns, all the right, title, interest and estate of said _____, deceased, in and to the following described real estate [describe tract as in an ordinary deed according to plat or government survey].

Provided, however, that if I, as such [administrator], or my successors in office, or the heirs or devisees of said decedent, or their heirs representatives or assigns, shall well and truly pay, or cause to be paid, to the said _____, his heirs, representatives or assigns, the sum of _____ dollars, according to the terms of a promissory note executed by me, as such [administrator], to said _____, and pay all taxes which now are or may hereafter be assessed on said premises, as they shall become due, then this deed shall be void.

If default shall be made in the payment of said sum of money, or the interest, or the taxes, or any part thereof, at the time and in the manner specified for the payment thereof, the said _____, his heirs, representatives and assigns are hereby authorized to sell said premises and convey the same to the purchaser in accordance with the statute in such case made and provided, and from the proceeds of such sale to retain the principal and interest which shall then be due on said note, and all taxes on said lands, together with all charges and disbursements, including _____ dollars attorney's fees, and to pay any surplus to the representatives, heirs or devisees of said estate, or to their heirs, representatives or assigns.

And as such [administrator] I covenant and agree with said _____, his heirs, representatives and assigns, to pay, or cause to be paid, out of the funds of said estate, the sum of money above specified, at the time and in the manner specified, together with all charges and disbursements, including _____ dollars attorney's fees, if any.

If default is made in any of the foregoing provisions, it shall be lawful for said _____, his heirs, representatives or assigns, to declare the whole sum above specified to be due.

In witness whereof I have hereunto set my hand this _____ day of 19 _____.

.....
[Administrator] of the Estate
of _____, deceased.

Executed in presence of:
.....
.....

[Acknowledgment as in § 1539.]
[Approval of Judge as in § 1539, substituting "mortgage" for deed.]

1541. Lease by representative under license from probate court.

Whereas, on 19 , the Probate Court of county, state of Minnesota, duly made an order authorizing me as the [administrator] of the estate of , deceased, duly appointed as such [administrator] by said Court on 19 , to lease the real estate hereinafter described of which said decedent died seized, upon the terms and conditions hereinafter specified,

Now, therefore, in pursuance of said order, I, as such [administrator], do hereby demise and let unto , the [describe premises], for the term of , from 19 , at the [yearly] [monthly] rental of \$, payable in advance on the first day of each month of said term. [Add any further stipulations.]

.....
 [Administrator] of the Estate
 of , deceased.

 Lessee.

Executed in presence of:

.....

[Acknowledgment and approval of Judge as in § 1539.]

1542. Petition for approval of agreement and conveyance of land for public purposes under G. S. 1913, § 7365.

[Title as in § 1396 or § 1397.]

To the above named Court:

Your petitioners respectfully represent:

I. That at the time of the agreement hereinafter mentioned your petitioner, the , was and still is, a corporation, duly organized under the laws of the state of , and authorized and doing business as a [railroad] in this state, and authorized to exercise the power of eminent domain therein for the purposes of said railroad.

II. That at the time of said agreement your petitioner, , was and still is, the [administrator of the estate of the above named decedent] [guardian of the person and estate of the above named ward], duly appointed as such by this Court on 19 .

III. That on 19 , your petitioner, , desiring to acquire certain land of said [decedent] [ward] as [a right of way] for said railroad entered into a written agreement with said [administrator] [guardian] whereby they mutually agreed upon and adjusted the damages that would result from a taking of said land for said purpose and for a conveyance of said land by such [administrator] [guardian] to said corporation, which agreement and proposed conveyance are here-

to attached, marked Exhibits A and B, respectively, and made a part hereof.

IV. That the land so proposed to be taken and conveyed is described as follows:

.....

V. That the amount proposed by said agreement to be paid for said land and conveyance is the sum of \$, and such amount is the full value of said land [and the damages to the remainder of the adjacent land] of said [decedent] [ward].

Wherefore your petitioners pray for the approval of said agreement and proposed conveyance and that said [administrator] [guardian] be authorized to execute said conveyance as provided in said agreement.

.....

Petitioners.

.....

Attorney for Petitioners.

[Office and post office address.]

[Verification as in § 1405.]

**1543. Order approving agreement and conveyance under
 G. S. 1913, § 7365.**

[Title as in § 1396 or § 1397.]

The petition of and , filed herein on 19 , praying for the approval of a certain agreement between said petitioners for a conveyance by said , [administrator of the estate of the above named decedent] [guardian of the person and estate of the above named ward] to said , of certain land of said [decedent] [ward], coming on for hearing on this day, and it appearing to the satisfaction of the Court from said petition and from the evidence received on the hearing, that all the allegations of said petition are true, and that said agreement is just and equitable and said proposed conveyance is in due form,

It is ordered that said agreement and proposed conveyance be and they are hereby approved, and said [administrator] [guardian] is hereby authorized to execute and deliver said conveyance to the , upon its performing the terms and conditions of said agreement on its part.

Dated 19 .

.....

Judge.

1544. Deed of conveyance under G. S. 1913, § 7365.

In pursuance of an order of the Probate Court of _____ county, state of Minnesota, made on _____ 19____, authorizing me to make this conveyance as the [administrator of the estate of _____, deceased, late of said county.] [guardian of the person and estate of _____, a (minor), or said county], duly appointed as such [administrator] [guardian] by said Court on _____ 19____, and in consideration of the sum of _____ dollars, to me in hand paid by _____, the grantee herein, the receipt of which is hereby acknowledged, I, _____, acting as such [administrator] [guardian], do hereby grant, bargain, sell and convey unto _____, its successors and assigns, all the right, title, interest and estate of said _____, [deceased], in and to the [describe land according to plat or government survey, with name of county and state].

In witness whereof I have hereunto set my hand this _____ day of _____ 19____.

.....
[Administrator of the Estate

of _____, deceased.]

[Guardian of the person and estate

of _____, a (minor).]

Executed in presence of:

.....
.....

[Acknowledgment as in § 1539.]

1545. Petition under G. S. 1913, § 7376 for conveyance under land contract of decedent.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That on _____ 19____, the above named decedent entered into a written contract with your petitioner whereby he agreed to sell and convey to your petitioner, for a consideration therein stated, the following described real estate, in fee simple:

.....
.....

II. That a copy of said contract is hereto attached, marked Exhibit A, and made a part hereof.

III. That said contract is still in full force and unperformed on the part of said decedent.

IV. That on _____ 19____, the said decedent died, before making the conveyance provided for in said contract, and up to said time your petitioner had duly performed all the conditions of said contract on his part, [including the payment of all instalments of principal and inter-

est of the purchase price as provided by said contract,] and is ready to pay the balance of the purchase price and interest owing from him under the terms of said contract and otherwise fully to perform all the conditions of said contract on his part and is entitled to a conveyance of said real estate.

V. That on 19 , was duly appointed [administrator] of the estate of said decedent by this Court and thereupon duly qualified and is now acting as such [administrator].

VI. That the residence and post office address of your petitioner is No. , in the city of , county, state of Minnesota.

Wherefore your petitioner prays for an order authorizing and directing the said [administrator] to convey said real estate to the petitioner [upon payment of the balance of the purchase price and interest], according to the statutes in such case made and provided.

.....

Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1546. Order for hearing and for citation on petition for conveyance.

[Title as in § 1396.]

The petition of , praying for an order authorizing and directing the representative of the above named decedent to convey to the petitioner certain real estate of said decedent in pursuance of a contract of said decedent, having been filed in this Court on 19 .

It is ordered [continue as in § 1400].

1547. Citation on petition for conveyance.

[Title as in § 1396.]

The State of Minnesota to all persons interested in the estate of the above named decedent:

The petition of , praying for an order of this Court authorizing and directing the representative of the above named decedent to convey to the petitioner certain real estate of said decedent in pursuance of a contract of said decedent, having been filed in this Court on 19 ,

You are hereby cited [continue as in § 1401].

1548. Order for conveyance under G. S. 1913, § 7378.

[Title as in § 1396.]

The petition of _____, filed herein on _____ 19____, praying for an order authorizing and directing the representative of the above named decedent to convey to the petitioner certain real estate of said decedent, coming on for hearing on this day pursuant to an order made by this Court on _____ 19____, and proof of the due service of the citation to all persons interested in the estate of said decedent required by said order having been filed, and it appearing to the satisfaction of the Court from said petition and the evidence submitted on the hearing, that all the allegations of said petition are true and that the petitioner is entitled to a conveyance as therein prayed [upon paying the balance of the purchase money and interest due under said contract],

It is ordered that the [administrator] of the estate of said decedent be and he is hereby authorized and directed, as such representative, to make and deliver to said petitioner a deed conveying to said petitioner all the right, title, interest and estate of said decedent in and to the [describe premises], [upon said petitioner paying to said representative the balance due of the principal and interest of the purchase price as provided in said contract,] [and before said deed is delivered it shall be submitted to the Judge of this Court for his approval].

Dated _____, 19____.

.....

Judge.

1549. Order dismissing petition for a conveyance under G. S. 1913, § 7378.

[Title as in § 1396.]

The petition of _____ filed herein on _____ 19____, praying for an order authorizing and directing the representative of the above named decedent to convey to the petitioner certain real estate of said decedent, coming on for hearing on this day pursuant to an order made by this Court on _____ 19____, and proof of the due service of the citation to all persons interested in the estate of said decedent required by said order having been filed, and it appearing to the satisfaction of the Court from said petition and the evidence submitted on the hearing, that [the right of the petitioner to a conveyance as prayed is reasonably doubtful] [there is a reasonable contest over the title of said decedent to the real estate involved in said petition] [said petitioner failed to prove the performance of the conditions of the contract set out in said petition on his part, in this, that he (state default), and on account of said default is not entitled to a conveyance as prayed] [the contract set out in said petition is not sufficiently definite and certain to be specifically enforced],

It is ordered that said petition be and the same is hereby dismissed, without prejudice to an action by the petitioner in the District Court.

Dated 19 .

.....

Judge.

1550. Deed of representative under contract of decedent.

I, , duly appointed [administrator] of the estate of , deceased, by the Probate Court of county, state of Minnesota, on 19 , acting as such [administrator] under and in pursuance of an order made by said Court on 19 , authorizing and directing me as such [administrator] to make this conveyance in fulfilment of a written contract entered into between said decedent and the grantee herein on 19 , [said order having been affirmed on appeal,] [no appeal having been taken from said order, within the time limited therefor by law,] in fulfilment of said contract and in consideration of the sum of dollars, to me in hand paid by the grantee herein, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto , his heirs and assigns, all the right, title, interest and estate of said , deceased, in and to the following described real estate [describe tract as in an ordinary deed according to plat or government survey]. [Continue as in § 1539.]

1551. Petition to pay mortgage debt of decedent under G. S. 1913, § 7342.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That he is the [administrator] of the estate of the above named decedent, duly appointed as such by this Court on 19 .

II. That one , residing at , has a valid claim against said estate consisting of a promissory note for \$, made and delivered by said decedent to said , on 19 , payable 19 , and secured by a real estate mortgage [describe mortgage].

III. That there is now due on said note and mortgage the sum of \$, and said estate has no offset or counterclaim against the same.

IV. That your petitioner has in his hands belonging to said estate over \$ in cash which is not needed to pay the other claims against said estate and the charges and expenses of the administration thereof.

V. That it would be for the best interests of said estate and all persons interested therein that said note and mortgage should be paid out of said funds, [state reason for payment].

Wherefore your petitioner prays that he be authorized to pay said note and mortgage out of said funds.

.....
Petitioner.

.....
Attorney for Petitioner.
[Office and post office address.]
[Verification as in § 1405.]

1552. Order for payment of mortgage debt under G. S. 1913, § 7342.

[Title as in § 1396.]

The petition of [administrator] of the estate of the above named decedent, filed herein on 19 , praying that he be authorized to pay a certain claim of against said estate consisting of a promissory note secured by a real estate mortgage, coming on for hearing on this day, and it appearing to the satisfaction of the Court from said petition and the files, records and prior proceedings of this administration, and from the evidence received on the hearing, that all the allegations of said petition are true and that it would be for the best interests of said estate and all persons interested therein that said note and mortgage should be paid as prayed in said petition,

It is ordered that said petitioner be and he is hereby authorized and directed to pay the note and mortgage mentioned in said petition out of the funds of said estate specified in said petition.

Dated 19 .

.....
Judge.

1553. Complaint charging embezzlement, etc., under G. S. 1913, § 7315.

[Title as in § 1396.]

The complainant complains and alleges:

I. That he is the [administrator] of the estate of the above named decedent, duly appointed as such by this Court on 19 .

II. That he suspects that , residing at No. , in the city of , county, state of Minnesota, has concealed, embezzled, carried away and disposed of certain moneys, goods and chattels, belonging to the estate of said decedent, described as follows: [Describe property.]

III. That he suspects that said has in his possession or knowledge certain deeds, conveyances, bonds, contracts and other writings which contain evidence of or tend to disclose the right, title, interest, or claim of said decedent to certain real and personal property and in certain claims and demands, described as follows: [Describe deeds or other instruments in general terms.]

Wherefore complainant prays that the said be cited before this Court and examined upon the matters alleged in this complaint.

.....
Complainant.

[Venue.]

, being duly sworn, says that he is the complainant in the above entitled proceeding; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

.....

[Jurat as in § 1406.]

1554. Order for citation under G. S. 1913, § 7315.

[Title as in § 1396.]

The complaint of , alleging that he suspects that , residing at No. , in the city of , county, state of Minnesota, has concealed [follow charge of complaint], having been filed in this court,

It is ordered that a citation issue to said , requiring him to appear before this Court at its court room in the Court-House in the city of , county, state of Minnesota, on 19 , at o'clock in the forenoon, and be examined on oath upon the matters of said complaint.

It is further ordered that said citation be personally served on said , at least days prior to 19 .

Dated 19 .

.....
Judge.

1555. Citation under G. S. 1913, § 7315.

[Title as in § 1396.]

The State of Minnesota to : τ

The complaint of , having been filed in this Court on 19 , alleging that he suspects that you have concealed [continue allegations of complaint].

You are hereby cited and required to appear before this Court at its court room in the Court-House in the city of , in county, state of Minnesota, on 19 , at o'clock in the forenoon, and be examined on oath upon the matters of said complaint.

Witness the Judge of said Court and the seal thereof this day of 19 .

.....
Judge.

[Seal of court.]

1556. Examination of person charged with embezzlement, etc. under G. S. 1913, § 7315.

[Title as in § 1396.]

Examination of _____, cited for examination under G. S. 1913, § 7315, upon the complaint of _____, filed herein on _____ 19 ____ . The said _____ being first duly sworn by the Court to testify the whole truth and nothing but the truth relative to the matters specified in said complaint, the following questions were put to him by [the Court] [_____, attorney for _____, the complainant], and his answers thereto were, reduced to writing by [the Court] [_____, a disinterested person, in the presence and under the direction of the Court]. After his testimony was completed and so reduced to writing it was carefully read over to the witness by the Court and signed by the witness in the presence of the Court, after the witness had been given an opportunity to add to or qualify his testimony. Mr. _____ appeared as attorney for the witness to assist him in answering the questions.

1. Q.

A.

2. Q.

A.

Sworn and subscribed in open court before me this _____ day of _____ 19 ____

[Seal of court.]

.....
Judge.

1557. Petition for order compelling representative to sue for property fraudulently conveyed.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That on _____ 19 ____, letters [testamentary] [of administration] on the estate of the above named decedent were duly issued by this Court to _____, who thereupon duly qualified and is now acting as [executor] [administrator] of said estate under said letters.

II. That your petitioner is a creditor of said estate [and his claim was duly allowed by this Court on _____ 19 ____, in the sum of \$ _____].

III. That the property of said decedent available for the payment of his debts is insufficient to pay the same in full, including said claim of your petitioner.

IV. That on _____ 19 ____, being then the owner thereof, said decedent conveyed to one _____, the following described real estate, situated in _____ county, state of Minnesota: [Describe property.]

V. That said decedent made said conveyance with the intent to hinder,

delay and defraud his creditors, including your petitioner, and the same was received by said _____ with full knowledge of such intent.

VI. That said conveyance ought to be set aside judicially and said property recovered as an asset of said estate.

VII. That on _____ 19____, your petitioner requested said [executor] [administrator] to bring an action to set aside said conveyance as fraudulent and to recover said property as an asset of said estate and offered to pay, or to secure the payment, of the expenses of such action, as this Court might direct, but said [executor] [administrator] refused and still refuses and neglects to bring such an action.

VIII. That your petitioner is still ready and able to pay or to secure the payment of the expenses of such an action as this Court may direct.

IX. That the residence and post office address of your petitioner is No. _____ in the city of _____, _____ county, state of Minnesota.

Wherefore your petitioner prays that a citation issue to said [executor] [administrator] requiring him to show cause why he should not bring such an action.

.....

Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

See forms in Dunnell, Minn. Pl. [2 ed.] §§ 1360-1369.

1558. Order for hearing and for citation on foregoing petition.

[Title as in § 1396.]

The petition of _____, praying that a citation issue requiring the [administrator] of the estate of the above named decedent to show cause why he should not bring an action to set aside a certain alleged fraudulent conveyance of said decedent, having been filed in this Court on _____ 19____.

It is ordered that the same be heard before this Court at its court room in the Court-House in the city of _____, _____ county, state of Minnesota, on _____ 19____, at _____ o'clock in the forenoon, and that a citation issue requiring said [administrator] then and there to show cause why he should not bring an action as prayed in said petition, and that said citation be personally served on said [administrator] at least _____ days before said date of hearing.

Dated _____ 19____.

.....

Judge.

1559. Citation to representative on foregoing petition.

[Title as in § 1396.]

The State of Minnesota to _____, [administrator] of the above named decedent:

The petition of _____, praying that a citation issue requiring you to show cause why you should not bring an action to set aside a certain alleged fraudulent conveyance of said decedent having been filed in this Court on _____ 19 _____,

You are hereby cited and required to appear before this Court at its court room in the Court-House, in the city of _____, _____ county, state of Minnesota, on _____ 19 _____, at _____ o'clock in the forenoon, and show cause, if any you have, why you should not bring an action as prayed in said petition.

Witness the [Honorable _____] Judge of said Court and the seal thereof this _____ day of _____ 19 _____.

.....

[Judge.] [Clerk.]

[Seal of court.]

1560. Order requiring representative to bring action to set aside fraudulent conveyance.

[Title as in § 1396.]

The petition of _____, filed herein on _____ 19 _____, praying for a citation to the [administrator] of the estate of the above named decedent to show cause why he should not bring an action to set aside a certain alleged fraudulent conveyance of said decedent, coming on for hearing on this day pursuant to an order of this Court made on _____ 19 _____, and proof of the due service of the citation to said [administrator] required by said order having been filed, and it appearing to the satisfaction of the court from said petition, and the evidence received on the hearing, and from the files, records and prior proceedings of this administration, that all the allegations of said petition are true and that an action ought to be brought as therein prayed,

It is ordered that said [administrator] be and he is hereby authorized and directed forthwith to commence and prosecute to final judgment an action as prayed in said petition; and that before said action is commenced said petitioner shall file herein a bond, approved by the Judge of this Court, in the penal sum of \$ _____, with sufficient sureties, conditioned to pay from time to time as demanded by said [administrator], [one-half] the expenses of said action; and it is further ordered that if said action is successful and the property mentioned in said petition is recovered as an asset of said estate, said [administrator] shall refund

to said petitioner, out of the proceeds of such property, all the expenses of said action paid by said petitioner.

Dated 19

.....
Judge.

1561. Bond to secure expenses of action under G. S. 1913, § 7313.

[Title as in § 1396.]

Know all men by these presents that we, , as principal, and and , as sureties, all residents of county, Minnesota, are bound unto , Judge of the above named Court, and his successors in office, in the sum of dollars, to the payment of which to the said Judge or his successors in office, we jointly and severally bind ourselves, our heirs, executors, by these presents.

The condition of this obligation is such that whereas , the administrator of the estate of the above named decedent, has been authorized and directed by an order of said Court made on 19 , to commence and prosecute to final judgment an action against , to set aside an alleged fraudulent conveyance of said decedent to said , described in the petition of , filed in said Court on 19 ,

Now, therefore, if the said shall pay [one-half] the expenses of said action from time to time as demanded by said administrator [or as ordered by said Court], then this obligation shall be void; otherwise to remain in full force.

In witness whereof we have hereunto set our hands this day of 19 .

.....
.....
.....

Executed in presence of:

.....
.....

[Acknowledgment as in § 1407.]

[Justification of sureties as in § 1408.]

I hereby approve the foregoing bond and the sureties thereon.

Dated 19 .

.....
Judge.

1562. Petition of representative for final settlement and decree of distribution.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That he is the [administrator] of the estate of the above named decedent, duly appointed as such by this Court on 19 .

II. That the time for the presentation of claims against said estate has expired; that your petitioner has paid all the claims allowed by this Court against said estate, and all other valid claims against said estate, including all real and personal property taxes assessed against the same, and all inheritance taxes due and payable upon the shares of said estate, and has fully administered said estate except to distribute the residue thereof.

III. That after the payment of all said claims in full there remains a residue of property belonging to said estate subject to distribution by a final decree of this Court, as will more fully appear by the final account of your petitioner, herewith presented and filed.

IV. [That said decedent died intestate and left surviving him the following persons as his sole heirs, all of whom are still living:] [That said decedent died leaving a last will which was admitted to probate by this Court on 19 , whereby he gave all his estate to the following persons, all of whom are still living:]

Name.	Age.	Relationship to decedent.	Place of residence.
-------	------	---------------------------	---------------------

.....			
.....			
.....			
.....			

Wherefore your petitioner prays for the adjustment and allowance of his final account and for the assignment of the residue of said estate to the persons entitled thereto, and for an order fixing a time and place therefor.

.....
Petitioner.

.....
Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1563. Order for hearing and for citation on petition for final settlement and distribution.

[Title as in § 1396.]

The petition of _____, [administrator] of the estate of the above named decedent, praying for the adjustment and allowance of his final account and for the assignment of the residue of said estate to the persons entitled thereto, having been filed herein on _____ 19____, together with said account,

It is ordered that [continue as in § 1400].

1564. Citation on petition for final settlement and distribution.

[Title as in § 1396.]

The State of Minnesota to all persons interested in the settlement of the final account of the representative of the above named decedent and the assignment of the residue of the estate of said decedent:

The petition of _____, representative of the above named decedent, having been filed in this Court, representing that he has fully administered the estate of said decedent and that there is a residue for distribution among the persons entitled thereto, and praying that his final account, filed therewith, be adjusted and allowed and that said residue be assigned to the persons entitled thereto,

You are hereby cited [continue as in § 1401].

1565. First and final account of representative.

[Title as in § 1396.]

The undersigned [administrator] of the estate of the above named decedent respectfully submits to the Court the following first and final account of his administration, with accompanying vouchers, showing all his receipts, disbursements and sales during the entire period of his administration to the date hereof and the residue remaining for final distribution, the estate being now fully administered except the distribution of such residue.

RECEIPTS—DEBITS

Personal property described in inventory.....	
Personal property not included in inventory.....	
Interest and dividends on above property.....	
Increase of above property.....	
Gain by sale of personal property above appraised value	
Real estate described in inventory.....	
Real estate not included in inventory.....	
Rents and profits of real estate.....	
	Total, \$

DISBURSEMENTS—CREDITS

	Voucher Dollars Cts. number
Property set apart.	
Homestead	
Personal property to surviving spouse [or children]	
Taxes paid.	
On personal property.....	
On real property.....	
Federal inheritance tax.....	
Expenses of last sickness.	
Medical attendance.....	
Medicines, etc.....	
Hospital charges.....	
Nurse	
Funeral expenses.	
Undertaker, etc.....	
Coffin	
Monument over grave.....	
Cemetery lot.....	
Expenses of administration.	
Allowance to widow of decedent pending administration	
Fees of appraisers.....	
Fees of attorney.....	
Publication and service of notices, orders, etc...	
Repairs on real estate.....	
Care of property of estate.....	
Insurance of real estate.....	
Insurance of personal property.....	
Postage, stationery, etc.....	
Traveling expenses of attorney.....	
Traveling expenses of representative.....	
Compensation of representative.....	
Interest paid on money borrowed.....	
Court costs allowed against estate.....	
Claims allowed by Court against estate and paid.	
[Name of claimant].....	
"	
"	
"	

DISBURSEMENTS—CREDITS—(Continued)

Other claims against estate paid.

Voucher

Dollars Cts. number

[Describe claim in general terms.].....
 "
 "
 "

Credits for losses.

Loss on sale of personal property below ap-
 praised value.....
 Loss on sale of real estate below appraised val-
 ue
 Loss of personal property by death or other
 cause
 Loss on [compromise] [arbitration] of claim
 of estate against
 Loss from uncollectible debts.....
 Loss from offsets against claims of estate.....

Legacies paid.

[Name of legatee].....
 [Payment of legacies should be omitted under
 ordinary circumstances. See § 1021.]

Total, \$

SUMMARY

Total receipts and debits.....
 Total disbursements and credits.....
 Balance

PROPERTY SOLD

	Appraised value.	Sale price.
Personal property.		
.....		
.....		
.....		
.....		
Total, \$		

	Appraised value.	Sale price.
Real property.		
.....		
.....		
.....		
.....		
Total, \$		

RESIDUE FOR DISTRIBUTION**Personal property.¹**

Cash on hand.....

.....

Total, \$

Real estate.²

[Describe all the various tracts.]

.....

Total, \$

Dated 19 .

[Executor.] [Administrator.]

[Venue.]

, being duly sworn, says that the foregoing account signed by him is in all respects just and true and that he has actually paid out and expended the several sums therein named.

[Jurat as in § 1406.]

1566. Renunciation by executor of compensation provided in will.

[Title as in § 1396.]

I, the undersigned, executor of the last will of the above named decedent, duly appointed as such by this Court on 19 , hereby renounce all claim for compensation for my services as such executor provided by said will and claim the compensation for such services provided by law.

Dated 19 .

1567. Order settling and allowing final account.

[Title as in § 1396.]

The petition of , [administrator] of the estate of the above named decedent, filed herein on 19 , praying for the adjustment and allowance of his final account therewith filed, coming on for

¹ Do not include personal property selected by surviving spouse and already assigned under G. S. 1913, § 7308, or legacies that have been paid.

² Do not include homestead which has already been assigned under G. S. 1913, § 7308, unless it passes under a will.

hearing this day pursuant to an order of this Court made on 19 , and proof of the due service of the citation to all persons interested in such matter required by said order having been filed, and it appearing to the satisfaction of the Court from said petition, and from an examination of said account, and from the evidence received on the hearing, and from the files, records and prior proceedings of this administration, that all the allegations of said petition are true, and that said account is in all things true, [as corrected under the direction of the Court,] and that all real and personal property taxes assessed against said estate have been paid [so far as there were funds to pay them,] [and that all inheritance taxes on the shares of said estate have been fully paid and proper receipts therefor duly filed herein,] [and that none of the shares of said estate is subject to an inheritance tax,]

It is ordered that said account be and the same is hereby settled and allowed as and for the final account of said [administrator].

Dated 19 .

.....
Judge.

1568. Proof of death, domicile and heirship.

[Title as in § 1396.]

[Venue.]

, being duly sworn says that he is a resident of the city of , county, state of Minnesota, and over twenty-one years of age; that at the time of the death of the above named decedent and for many years immediately prior thereto he was intimately acquainted with said decedent and his family; that he is [state relationship to decedent if any]; that said decedent died on 19 , in the city of , county, state of , and at the time of his death resided and was domiciled in [said county] [county, state of Minnesota]; that the following named and described persons are the heirs and the only heirs of the said decedent, and that their ages, relationship and places of residence are as indicated below:

Name of heir.	Age.	Relationship to decedent.	Residence.
.....
.....
.....
.....

[Jurat as in § 1406.]

1569. Final decree of distribution—Decedent dying intestate.

[Title as in § 1396.]

The petition of _____, representative of the estate of the above named decedent, filed herein on _____ 19____, praying for the allowance of his final account therewith filed and the assignment of the residue of said estate to the persons entitled thereto, coming on for hearing on this day pursuant to an order of this Court made on _____ 19____, and proof of the due service of the citation to all persons interested in such matters required by said order having been filed, and said account having been settled and allowed by this Court on [this day], and it appearing to the satisfaction of the Court from said petition, and from the files, records and prior proceedings of this administration, and from the evidence received on the hearing, that all the claims against said estate and all charges and expenses thereof, including all real and personal property taxes assessed against said estate, have been fully paid, [so far as there were funds to pay them,] [and that none of the distributive shares of said estate is subject to an inheritance tax,] [and that all inheritance taxes upon the distributive shares of said estate have been fully paid and receipts therefor duly filed herein,] and proper receipts therefor filed herein, and that there is a residue remaining upon the final settlement of said estate consisting of the following described property:

Personal property. ¹	Appraised value.
.....
.....
.....
.....
	Total, \$
Real property. ²	
.....
.....
.....
.....
	Total, \$

And it further appearing that said decedent died on _____ 19____, intestate, and at the time of his death resided and was domiciled in _____ county, state of Minnesota, and that he left surviving him as his sole heirs _____, [his wife], and _____; [his son], and _____, [his daughter], who, as such heirs, are entitled to all of said residue, [and

¹ Do not include the personal property selected by the surviving spouse if that has already been assigned under G. S. 1913, § 7308. See § 808.

² As to including the homestead, see § 1060.

any other property of which said decedent died seized or possessed but not included in this administration,] ³ under the statutes of descent and distribution, as hereinafter assigned,

Now, therefore, it is decreed that all of said residue [and any other property of which said decedent died seized or possessed but not included in this administration,] ³ be and the same is hereby assigned to said heirs, in accordance with the statutes of descent and distribution, as follows:

To said A is assigned an undivided one-third⁴ thereof. To said B. C. and D, each, is assigned an undivided two-ninths⁴ thereof.

Dated 19 .

.....

Judge.

1570. Same—Where there is a sole heir.

[Title as in § 1396.]

[Same as in § 1569 down to "And it further appearing."]

And it further appearing that said decedent died on 19 , intestate, and at the time of his death resided and was domiciled in county, state of Minnesota, and that he left surviving him as his sole heir , his wife, who, as such heir, is entitled to all of said residue, [and any other property of which said decedent died seized or possessed but not included in this administration,] under the statutes of descent and distribution, as hereinafter assigned,

Now, therefore, it is decreed that all of said residue, [and any other property of which said decedent died seized or possessed but not included in this administration,] be and the same is hereby assigned to said .

Dated 19 .

.....

Judge.

1571. Same—Where there has been an advancement.

[Title as in § 1396.]

[Same as in § 1569 down to "Now, therefore,"]

And it further appearing that said , son of said decedent, received from said decedent in the latter's lifetime, the [sum of \$] [describe property received], by way of advancement of his share of the estate of said decedent, and that said advancement should be treated as a part of the estate of said decedent for the purposes of this distribution and taken by said son toward his share of said estate, and that the value of said advancement [when it was given] [as expressed in the conveyance of said property to said son] [as expressed in the written

³ It is customary to add this phrase but it is of doubtful efficacy. See § 1071. ⁴ Vary the fraction to meet the facts of the particular case.

charge thereof made by said decedent] [as expressed in the written acknowledgment thereof by said son] was \$, and that the value of all the [personal] [real] property of said estate for distribution, including said advancement, is \$, and that the value of the share of said son therein would be \$, and that the value of the entire estate for distribution, including said advancement, is \$, and that the value of the share of said son in the entire estate, including said advancement would be \$, [and that as said son by said advancement has already received more than his share of the entire estate he should receive nothing upon this distribution] [and that as the value of said advancement exceeds the share of said son in the (real) (personal) property of said estate he should receive upon this distribution proportionately less of the (real) (personal) property thereof] [and that in order to equalize the share of said son with the shares of the other children of said decedent he should receive of this distribution (state fraction) of the personal property of said residue and (state fraction) of the real property of said residue]

Now, therefore, it is decreed [continue as in § 1569, assigning the real and personal property separately].

Dated 19 .

.....
Judge.

1572. Same—Where there is a will—General form.

[Title as in § 1396.]

[Same as in § 1569 down to "And it further appearing."]

And it further appearing that said decedent died on 19 , and at the time of his death resided and was domiciled in county, state of Minnesota, and that he left a last will which was duly admitted to probate by this Court on 19 , under the provisions of which , [his wife], and , [his son], and , [his daughter], and , are entitled to all of said residue [and all other property of which said decedent died seized or possessed but not included in this administration,] as hereinafter assigned to them; [and it appearing that said surviving wife of said decedent has elected, (by an instrument filed in this Court on 19 ,) to take under said will instead of under the statute,] [and that the omission of any provision in said will for , a son of said decedent, was intentional on the part of said decedent and not occasioned by accident or mistake,] [and that all the devises and bequests in said will are valid and operative,] [and that all the devises and bequests in said will are valid and operative, except the bequest to , which is invalid and inoperative by reason of the fact that (state ground),] [and that the bequest in said will to wholly abates by reason of the fact that (state reason),] [and that the bequest in said will to lapsed by reason of the fact that

(state reason),] [and that the bequest in said will to has been adeemed by (state mode),] [and that all the gifts in said will to have been forfeited by reason of the fact that (state ground of forfeiture),] [and that all the legacies given by said will have been fully paid and receipts therefor filed in this Court],

Now, therefore, it is decreed that all of said residue [and any other property of which said decedent died seized or possessed but not included in this administration,] be and the same is hereby assigned, in accordance with the provisions of said will, as follows:

To said A is assigned [describe property assigned] [in fee] [for life, remainder to said B and C] [for life, two-thirds of the remainder to said B and C and one-third of the remainder to said D and E] [in trust for the purposes and subject to the terms and conditions specified in said will] [subject to the terms and conditions specified in said will] [subject to the condition that] [subject to the payment of] [subject to the payment of a legacy of \$ to , as provided in said will] [upon condition that he pay a legacy of \$ to as provided in said will].

To said F is assigned [as above].

To said G is assigned [all the rest of said residue (and all other property of which said decedent died seized or possessed but not included in this administration)].

Dated 19 .

.....

Judge.

1573. Same—Another general form setting out provisions of will.

[Title as in § 1396.]

[Same as in § 1569 down to "And it further appearing."]

And it further appearing that said decedent died on 19 , and at the time of his death resided and was domiciled in county, state of Minnesota, and that he left a last will which was duly admitted to probate by this Court on 19 , whereby he gave to , [his wife], [state provision], and to , [his son], [state provision], and to , [his daughter], [state provision]; and it appearing that his said wife has elected [continue as in § 1572].

1574. Same—Where wife renounces will.

[Title as in § 1396.]

[Same as in § 1572 down to "has elected."]

has elected, by an instrument filed in this Court on 19 , to take under the statute instead of under said will,

Now, therefore, it is decreed that said residue be and the same is hereby assigned to said wife, under the statutes of descent and distribution,

and to the other distributees in accordance with the provisions of said will, as affected by such election of said wife, as follows:

To said [continue as in § 1569].

Dated 19 .

.....
Judge.

1575. Same—Where there is a sole beneficiary under a will.

[Title as in § 1396.]

[Same as in § 1569 down to "And it further appearing."]

And it further appearing that said decedent died on 19 , and at the time of his death resided and was domiciled in county, state of Minnesota, and that he left a last will which was duly admitted to probate by this Court on 19 , whereby he gave all the property of which he died possessed to [his wife, who has elected to take under said will instead of under the statute],

Now, therefore, it is decreed that all of said residue, [and all other property of which said decedent died seized or possessed,] be and the same is hereby assigned, in accordance with the provisions of said will, to said , [the personal property absolutely and the real property in fee].¹

Dated 19 .

.....
Judge.

1576. Final decree of distribution in ancillary administration of estate of intestate.

[Title as in § 1396.]

[Same as in § 1569 down to "And it further appearing."]

And it further appearing that said decedent died intestate on 19 , in the city of , in the county of , state of , and was then a resident of said county and domiciled therein, and left as his sole heirs , [his wife,] and , [his son,] and , [his daughter,] who, as such heirs, are entitled to said residue of personal property under the statutes of distribution of said state of , and to said residue of real estate under the statutes of descent of this state, as hereinafter assigned,

Now, therefore, it is decreed that all of said residue be and the same is hereby assigned to said heirs, in accordance with such statutes, as follows:

[Continue as in § 1569.]

¹ Omit if the nature of the estate or title is not specified in the will. See § 1071.

1577. Final decree of distribution in ancillary administration of estate of testate.

[Title as in § 1396.]

[Same as in § 1569 down to "And it further appearing."]

And it further appearing that said decedent died on 19 , in the city of , in the county of , state of , and was then a resident of said county and domiciled therein, and that he left a last will, which was duly admitted to probate by this Court on 19 , under the provisions of which , [his wife,] and and and , are entitled to said residue of real estate as hereinafter assigned to them, and that said wife of the decedent has elected to take under said will instead of under the statutes of descent of this state, and that administration on the estate of said decedent is now being had in the Court of said county, state of , and that , residing at , is the duly appointed, qualified and acting sole domiciliary [executor] [administrator] of said estate, under letters testamentary duly issued to him by said Court on 19 ,

It is ordered and decreed that said transmit all of said residue of personal property to said , domiciliary [executor] [administrator] of said estate, at , and file his receipt therefor in this Court, and that all of said residue of real estate be and the same is hereby assigned, in accordance with the provisions of said will, as follows:

[Continue as in § 1572.]

1578. Order to transmit residue of personalty to domiciliary representative.

[Title as in § 1396.]

[Same as in § 1569 down to "And it further appearing."]

And it further appearing that said decedent died [testate] [intestate] on 19 , in the city of , in the county of , state of , and was then a resident of said county and domiciled therein, and that administration on the estate of said decedent is now being had in the Court of said county, and that , residing at , is the duly appointed, qualified and acting sole domiciliary [executor] [administrator] of said estate, under letters [testamentary] [of administration] duly issued to him by said Court on 19 ,

It is ordered that said transmit immediately all of said residue to said , domiciliary [executor] [administrator] of said estate, at , and file a receipt therefor in this Court.

Dated 19 .

.....

Judge.

1579. Petition under G. S. 1913, § 7245, where land is omitted in final decree.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That on 19 , died [intestate] in the city of , in the county of , state of , and at the time of his death resided and was domiciled in [said county] [county, state of].

II. [That letters of administration on the estate of said decedent were duly granted by this Court to , on 19] [That said decedent left a last will which was duly admitted to probate by this Court on 19 and letters testamentary thereon were granted by this Court to , on 19].

III. That thereupon such proceedings were had in the administration of the estate of said decedent that on 19 , a decree of final distribution was duly made by this Court therein assigning the residue of the property of the estate to the persons entitled thereto.

IV. That said decedent died seized and possessed [as owner in fee] [or state other interest according to the facts] of certain real estate, situated in county, state of Minnesota, described as follows:

[Describe property according to plat or government survey.]

V. That through inadvertence said real estate was not included in the administration of said estate and was omitted in said final decree and has never been assigned to the persons entitled to it.

VI. That your petitioner is interested in said real estate in this, that he [state facts showing his interest].

VII. That according to the best information of your petitioner the names, ages, relationship and places of residence of all the heirs [and devisees] of said decedent are as follows:

Name.	Age.	Relationship.	Place of residence.
.....			
.....			
.....			
.....			

VIII. [That a copy of said will is hereto attached, marked Exhibit A, and made a part hereof.]

IX. That the residence and post office address of your petitioner is No. , in the city of , county, state of Minnesota.

Wherefore your petitioner prays that the descent of said real estate be determined and that it be assigned to the persons entitled thereto.

.....

Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1580. Order for hearing and for citation on petition to determine descent of omitted property under G. S. 1913, §§ 7245, 7246.

[Title as in § 1396.]

The petition of _____, filed herein on _____ 19____, representing that in the administration of the estate of the above named decedent, and in the final decree of distribution assigning the residue of said estate to the persons entitled thereto made by this Court on _____ 19____, certain real estate of said decedent was inadvertently omitted, and praying that the descent of said real estate be determined and that it be assigned to the persons entitled thereto,

It is ordered that [continue as in § 1400].

1581. Citation to determine descent of omitted property.

[Title as in § 1396.]

The State of Minnesota to all persons interested in the determination of the descent of the real estate of the above named decedent:

The petition of _____, having been filed in this Court, representing that in the administration of the estate of said decedent, and in the final decree of distribution assigning the residue of said estate to the persons entitled thereto made by this Court on _____ 19____, certain real estate of said decedent was inadvertently omitted, and praying that the descent of said real estate be determined and that it be assigned to the persons entitled thereto,

You are hereby cited [continue as in § 1401].

1582. Decree of distribution of omitted property under G. S. 1913, § 7248—Decedent dying intestate.

[Title as in § 1396.]

The petition of _____, filed herein on _____ 19____, praying that the descent of the real estate hereinafter described be determined and that it be assigned to the persons entitled thereto, coming on for hearing on this day pursuant to an order of this Court made on _____ 19____, and proof of the due service of the citation to all persons interested in such matters required by said order having been filed, and it appearing to the satisfaction of the Court from said petition and from the evidence received on the hearing and from the files, records and proceedings of

the administration of the estate of said decedent heretofore had in this Court, that all the allegations of said petition are true, and that said decedent died intestate on 19 , seized and possessed as [owner in fee] of the real estate hereinafter described and assigned, and that in the administration of the estate of said decedent heretofore had in this Court and in the final decree of distribution therein assigning the residue of said estate to the persons entitled thereto made by this Court on 19 , said real estate was inadvertently omitted, and that the following persons are the sole heirs of said decedent and entitled, as such heirs, to said real estate under the statutes of descent, as hereinafter assigned:

Name of heir.	Relationship to decedent.	Place of residence.
.....
.....
.....
.....

Now, therefore, it is decreed that said and and are the sole heirs of said decedent and that said real estate be and the same is hereby assigned to them as follows:

[Continue as in § 1569.]

**1583. Decree of distribution of omitted property under G. S. 1913,
§ 7248—Decedent dying testate.**

[Title as in § 1396.]

[Same as in § 1582 down to "died intestate"] died on 19 , leaving a last will which was duly admitted to probate by this Court on 19 , and that said decedent died seized and possessed as [owner in fee] of the real estate hereinafter described and assigned, and that in the administration of the estate of said decedent heretofore had in this Court and in the final decree of distribution therein assigning the residue of said estate to the persons entitled thereto made by this Court on 19 , said real estate was inadvertently omitted, and that the following persons are the sole devisees in said will and entitled to said real estate under the provisions of said will as hereinafter assigned:

Name of devisee.	Relationship to decedent.	Place of residence.
.....
.....
.....
.....

Now, therefore, it is decreed that said real estate be and the same is hereby assigned to said devisees in accordance with the provisions of said will as follows: [Continue as in § 1572.]

1584. Petition under G. S. 1913, § 7245, to determine descent without administration.

[Title as in § 1396.]
To the above named Court:
Your petitioner respectfully represents:

I. That on 19 , died [intestate] in the city of , in the county of , state of .

II. That more than five years have passed since the death of said decedent and no will of his has been probated or administration on his estate granted in this state.

III. That said decedent died seized and possessed of certain real estate situated in county, state of Minnesota, described as follows:
[Describe property according to plat or government survey.]

IV. That your petitioner is interested in said real estate in this, that he [state facts showing his interest].

V. [That said decedent died leaving a last will which is herewith filed, presented for probate, marked Exhibit A, and made a part hereof.]

VI. That according to the best information of your petitioner the names, ages, relationship and places of residence of all the heirs [and devisees] of said decedent are as follows:

Name.	Age.	Relationship.	Place of residence.
.....			
.....			
.....			
.....			

VII. That the residence and post office address of your petitioner is No. in the city of , county, State of Minnesota.

Wherefore your petitioner prays that [the descent of said property be determined and that it be assigned to the persons entitled thereto] [that said will be admitted to probate and that the descent of said property be determined and that it be assigned to the persons entitled thereto].

.....
Petitioner.

.....
Attorney for Petitioner.
[Office and post office address.]
[Verification as in § 1405.]

1585. Order for hearing and for citation on petition to determine descent under G. S. 1913, § 7245.

[Title as in § 1396.]
The petition of , praying for the determination of the descent of certain real estate of the above named decedent and its assignment

to the persons entitled thereto, [and for the admission to probate of a certain instrument as the last will of said decedent,] having been filed herein on 19 , together with said instrument,

It is ordered [continue as in § 1400].

1586. Citation on petition to determine descent under G. S. 1913, § 7247.

[Title as in § 1396.]

The State of Minnesota to all persons interested in the determination of the descent of the real estate, [and in the probate of the last will,] of the above named decedent:

The petition of , having been filed in this Court, representing that said decedent died [testate] [intestate] more than five years prior to the filing thereof, leaving certain real estate in county, state of Minnesota, and that no will of said decedent has been proved, nor administration of his estate granted, in this state, and praying that [the descent of said real estate be determined and that it be assigned to the persons entitled thereto] [the last will of said decedent presented and filed with said petition be admitted to probate and that the descent of said real estate be determined and that it be assigned to the persons entitled thereto],

You are hereby cited [continue as in § 1401].

1587. Decree of distribution under G. S. 1913, § 7248—Decedent dying intestate.

[Title as in § 1396.]

The petition of , filed herein on 19 , praying that the descent of the real estate hereinafter described be determined and that it be assigned to the persons entitled thereto, coming on for hearing on this day pursuant to an order of this Court made on 19 , and proof of the due service of the citation to all persons interested in such matters required by said order having been filed, and it appearing to the satisfaction of the Court from said petition and from the evidence received on the hearing, that all the allegations of said petition are true and that said decedent died intestate on 19 , seized and possessed of the following described real estate situated in county, state of Minnesota:

.....

And it further appearing that more than five years have passed since the death of said decedent and that no will of his has been probated or administration on his estate granted in this state, and that all taxes assessed against said real estate have been fully paid [and that none of the distributive shares of said estate is subject to an inheritance tax,] [and that all inheritance taxes due and payable upon the distributive shares of said estate have been paid and receipts therefor duly filed

herein] and that said decedent left as his sole heirs _____, his [wife] and _____ his [son] and _____ his [daughter], who, as such heirs, are entitled to said real estate, [and any other real estate in this state of which said decedent died seized or possessed but not described herein,] under the statutes of descent, as hereinafter assigned,

Now, therefore, it is decreed that all of said real estate, [and any other real estate in this state of which said decedent died seized or possessed but not described herein,] be and the same is hereby assigned to said heirs as follows: [Continue as in § 1569.]

Dated _____ 19 ____ .

.....
Judge.

1588. Decree of distribution under G. S. 1913, § 7248—Decedent dying testate.

[Title as in § 1396.]

The petition of _____, filed herein on _____ 19 ____, praying that the last will of the above named decedent presented with said petition be admitted to probate and that the descent of the real estate hereinafter described be determined and assigned to the persons entitled thereto, coming on for hearing on this day pursuant to an order of this Court made on _____ 19 ____, and proof of the due service of the citation to all persons interested in such matters required by said order having been filed, and it appearing to the satisfaction of the Court from said petition and from the evidence received on the hearing, that all the allegations of said petition are true, and that said decedent died on _____, seized and possessed of the following described real estate situated in _____ county, state of Minnesota:

.....
.....

And it further appearing that more than five years have passed since the death of said decedent and that no will of his has been probated or administration on his estate granted in this state prior to said petition, and that all taxes assessed against said real estate have been fully paid [and that none of the distributive shares of said estate is subject to an inheritance tax,] [and that all inheritance taxes due and payable upon the distributive shares of said estate have been paid and receipts therefor duly filed herein] and that said decedent left a last will, which has this day been admitted to probate by this Court, under the provisions of which [continue as in § 1572 or § 1573].

Dated _____ 19 ____ .

.....
Judge.

1589. Petition for confirmatory final decree under G. S. 1913, § 7394.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That he is a [son] [devisee] [or state other facts giving the petitioner a status to make the petition], of the above named decedent.

II. That on 19 , this Court made a final decree assigning the residue of the estate of said decedent, including real estate, to the persons entitled thereto by law [without any notice being given of the hearing on the petition for such decree] [but the notice of the hearing on the petition for such decree was not such as was required by law, in this, that (state defect)]. .

III. That the residence and post office address of your petitioner is No. , in the city of , county, state of Minnesota.

Wherefore your petitioner prays for a new and confirmatory decree, after due notice, assigning said residue to the persons to whom the same was assigned by such former decree, according to the terms of such former decree.

.....
Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1590. Order for hearing and for notice on petition under G. S. 1913, § 7394.

[Title as in § 1396.]

The petition of , representing that on 19 , this Court made a final decree assigning the residue of the estate of the above named decedent to the persons entitled thereto by law, without due notice being given as required by law, and praying for a new and confirmatory decree assigning said residue to the same persons to whom it was assigned by such former decree, according to the terms of such former decree, having been filed in this Court on 19 ,

It is ordered [continue as in § 1399].

1591. New and confirmatory final decree under G. S. 1913, § 7396.

[Title as in § 1396.]

The petition of , filed herein on 19 , representing that on 19 , this Court made a final decree assigning the residue of the estate of the above named decedent to the persons entitled thereto

by law, without due notice being given as required by law, and praying for a new and confirmatory decree, after due notice, assigning said residue to the same persons to whom it was assigned by such former decree, according to the terms of such former decree, coming on for hearing on this day pursuant to an order of this Court made on 19 , and proof of the due service of the notice of hearing required by said order having been filed, and it appearing to the satisfaction of the Court from said petition and the evidence received on the hearing, and from the files, records and prior proceedings of this administration, that all the allegations of said petition are true, and that said former decree was made without due notice being given as required by law, and that the persons to whom said residue was assigned by such former decree were in fact the persons entitled thereto,

It is decreed that said former decree be and the same is hereby confirmed and that said residue be and the same is hereby assigned to the same persons to whom it was assigned by such former decree, and in the same proportions and upon the same conditions and in the same terms as in such former decree, subject however, to the rights of all persons claiming under such persons, as owners, mortgagees or otherwise, such former assignment and this assignment being as follows: [Follow former decree verbatim.]

Dated 19 .

.....

Judge.

1592. Petition for final decree after discharge of representative under G. S. 1913, § 7392.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That he is a [son] [devisee] [or state other facts giving petitioner a status under the statute to make this petition], of the above named decedent.

II. That one , who administered the estate of said decedent as [administrator] thereof in this Court, was finally discharged from his trust as such [administrator] by an order of this Court made on 19 , but through [inadvertence] [or state other cause according to the facts] no final decree assigning the residue of the estate of said decedent has ever been made or entered in the administration of said estate.

III. That there is a residue remaining upon the final settlement of said estate after all the claims against such estate and all the expenses and charges of the administration thereof have been fully paid, consisting of the following described property, which ought to be assigned to the persons entitled thereto as provided by law:

Description of residue.	Appraised or estimated value.
.....
.....
.....
.....
	Total, \$

IV. That the residence and post office address of your petitioner is No. , in the city of , county, state of Minnesota.

Wherefore your petitioner prays that said residue be assigned to the persons entitled thereto by law.

.....
Petitioner.

.....
Attorney for Petitioner.
[Office and post office address.]
[Verification as in § 1405.]

1593. Order for hearing and for notice on petition under G. S. 1913, § 7392.

[Title as in § 1396.]

The petition of , praying for the assignment of the residue of the estate of the above named decedent, having been filed herein on 19,

It is ordered [continue as in § 1399].

1594. Citation on petition for final decree under G. S. 1913, § 7392.

[Title as in § 1396.]

The State of Minnesota to all persons interested in the assignment of the residue of the estate of the above named decedent:

The petition of , representing that the [administrator] of the estate of said decedent has been finally discharged from his trust as such administrator and that there is a residue remaining upon the final settlement of said estate which has never been assigned, and praying for the assignment thereof, having been filed in this Court,

You are hereby cited [continue as in § 1401].

[Statute does not provide for citation. Use this form only when citation ordered by Court.]

1595. Final decree after discharge of representative under G. S. 1913, § 7392.

[Title as in § 1396.]

The petition of , filed herein on 19 , representing that , the [administrator] of the estate of the above named dece-

dent, has been finally discharged from his trust as such [administrator] and that there is a residue remaining upon the final settlement of said estate which has never been assigned, and praying for the assignment thereof to the persons entitled thereto, coming on for hearing on this day pursuant to an order of this Court made on 19 , and proof of the due publication of said order having been filed, and it appearing to the satisfaction of the Court from said petition, and from the evidence received on the hearing, and from the files, records and prior proceedings of this administration, that all the allegations of said petition are true, and that all the claims against said estate and all the expenses and charges of the administration thereof have been fully paid, and that there is a residue [continue as under §§ 1569-1575].

1596. Petition for amendment of final decree to conform to facts.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That he is [one of the heirs of the above named decedent] [or state other facts giving the petitioner a status to make the petition].

II. That on 19 , in the regular course of the administration of the estate of said decedent, this Court made a final decree of distribution assigning the residue of said estate to the persons entitled thereto.

III. That a part of said decree reads as follows: [Give erroneous part verbatim.]

IV. That said part does not conform to the facts and does not express the real intention of the Court in this that, through inadvertence [state error].

V. That to conform to the facts and the real intention of the Court such part of said decree should be amended so as to read as follows: [Give desired correction.]

VI. That the residence and post office address of your petitioner is No. , in the city of , county, state of Minnesota.

Wherefore your petitioner prays that said decree be amended in the particulars herein specified.

.....

Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1597. Order for hearing and for citation on petition for amendment of final decree.

[Title as in § 1396.]

The petition of _____, praying for the amendment of the final decree of distribution, made by this Court on _____ 19____, assigning the residue of the estate of the above named decedent to the persons entitled thereto, having been filed herein on _____ 19____,

It is ordered [continue as in § 1400].

1598. Citation on petition for amendment of final decree.

[Title as in § 1396.]

The State of Minnesota to all persons interested in the assignment of the residue of the estate of the above named decedent:

The petition of _____, representing that the final decree of distribution assigning the residue of said estate to the persons entitled thereto, made by this Court on _____ 19____, does not conform to the facts or express the real intention of the Court, and praying that it be amended in certain particulars, having been filed in this Court,

You are hereby cited [continue as in § 1401].

1599. Order amending final decree to conform to the facts.

[Title as in § 1396.]

The petition of _____, filed herein on _____ 19____, praying for the amendment of the final decree of distribution made by this Court on _____ 19____, assigning the residue of the estate of the above named decedent to the persons entitled thereto, coming on for hearing on this day pursuant to an order made by this Court on _____ 19____, and proof of the due service of the citation to all persons interested in such matter required by said order having been filed, and it appearing to the satisfaction of the Court from said petition and the evidence received on the hearing, and from the files, records and prior proceedings of this administration, that all the allegations of said petition are true, and that through clerical error and inadvertence said decree does not conform to the facts or express the real intention of the Court in the particulars specified in said petition, and that it ought to be amended accordingly,

It is ordered that said decree be and the same is hereby amended so that the whole decree as amended shall read as follows: [Set out decree in full as amended.]

Dated _____ 19____.

.....
Judge.

1600. Petition for partition under G. S. 1913, § 7408.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That the above named decedent died on 19 , [intestate] [leaving a last will which was duly admitted to probate by this Court on 19].

II. That the estate of said decedent has been fully administered in this Court excepting the distribution thereof, and it appears from the final account of , representative of said decedent, filed herein on 19 , that there is a residue remaining, after all the claims against said estate and all the expenses of its administration have been fully paid, for distribution among the [heirs] [devisees and legatees] of said decedent, which is described as follows:

[Describe the residue specifically.]

III. That the following named persons, including your petitioner, are the sole [heirs] [devisees and legatees] of said decedent and entitled under the [statutes of descent and distribution] [provisions of said will] to all of said residue:

Name of heir, devisee or legatee.	Age.	Relationship to decedent.	Residence.
.....			
.....			
.....			

IV. That in the final decree of distribution of said residue to be made by this Court in the due course of administration of said estate your petitioner and and are entitled to have said residue assigned to them in common and undivided and their separate shares therein are not separated and distinguished.

V. That your petitioner desires to have his share of said residue assigned to him in severalty.

Wherefore your petitioner prays that said residue be partitioned as provided by statute and assigned to the persons entitled thereto in severalty and not in common.

.....
Petitioner.

.....
Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1601. Order for hearing and citation on petition for partition.

[Title as in § 1396.]

The petition of _____, having been filed in this Court, representing that he is one of the [heirs] [devisees] [legatees] of the above named decedent and entitled to share in the residue of the estate of said decedent, and praying that a partition of said residue be had as provided by statute, and that his share be assigned to him in severalty and not in common with other [heirs] [devisees and legatees],

It is ordered that [continue as in § 1400].

1602. Citation on petition under G. S. 1913, § 7408.

[Title as in § 1396.]

The State of Minnesota to all persons interested in the partition, distribution and assignment of the residue of the estate of the above named decedent:

The petition of _____, representing that he is one of the [heirs] [devisees] [legatees] of said decedent and entitled to share in the residue of said estate, and praying that a partition of said residue be had as provided by statute and that his share be assigned to him in severalty and not in common with the other [heirs] [devisees and legatees], having been filed in this Court,

You are hereby cited [continue as in § 1401].

1603. Order appointing referees.

[Title as in § 1396.]

The petition of _____, filed herein on _____ 19____, praying for a partition of the residue of the estate of the above named decedent as provided by statute and its assignment to the persons entitled thereto in severalty and not in common, coming on for hearing on this day pursuant to an order of this Court made on _____ 19____, and proof of the due service of the citation to all persons interested in such matters required by said order having been filed, and it appearing to the satisfaction of the Court from said petition and from the files, records and prior proceedings of said estate and from the evidence received on the hearing, that all the allegations of said petition are true, and that the estate to be assigned herein to said petitioner and the other beneficiaries thereof is in common and undivided and that their respective shares are not separated and distinguished, and that said petitioner is entitled to have the same partitioned and his share assigned to him in severalty and not in common with the other beneficiaries,

It is ordered that _____ and _____ and _____ be and they are hereby appointed referees to make partition of said residue as provided by law and that a warrant issue to them for that purpose; that as such referees they proceed, after taking and subscribing an oath as required

by law and giving written notice, served [in the manner of a summons in a civil action], of the time and place where they will make partition, to all persons interested therein, their guardians or agents, to make partition of the property hereinafter described and constituting all the residue of the estate of said decedent, and set off the same, according to its value as appraised by them, as follows:

To , the equivalent in value of an undivided [one-half] thereof.

To , the equivalent in value of an undivided [one-half] thereof.

And it is further ordered that the several shares shall be set off by said referees to each distributee in severalty by metes and bounds, or by description, so that the same can be easily distinguished, but if any two or more of the distributees consent, and request to have their shares set off so as to be held by them in common and undivided they shall be so set off. In making such partition the referees may divide specific tracts of real estate, but they are not required to do so.

The property to be so partitioned is described as follows: [Describe all the residue, both real and personal, specifically.]

Dated 19 .

.....

Judge.

1604. Warrant to referees.

[Title as in § 1396.]

The above named Court to , and , and

Greeting:

Having been appointed by this Court on 19 , referees to make partition of the residue of the estate of the above named decedent, consisting of the property hereinafter described, you are hereby authorized and directed to proceed in making such partition as follows: After taking and subscribing the oath required by law, and after giving written notice, served [in the manner of a summons in a civil action], of at least [ten] days, of the time when and the place where you will proceed to make such partition, to guardian of , a minor hereinafter mentioned, who was appointed such guardian by this Court on 19 , for the purposes of this proceeding, and to , residing at , who was appointed by this Court on 19 , as agent of , hereinafter mentioned, for the purposes of this proceeding, and to , residing at , and to , residing at , hereinafter mentioned, you shall proceed at the time and place appointed by said notice to make partition of the property hereinafter described, according to its cash market value at the time as appraised by you, and set off the same as follows:

To , the equivalent in value of an undivided [one-half] thereof.

To , the equivalent in value of an undivided [one-half] thereof.

And you shall set off the several shares to each of said persons in severalty, by metes and bounds, or by description, so that the same can

be easily distinguished. If any two or more of said persons consent and request to have their shares set off so as to be held by them in common and undivided, you shall set off their shares accordingly. In making partition you may divide specific tracts of land, but you are not required to do so. If any tract of said lands or tenements is of greater value than the share of any one of said [heirs] in the estate to be divided, and cannot be divided without injury to the same you may set it off to any one of said [heirs] who will accept it and pay or secure to one or more of the other [heirs] such sums as you may award to make the partition equal, and you shall make your award accordingly. You shall proceed to make such partition with all reasonable speed and make written report of your proceedings to this Court, with a statement of your expenses therein.

The property to be so partitioned is described as follows:

.....
.....
.....

Witness the Judge of said Court and the seal thereof this day
of 19 .

.....
Judge.

[Seal of court.]

1605. Oath of referees.

[Title as in § 1396.]

[Venue.]

 and and being duly sworn, each for himself says that he is one of the referees appointed to make partition of the residue of the estate of the above named decedent and that he will truly, faithfully and impartially appraise and partition the same, according to his warrant and the law, to the best of his knowledge and ability. So help me God.

.....
.....
.....

[Jurat as in § 1406.]

1606. Appointment of agent for non-resident distributee.

[Title as in § 1396.]

Proceedings having been instituted herein for the partition of the residue of the estate of the above named decedent, and it appearing to the Court that , one of the persons entitled to share in said residue resides in the city of , state of , and has no agent in this state, and that it is necessary that some person residing in this state be authorized to act for said in such partition proceedings and

to take possession and charge of the share of the said in said residue,

It is ordered that , residing at , be and he is hereby appointed as such agent for the purposes aforesaid and is authorized to act as such agent upon filing herein a bond in the penal sum of \$, with sufficient sureties, conditioned faithfully to manage and account for said share and act as said agent, and approved by the Judge of this Court.

Dated 19 .

.....
Judge.

1607. Bond of agent for non-resident distributee.

[Title as in § 1396.]

Know all men by these presents that we, as principal, and and , as sureties, all residents of county, state of Minnesota, are bound unto , Judge of the above named Court, and his successors in office, in the sum of dollars, to the payment of which to the said Judge or his successors in office, we jointly and severally bind ourselves, our heirs, executors and administrators, by these presents.

The condition of this obligation is such that whereas proceedings are pending in the above named Court for the partition of the residue of the estate of the above named decedent and the said has been appointed by said Court to act as agent for , residing at , who is one of the persons entitled to share in said residue, in said proceedings and to take possession and charge of the share of said in said residue,

Now, therefore, if the said shall faithfully act as such agent and faithfully manage and account for said share, then this obligation shall be void; otherwise to remain in full force.

In witness whereof we have hereunto set our hands this day of , 19 .

.....
.....
.....

Executed in presence of:

.....
.....

[Acknowledgment as in § 1407.]

[Justification of sureties as in § 1408.]

I hereby approve the foregoing bond and the sureties thereon.

Dated 19 .

.....
Judge.

1608. Notice to interested parties—Admission of service.

[Title as in § 1396.]

To , and , and , guardian of , and
agent of :

You are hereby notified that the undersigned referees, appointed by the above named Court to partition the residue of the estate of the above named decedent, will meet at [name building or office with street number,] in the city of , in county, state of Minnesota, on 19 , at o'clock in the forenoon, to make such partition, and that you may then and there be heard in relation thereto.

Dated 19 .

.....
.....
.....

Referees.

Due service of the foregoing notice is hereby admitted this
day of 19 .

.....
.....
.....
.....

1609. Consent to have shares set off in common.

[Title as in § 1396.]

We, the undersigned, being of full age and entitled to share in the residue of the estate of the above named decedent, hereby consent and request that in the proceedings now pending in this Court for the partition of said residue our shares therein be set off to us so as to be held by us in common and undivided and not in severalty.

Dated 19 .

.....
.....

1610. Report of referees upon partition.

[Title as in § 1396.]

We, the undersigned referees appointed by this Court on 19 , to make partition and division of the residue of the estate of the above named decedent, respectfully report that after taking and subscribing an oath herewith returned, and after giving notice to all persons interested in such partition as directed by the warrant to us herewith returned, as more fully appears from the copy of said notice and

proof of the due service thereof herewith returned, and after examining and appraising the property to be partitioned and hearing the testimony of all interested persons who appeared and desired to be heard, we divided and partitioned and set off all the property described in said warrant as follows:

To , we set off in severalty the following property:

Description.	Value as appraised by referees.
.....
.....
.....
.....
Total, \$	

To we set off the following described tract of land, its value being greater than the share of any one of the [heirs] mentioned in said warrant and it appearing to us that it could not be divided without injury to the same, the said having agreed to accept it as so set off to him, and, in order to equalize the partition, has agreed to pay to the sum of dollars, which sum we award to said agreement being herewith returned.

Description.	Value as appraised by referees.
.....

To and , we set off in common and undivided the following property, they having consented in writing to have their shares set off to them in common and undivided, such consent being herewith returned:

Description.	Value as appraised by referees.
.....
.....
.....
.....
Total, \$	

The market value of the property set off to each of the distributees is [one-half] of the total market value of all the property partitioned by us and directed to be partitioned by said warrant. In making the partition we appraised the property at its present cash market value as indicated above. An itemized statement of the expenses of the partition is hereto attached and made a part hereof.

Dated 19 .

.....
.....
.....

Referees.

EXPENSES OF PARTITION

Surveyor, as per voucher No. 1.....	\$
Hotel bill, as per voucher No. 2.....	\$
Attorney's fees, as per voucher No. 3.....	\$
Hire of automobile to view lands, as per voucher No. 4.....	\$
Referees' commissions.....	\$
<hr/>	
Total, \$	
.....	
.....	
.....	
Referees.	

CONSENT OF DISTRIBUTEES

We, the undersigned, being all the distributees [or agents or guardians thereof] mentioned in the foregoing report [and all being of full age] hereby consent to the partition therein reported and request that said partition and report be in all things confirmed by this court, and that said residue be assigned by the Court in accordance therewith.

Dated 19 .

.....
.....
.....
.....

1611. Order confirming report of partition.

[Title as in § 1396.]

The report of the referees appointed to partition the residue of the estate of the above named decedent having been filed herein on 19 , and the same having been examined by the Court and found to have been made in conformity with the law and with the warrant issued by this Court to said referees on 19 , after due notice to all the distributees of said estate, [and all of said distributees having consented to the partition made by said referees and requested the confirmation of said report,] [and it appearing that , one of said distributees, to whom was set off all of said real estate has agreed to accept the same and in order to equalize the partition has paid to (secured to their satisfaction) the other persons entitled to share in said estate the sum of dollars awarded to them by said referees],

It is ordered that said report and the partition therein made be and the same is hereby in all things confirmed.

Dated 19 .

.....
Judge.

1612. Final decree after partition proceedings.

[Title as in § 1396.]

The matter of the final distribution and assignment of the residue of the estate of the above named decedent coming on for hearing on this day pursuant to an adjournment on account of the institution of partition proceedings herein, and the report of the referees appointed in said partition proceedings having been filed and confirmed by this Court on 19 , and the final account of the representative of said decedent having been settled and allowed by this Court on 19 , and it appearing to the satisfaction of the Court [continue as in § 1569 or § 1572, with necessary changes, down to "Now, therefore"].

Now, therefore, it is decreed that all of said residue be and the same is hereby assigned to said [heirs] [devisees and legatees] in accordance with the [statutes of descent and distribution] [provisions of said will], and said partition proceedings and the report of the referees appointed therein, [and the consent of all the heirs, devisees and legatees of said decedent filed herein on 19], as follows:

To [continue as in § 1569 or § 1572, with the necessary changes, following the report of the referees as confirmed by the Court].

1613. Petition for partition under G. S. 1913, § 7410.

[Title as in § 1396.]

I.-IV. as in § 1604.

V. That said real estate consists of a [single farm] and cannot be divided without prejudice and inconvenience to the owners and your petitioner is willing to accept it and to have it assigned to him as a whole and to pay to the other [heirs] [devisees] above mentioned their just proportion of the true value thereof.

Wherefore your petitioner prays that the whole of said real estate be assigned to him as provided by General Statutes 1913, § 7410, and that appraisers be appointed to ascertain its true value.

.....
Petitioner.

.....
Attorney for Petitioner.

[Office and post office address.]
[Verification as in § 1405.]

1614. Order for hearing and citation on petition under G. S. 1913, § 7410.

[Title as in § 1396.]

The petition of , having been filed in this Court, representing that he is one of the [heirs] [devisees] of the above named decedent

and entitled to share in the residue of the estate of said decedent, and praying that all the real estate of said residue be assigned to him upon his paying to the other [heirs] of said decedent their just proportion of the true value of said real estate, or securing the same to their satisfaction,

It is ordered that [continue as in § 1400].

1615. Citation for partition under G. S. 1913, § 7410.

[Title as in § 1396.]

The State of Minnesota to all persons interested in the partition, distribution and assignment of the residue of the estate of the above named decedent:

The petition of _____, representing that he is one of the [heirs] [devisees] of said decedent and entitled to share in the residue of said estate, and praying that all the real estate of said residue be assigned to him upon his paying to the other [heirs] [devisees] of said decedent their just proportion of the true value of said real estate, or securing the same to their satisfaction, having been filed in this Court,

You are hereby cited [continue as in § 1401].

1616. Order appointing appraisers under G. S. 1913, § 7410.

[Title as in § 1396.]

The petition of _____, filed herein on _____ 19____, representing that the real estate constituting the residue of the estate of the above named decedent cannot be divided without prejudice and inconvenience to the owners and praying that the whole of said real estate be assigned to the petitioner, coming on for hearing on this day pursuant to an order of this Court made on _____ 19____, [and proof of the due service of the citation to all persons interested in such matter required by said order having been filed,] and it appearing to the satisfaction of the Court from said petition, and from the files, records and prior proceedings in this administration, and from the evidence received on the hearing, that all the allegations of said petition are true and that the real estate constituting the residue of the estate of said decedent consists of a [single farm] and cannot be divided without prejudice and inconvenience to the owners, and that the petitioner is willing to accept it and have it assigned to him as a whole and to pay to the other [heirs] [devisees] of said decedent their just proportion of the true value thereof, [and that said other (heirs) (devisees) have requested that said petition be granted],

It is ordered that _____ and _____ be and they are hereby appointed appraisers to ascertain and appraise the true value of

said real estate and report their proceedings to this Court, and it is further ordered that a warrant issue to them for that purpose.

Dated 19 .

.....
Judge.

1617. Warrant to appraisers under G. S. 1913, § 7410.

[Title as in § 1396.]

The above named Court to and , Greetings:

Having been appointed by this Court appraisers to ascertain and appraise the true value of certain real estate hereinafter described, consisting of the residue of the estate of the above named decedent, you are hereby authorized and directed to proceed as follows in making such appraisement: After taking and subscribing an oath to discharge your duties truly, faithfully and impartially and to the best of your knowledge and ability; you will proceed with all reasonable speed to examine, ascertain and appraise the present true, cash market value of said real estate and report the same to this Court in writing, with a statement of your expenses therein, and return therewith this warrant and your oath.

The property to be so appraised by you is described as follows:

.....
.....

Witness the Judge of said Court and the seal thereof this day
of 19 .

.....
Judge.

[Seal of court.]

1618. Oath of appraisers under G. S. 1913, § 7410.

[Title as in § 1396.]

[Venue.]

 and and , being duly sworn, each for himself says that he is one of the appraisers appointed to appraise certain real estate of the above named estate and that he will discharge his duties as such appraiser and appraise such real estate truly, faithfully and impartially, to the best of his knowledge and ability. So help me God.

.....
.....
.....

[Jurat as in § 1406.]

1619. Report of appraisers under G. S. 1913, § 7410.

[Title as in § 1396.]

We, the undersigned appraisers appointed by this Court on 19 , to appraise the real estate hereinafter described, respectfully report that in accordance with the warrant to us herewith returned, after taking and subscribing the oath herewith returned, we examined said real estate and ascertained and appraised its present true, cash market value as follows:

Description of property appraised.	Appraised value.
.....
.....

An itemized statement of our expenses herein is hereto attached and made a part hereof.

Dated 19 .

.....
.....
.....

Appraisers.

[Statement of expenses as in § 1610.]

CONSENT OF DISTRIBUTEES

We, the undersigned, being [all the] [heirs] [devisees] [and agents or guardians of (heirs) (devisees)] of the above named decedent, [and all being of full age,] hereby consent to the foregoing appraisement and request that the same and the report thereof be confirmed by this Court, and that said real estate be assigned to by the Court.

Dated 19 .

.....
.....
.....
.....

1620. Order confirming report of appraisers under G. S. 1913, § 7410.

[Title as in § 1396.]

The report of the appraisers appointed by this Court on 19 , to appraise certain real estate of the above named decedent, having been filed herein on 19 , and having been examined by the Court, and it appearing to the Court that the appraisement therein reported was duly made in accordance with the law and with the warrant issued by this Court to said appraisers on 19 , and to be fair and just, [and all the (heirs) (devisees) of said decedent having consented to said appraisement and requested that the same and the report thereof be confirmed by this Court] [and it appearing that , one of the

(heirs) of said decedent has agreed to accept said real estate and has paid to the other (heirs) of said decedent their just proportion of the true value thereof according to said appraisement, or secured the same to their satisfaction],

It is ordered that said appraisement and report thereof be and the same is hereby in all things confirmed.

Dated 19 .

.....

Judge.

1621. Final decree under G. S. 1913, § 7410.

[Title as in § 1396.]

The matter of the final distribution and assignment of the residue of the estate of the above named decedent coming on for hearing on this day pursuant to an adjournment on account of the institution of partition proceedings herein under G. S. 1913, § 7410, and the report of appraisers appointed in said proceedings having been filed and confirmed by this Court on 19 , and the final account of the representative of said decedent having been settled and allowed by this Court on 19 , and it appearing to the satisfaction of the Court [continue as in § 1569 or § 1572, with necessary changes, down to "Now, therefore"],

Now, therefore, it is decreed that, in accordance with said partition proceedings and the report of the appraisers appointed therein [and the consent of all the other heirs and devisees of said decedent filed herein on 19], all of said real estate be and the same is hereby assigned to .

Dated 19 .

.....

Judge.

1622. Receipt of distributive share.

Received this day from , as [executor] [administrator] of the estate of , deceased, the sum of \$, and [describe chattels], in full of my distributive share of the personal property of said estate.

Dated 19 .

.....

1623. Order appointing trustee of contingent legacy under G. S. 1913, § 7337.

[Title as in § 1396.]

It appearing to the Court that by the last will of the above named decedent, admitted to probate by this Court on 19 , a certain legacy of is given to , contingent on said legatee living to the age of [twenty-one years], and that said testator has omitted to appoint any person or persons to receive and hold said legacy until such

legatee arrives at such age, and that _____, the representative of said estate, has in his hands funds for the payment of said legacy in full,

It is ordered that _____, residing at _____, be and he is hereby appointed trustee to receive, invest and control said legacy, and the income thereof, until said legatee shall arrive at the age of [twenty-one] years, or in case of the death of said legatee before arriving at such age, to dispose of said legacy and the income thereof as provided by said will; and it is further ordered that before entering upon the duties of his trust said trustee shall file an oath as required by law and a bond in the penal sum of \$ _____, with sufficient sureties, conditioned as required by law and approved by the Judge of this Court.

Dated _____ 19 ____.

.....

Judge.

1624. Bond of trustee of legacy under G. S. 1913, § 7337.

[Title as in § 1396.]

Know all men by these presents that we, _____, as principal, and _____ and _____, as sureties, all residents of _____ county, state of Minnesota, are bound unto _____, Judge of the above named Court, and his successors in office, in the sum of _____ dollars, to the payment of which to the said Judge or his successors in office, we jointly and severally bind ourselves, our heirs, executors and administrators, by these presents.

The condition of this obligation is such that whereas said _____ has been appointed by said Court a trustee under the provisions of G. S. 1913, § 7337, to receive, hold, invest and control a certain legacy and the income thereof given by the above named decedent by his last will admitted to probate by said Court on _____ 19 ____, to _____, said legacy being contingent on the event of said legatee living to the age of _____ years,

Now, therefore, if said _____ shall faithfully execute the duties of said trust and render a just and true account of his trusteeship to said Court at any time when required by said Court, and shall perform all orders and decrees of said Court to be by him performed in the premises, and when said legatee arrives at the age of _____ years shall pay to said legatee the amount of said legacy and the income thereof, or, in case of the death of said legatee before arriving at such age, shall pay said legacy and the income thereof to the person or persons designated in said will as being entitled thereto, then this obligation shall be void; otherwise to remain in full force.

In witness whereof we have hereunto set our hands this _____ day of _____ 19 ____.

.....

Executed in the presence of:

.....

[Acknowledgment as in § 1407.]

[Justification of sureties as in § 1408.]

I hereby approve the foregoing bond and the sureties thereon.

Dated 19 .

.....

Judge.

OATH OF TRUSTEE

[Venue.]

I, , do solemnly swear that I will faithfully and justly perform all the duties of the office and trust which I now assume as trustee of a certain legacy given to by the last will of , deceased, to the best of my ability. So help me God.

.....

[Jurat as in § 1406.]

1625. Petition for final discharge of executor or administrator under G. S. 1913, § 7400.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That he is the [executor] [administrator] of the estate of the above named decedent, duly appointed as such by this Court on 19 .

II. That a final decree of distribution of said estate was made by this Court on 19 [and the time to appeal therefrom has expired and no appeal is pending].

III. That your petitioner has fully complied with all the terms and conditions of said decree and has paid over and delivered to the distributees named therein all moneys, funds and property to them awarded by such decree, and herewith presents and files receipts therefor from said distributees, and has fully complied with the terms and conditions of all the orders, judgments and decrees of this Court in the administration of said estate, and has in all things, well, faithfully and fully administered his trust as such [executor] [administrator].

Wherefore your petitioner prays that he and the sureties on his bond be discharged from all further liability and from all liability by reason of said trust and by reason of said administration.

.....

Petitioner.

.....

Attorney for Petitioner.

[Office and post office, address.]

[Verification as in § 1405.]

1626. Order of final discharge of representative under G. S. 1913, § 7400.

[Title as in § 1396.]

The petition of _____, representative of the above named decedent, praying for his discharge and for the discharge of his sureties, having been filed herein on _____ 19____, and it appearing to the satisfaction of the Court from said petition and the receipts filed therewith, and from an examination of said representative and the files and records and prior proceedings of this administration, that all the allegations of said petition are true,

It is ordered and decreed that said representative and the sureties on his bond filed herein on _____ 19____, be and they are hereby fully discharged from further liability and from all liability by reason of said trust as such representative and by reason of said administration.

Dated _____ 19____.

.....
Judge.

1627. Petition of special administrator for final accounting and discharge.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That he is special administrator of the estate of the above named decedent, duly appointed as such by this Court on _____ 19____.

II. That a general representative of said estate was duly appointed by this court on _____ 19____, who has duly qualified and is now acting as such representative.

III. That your petitioner herewith presents and files his final account and is prepared to turn over the property of the said estate in his hands to said general representative.

Wherefore your petitioner prays that his final account be settled and allowed and that he be discharged.

.....
Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1628. Final account of special administrator.

[Title as in § 1396.]

The undersigned special administrator of the estate of the above named decedent respectfully submits to the Court the following final account of his administration of said estate, with accompanying vouchers:

RECEIPTS—DEBITS

Personal property described in his inventory filed
 Personal property not included in his inventory..
 Interest and dividends on above property.....
 Gain by sale of personal property above appraised
 value
 Rents and profits of real property.....

Total, \$

DISBURSEMENTS—CREDITS

	Dollars	Cts.	Voucher Number.
Expenses of administration .			
[As in § 1565.]			
.....			
.....			
.....			
Credits for losses.			
Loss on sale of personal property below ap- praised value.....			
Loss on personal property by death or other cause			
[Any other losses.]			

Total, \$

SUMMARY

Total receipts and debits.....
 Total disbursements and credits.....
 Balance

SALES OF PERSONAL PROPERTY

Description of property sold.	Amount received.
.....	
.....	
.....	
.....	

Total, \$

PROPERTY ON HAND

Personal property on hand ready for delivery to general representative.

..... \$
 \$
 \$
 \$

Total, \$

Dated 19

.....
 Special Administrator,
 Estate of , deceased.

[Verification as in § 1565.]

1629. Order for hearing and for notice on petition of special administrator for settlement of final account and discharge.

[Title as in § 1396.]

The petition of , special administrator of the estate of the above named decedent, praying for the settlement and allowance of his final account and for his discharge, having been filed herein on 19 , together with his final account,

It is ordered that the same be heard before this Court at its court room in the Court-House in the city of , county, state of Minnesota, on 19 , at o'clock in the forenoon, and that a copy [of said petition and account and] of this order be [personally] served on , the [general administrator] of said estate, [in the manner of service of summons in a civil action,] at least days before said day of hearing.

Dated 19 .

.....
 Judge.

G. S. 1913, § 7389, probably does not apply. Upon the appointment of an executor or general administrator a special administrator is required to deliver to him "forthwith" all the property of the estate. As the special administrator is entitled to an accounting before delivering the property his account should be settled and allowed promptly upon the appointment of an executor or general administrator. Often and properly the settlement is made without any notice or order, the special and general administrators appearing voluntarily. If a regular three weeks' published notice is deemed necessary or desirable modify the foregoing order accordingly. See §§ 1400, 1401.

1630. Order settling and allowing final account of special administrator and discharging him.

[Title as in § 1396.]

The petition of _____, special administrator of the estate of the above named decedent, filed herein on _____ 19____, praying for the settlement and allowance of his final account therewith filed and for his discharge, coming on for hearing on this day [pursuant to an order of this Court made on _____ 19____], and it appearing to the satisfaction of the Court from said petition, and from an examination of said account and from the evidence received on the hearing, and from the files, records and prior proceedings in this administration, that all the allegations of said petition are true, and that said account is in all things true, [as corrected under the direction of the Court,] and that said administrator has fully and faithfully discharged his trust as such administrator,

It is ordered that said account be and the same is hereby settled and allowed as and for the final account of said administrator; and that said administrator be and he is hereby discharged from further duty or liability as such administrator, without further order, as soon as he has turned over to _____, general [administrator] of said estate, all the property of said estate remaining in his hands, as shown by said final account, as allowed, and said general [administrator] has filed in this Court a receipt therefor.

Dated _____ 19____.

.....
Judge.

1631. Petition of representative of deceased representative for accounting under G. S. 1913, § 7301.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That _____, duly appointed [administrator] of the estate of the above named decedent by this Court on _____ 19____, died on _____ 19____, while acting as such [administrator] and before completing the administration of said estate and rendering his final account thereof.

II. That your petitioner is the duly qualified and acting [administrator] of the estate of said _____, duly appointed as such by [this Court] [the Probate Court of _____ county, state of Minnesota,] on _____ 19____.

III. That as such [administrator] your petitioner presents and files herewith an account of the administration of the estate of said _____, by said _____.

IV. That _____, residing at _____, and _____, residing at _____, are sureties on the official bond of said _____, as such [administrator,] filed in this Court on _____ 19____.

V. That the residence and post office address of your petitioner is No. , in the city of , county, state of Minnesota.

Wherefore your petitioner prays for the adjustment and allowance of said account and the discharge of said sureties.

.....

Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1632. Order for hearing and for citation on foregoing petition.

[Title as in § 1396.]

The petition of , [administrator] of the estate of , [administrator] of the estate of the above named decedent, praying for the adjustment and allowance of an account of the administration of the estate of the above named decedent by said , having been filed herein on 19 , together with said account,

It is ordered that [continue as in § 1400, providing for service of citation on sureties].

1633. Citation on foregoing petition.

[Title as in § 1396.]

The State of Minnesota to all persons interested in the settlement of the account of the administration of the estate of the above named decedent by , deceased, rendered by , [administrator] of the estate of said :

The petition of , [administrator] of the estate of said , representing that said died on 19 , while acting as [administrator] of the estate of , deceased, and praying for the adjustment and allowance of an account of the administration of said estate by said , rendered by the petitioner and filed with said petition, and for the discharge of the sureties on the official bond of said , as such [administrator], having been filed in this Court,

You are hereby cited [continue as in § 1401].

1634. Final account by representative of deceased representative under G. S. 1913, § 7301.

[Title as in § 1396.]

The undersigned, [administrator] of the estate of , who, at the time of his death, was acting as [administrator] of the estate of , under letters [of administration] duly issued to him by this Court on 19 , respectfully submits to the Court the following complete and final account of the administration of the estate of said by

said _____, with accompanying vouchers, showing all the receipts, disbursements and sales of said administrator in such administration during the entire period thereof to the time of his death and the balance of said estate remaining unadministered.

[Follow form under § 1565, substituting BALANCE OF ESTATE REMAINING UNADMINISTERED for RESIDUE FOR DISTRIBUTION, and insert the following verification.]

[Venue.]

_____, being duly sworn, says that the foregoing account signed by him is in all respects just and true to the best of his knowledge, information and belief.

.....

[Jurat as in § 1406.]

1635. Order allowing account of representative of a deceased representative and discharging sureties.

[Title as in § 1396.]

The petition of _____, [administrator] of the estate of _____, filed herein on _____ 19____, praying for the adjustment and allowance of an account of the administration of the estate of _____, by said _____, rendered by the petitioner and filed with said petition, coming on for hearing on this day pursuant to an order of this Court made on _____ 19____, and proof of the due service of the citation to all persons interested in such matter required by said order having been filed, and it appearing to the satisfaction of the Court from said petition and from an examination of said account, and from the evidence received on the hearing, and from the files, records and prior proceedings of said administration, that all the allegations of said petition are true, and that said account is in all things true, [as corrected under the direction of this Court],

It is ordered that said account be and the same is hereby settled and allowed as and for a complete and final account of the administration of the estate of _____, by said _____, and that the petitioner forthwith turn over to _____, administrator de bonis non of said estate, all the balance of said estate remaining unadministered as appears by said account so settled and allowed, and file in this Court a receipt therefor from said _____, as such administrator de bonis non; and it is further ordered that upon the filing of such receipt, _____ and _____, be and they are hereby discharged without further order, from all liability as sureties on the official bond of said _____, as such [administrator], filed herein on _____ 19____.

Dated _____ 19____.

.....

Judge.

1636. Petition for summary administration under Laws 1917, c. 251.

[Title as in § 1396.]
To the above named Court:
Your petitioner respectfully represents.

I. That on 19 , died in the city of , in the county of , state of , and at the time of his death resided and was domiciled in [said county] [county], state of Minnesota, and left estate in [said] [the latter] county subject to administration.

II. That the only property of which said decedent died possessed consists of certain personal property which by existing law is exempt from the payment of debts of said decedent, and does not exceed \$650 in value, and is described as follows:

Description.	Location.	Value.
.....
.....
.....
.....
Total, \$	

III. That said personal property is exempt from the payment of the debts of said decedent because it does not exceed in value the amount of claims against said estate for funeral expenses, expenses of last sickness, taxes, expenses of administration and the statutory allowance to the surviving spouse and family of said decedent.

IV. That the names, ages and relationship to decedent and places of residence of the heirs of said decedent, so far as known to your petitioner, are as follows:

Name.	Age.	Relationship to decedent.	Place of residence.
.....
.....
.....
.....

V. That the names and addresses of all creditors of said decedent, so far as known to your petitioner, are as follows:

Name.	Address.
.....
.....
.....
.....

VI. That said decedent died without leaving any will, as your petitioner verily believes, after diligent search and inquiry therefor.

VII. That your petitioner is the [surviving husband] [surviving wife] [son] of said decedent, is over twenty-one years of age, and is a suitable and competent person to administer said estate.

VIII. That the residence and post office address of your petitioner is No. , in the city of , county, state of Minnesota.

Wherefore your petitioner prays that letters of special administration on said estate be granted to him or some other suitable person under the provisions of Laws 1917, c. 251.

.....
Petitioner.

.....
Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1637. Order appointing special administrator under Laws 1917, c. 251.

[Title as in § 1396.]

The petition of , filed herein on 19 , praying that letters of special administration on the estate of the above named decedent be granted to him under the provisions of Laws 1917, c. 251, coming on for hearing on this day, and it appearing to the satisfaction of the Court from said petition and from the evidence received on the hearing, that all the allegations of said petition are true, and that all the property of which said decedent died possessed consists of certain personal property which is exempt under existing law from the payment of the debts of said decedent and does not exceed \$650 in value,

It is ordered that said petitioner be and he is hereby appointed special administrator of the estate of said decedent under the provisions of Laws 1917, c. 251, and that letters of administration issue to him accordingly, upon his filing an oath to faithfully and lawfully administer said estate according to law and a bond in the penal sum of \$, with sufficient sureties, conditioned as provided by law, and approved by the Judge of this Court.

Dated 19 .

.....
Judge.

1638. Oath of special administrator under Laws 1917, c. 251.

[Same as under § 1479.]

1639. Bond of special administrator under Laws 1917, c. 251.

[Title as in § 1396.]

[Same as under § 1479, except as to condition which should be as follows:]

The condition of this obligation is such that whereas said has been appointed special administrator of the estate of the above named decedent by said Court, under provisions of Laws 1917, c. 251,

1640. Letters of administration under Laws 1917, c. 251.

[Title as in § 1396.]

 is hereby appointed special administrator of the estate of
 , deceased, under the provisions of Laws 1917, c. 251.

Witness the Judge of said Court and the seal thereof this day
of , 19 .

.....
Judge.

[Seal of court.]

1641. Order appointing appraisers under Laws 1917, c. 251.

[Same as under § 1496.]

**1642. Inventory and appraisement and statement of liabilities under
Laws 1917, c. 251.**

[Title as in § 1396.]

[Same as in § 1497, but add following statement of liabilities and after
"inventory" in verification add "and statement of liabilities."]

STATEMENT OF LIABILITIES OF ESTATE

The following is a true and full statement of all the liabilities of the above named estate so far as known to me after diligent search and inquiry therefor.

.....
Administrator.

Name of claimant.	Address.	Nature of claim.	Amount of claim.
.....
.....
.....
.....
Total, \$		

1643. Petition for final settlement and discharge under Laws 1917, c. 251.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That he is special administrator of the estate of the above named decedent, duly appointed as such by this Court on 19 , under the provisions of Laws 1917, c. 251.

II. That he has fully administered said estate and herewith presents and files his final account of his administration.

Wherefore your petitioner prays for the settlement and allowance of said account and that he and his sureties be discharged from further liability.

.....

Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1644. Final account under Laws 1917, c. 251.

[Same as in § 1628.]

1645. Order for hearing and for notice on final account under Laws 1917, c. 251.

[Title as in § 1396.]

The petition of , special administrator of the estate of the above named decedent, praying for the settlement and allowance of his final account and for his discharge, having been filed herein on 19 , together with said account,

It is ordered that the same be heard before the Court at its court room in the Court-House in the city of , county, state of Minnesota, on 19 , at o'clock in the forenoon, and that notice thereof be given by serving a copy of this order upon all the heirs at law of said decedent and other persons interested in said estate whose names and addresses appear from the files and records herein, or are otherwise known, personally, at least days prior to said day of hearing.

Dated 19 .

.....

Judge.

1646. Order allowing final account and discharging administrator under Laws 1917, c. 251.

[Title as in § 1396.]

The petition of _____, special administrator of the estate of the above named decedent, filed herein on _____ 19____, praying for the settlement and allowance of his final account therewith filed and for his discharge, coming on for hearing on this day pursuant to an order of this Court made on _____ 19____, and proof of the due service of the notice of hearing required by said order having been filed, and it appearing to the satisfaction of the Court from said petition and from an examination of said account, and from the evidence received on the hearing, and from the files, records and prior proceedings of this administration, that all the allegations of said petition are true, and that said account is in all things true, [as corrected under the direction of the Court,] and that said administrator has fully and faithfully discharged his trust as such administrator, and that vouchers for all disbursements subject to payment paid by said administrator have been filed herein, and that the estate of said decedent does not exceed in valuation the amount of the claims for the expenses of the last sickness and burial of said decedent, and for taxes against said estate and the expenses of the administration thereof, and the statutory allowance to the surviving spouse and family of said decedent, and the other property of said decedent exempted by law from the payment of his debts,

It is ordered that said account be and the same is hereby settled and allowed as and for the final account of said administrator; and that said administrator and the sureties on his bond be and they are hereby discharged from further duty or liability regarding said trust.

Dated _____ 19____.

.....

Judge.

1647. Petition for summary settlement of small estate under Laws 1917, c. 289—Decedent dying intestate.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That on _____ 19____, _____ died in the city of _____, in the county of _____, state of _____, and at the time of his death resided and was domiciled in [said county] [_____ county, state of Minnesota], and left estate in said county subject to administration.

II. That all the property and assets of which said decedent died possessed do not exceed \$650 in value and are exempt from the payment of his debts under the laws of this state.

III. That the description and value of all the property both real and personal of which said decedent died possessed are as follows:

Description.	Location.	Value.
.....
.....
.....
.....
		Total, \$

IV. That said personal property is exempt from the payment of the debts of said decedent because it does not exceed in value the amount of claims against said estate for funeral expenses, expenses of last sickness, taxes, expenses of administration and the statutory allowance to the surviving spouse and family of said decedent, [and said real property is likewise exempt for the reason that at the time of his death it was occupied by said decedent as his homestead].

V. That the names, ages, relationship to decedent and places of residence of the heirs [devisees and legatees] of said decedent, so far as known to your petitioner, are as follows:

Name.	Age.	Relationship to decedent.	Place of residence.
.....
.....
.....

VI. That the names and addresses of all the creditors of said decedent, so far as known to your petitioner, are as follows:

Name.	Address.
.....
.....
.....

VII. That said decedent died without leaving any will, as your petitioner verily believes, after diligent search and inquiry therefor.

VIII. That your petitioner is the [surviving husband] [surviving wife] [son] of said decedent, is over twenty-one years of age and is a suitable and competent person to administer said estate.

IX. That the residence and post office address of your petitioner is No. , in the city of , county, state of Minnesota.

Wherefore your petitioner prays that letters of administration on said estate be granted to him or some other suitable person by this Court and that said estate be distributed and closed forthwith under the provisions of Laws 1917, c. 289.

.....
 Petitioner.

 Attorney for Petitioner.
 [Office and post office address.]
 [Verification as in § 1405.]

1648. Same—Decedent dying testate.

[Title as in § 1396.]

[Same as in § 1647 down to VII.]

VII. That said decedent left a will, dated 19 , wherein your petitioner was named as sole executor thereof, which your petitioner believes is the last will of said decedent and presents and files herewith for original probate in this Court.

VIII. That your petitioner is the [surviving husband] [surviving wife] [son] of said decedent, is over twenty-one years of age, and is a competent and suitable person to act as such executor.

IX. That the residence and address of your petitioner is No. , in the city of , county, state of Minnesota.

Wherefore your petitioner prays that said will may be proved and allowed herein and that letters testamentary thereon be granted to him or some other suitable person by this Court and that said estate be distributed and closed forthwith under the provisions of Laws 1917, c. 289.

.....
Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1649. Order for hearing and citation under Laws 1917, c. 289.

[Title as in § 1396.]

The petition of , praying that [a certain instrument therewith filed, dated 19 , be proved and allowed as the last will of the above named decedent and that letters testamentary thereon be granted to him,] [letters of administration on the estate of the above named decedent be granted to him,] and that said estate be forthwith distributed and closed under the provisions of Laws 1917, c. 289, having been filed in this Court,

It is ordered that the same be heard before this Court at its court room in the Court-House in the city of , county, state of Minnesota, on 19 , at o'clock in the forenoon, and that notice thereof be given by publishing a citation to all persons interested therein in the , a [daily] [weekly] newspaper published in said county, once each week for three successive weeks, the last publication to be at least days prior to said day of hearing, and by mailing a copy of said citation at least fourteen days prior to said day of hearing, postage prepaid, to each of the heirs and creditors of said

decedent, so far as they can be ascertained. Let citation issue accordingly.

Dated 19 .

.....

Judge.

1650. Citation under Laws 1917, c. 289.

[Title as in § 1396.]

The State of Minnesota to all persons interested in the estate of the above named decedent:

The petition of , praying that [a certain instrument therewith filed, dated 19 , be proved and allowed as the last will of the above named decedent and that letters testamentary thereon be granted to him,] [letters of administration on the estate of the above named decedent be granted to him,] and that said estate be forthwith distributed and closed under the provisions of Laws 1917, c. 289, having been filed in this Court on 19 , and it appearing by such petition that said decedent died possessed of the following described property:

.....

You are hereby cited [continue as in § 1401].

1651. Order admitting will to probate under Laws 1917, c. 289.

[Title as in § 1396.]

The petition of , filed herein on 19 , praying that a certain instrument therewith filed, dated 19 , be proved and allowed as the last will of the above named decedent and that letters testamentary thereon be granted to him, and that the estate of said decedent be forthwith distributed and closed under the provisions of Laws 1917, c. 289, coming [continue as in § 1423 or § 1424].

1652. Final decree under Laws 1917, c. 289—Decedent dying intestate.

[Title as in § 1396.]

The petition of , filed herein on 19 , praying that letters of administration on the estate of the above named decedent be granted to him and that said estate be forthwith distributed and closed under the provisions of Laws 1917, c. 289, coming on for hearing on this day pursuant to an order of this Court made on 19 , and proof of the due service of the citation to all persons interested in said estate required by said order having been filed, and it appearing to the satisfaction of the Court from said petition and the evidence received on the hearing, and from the files, records and prior proceedings of this ad-

ministration, that all the allegations of said petition are true, and that all the property of which said decedent died possessed does not exceed \$650 in value and is exempt from the payment of his debts, and that all real and personal property taxes assessed against said estate have been fully paid, and that all claims for which said estate is liable and all the charges and expenses of this administration have been fully paid, [as appears by the final account of the representative of said decedent this day settled and allowed by the Court,] and that there is a residue remaining upon the final settlement of said estate consisting of the following described property:

Description.	Value.
.....
.....
.....
.....
	Total, \$

And it further appearing that said decedent died intestate [continue as in § 1569].

1653. Final decree under Laws 1917, c. 289—Decedent dying testate.

[Title as in § 1396.]

The petition of _____, filed herein on _____ 19, praying that a certain instrument therewith filed, dated _____ 19, be proved and allowed as the last will of the above named decedent and that letters testamentary thereon be granted to him, and that the estate of said decedent be forthwith distributed and closed under the provisions of Laws 1917, c. 289, coming on for hearing on this day [continue as in § 1652 down to "And it further appearing."]

And it further appearing that said decedent died on _____ 19, and at the time of his death resided and was domiciled in _____ county, state of Minnesota, and that he left a last will which has this day been duly admitted to probate by this Court [continue as in § 1572 or § 1573].

1654. Petition for appointment of general guardian for minor under fourteen.

[Title as in § 1397.]

To the above named Court:

Your petitioner respectfully represents:

I. That the above named _____ is a minor under fourteen years of age, born on the _____ day of _____ 19, and your petitioner is the [state relationship to minor].

II. That said minor is the child of _____, late of _____, now deceased, and [your petitioner] [_____, his widow,] who resides at No. _____, in the city of _____, _____ county, state of Minnesota.

III. That said minor resides with and is in the custody of [your petitioner] [his mother] at No. , in the city of , county, state of Minnesota.

IV. That said minor has no testamentary or other guardian and no proceedings are pending in a District Court of this state, acting as a juvenile court, involving the care and custody of said minor.

V. That said minor possesses real and personal property in said county [and elsewhere] of the total approximate value of \$, and it is necessary [and convenient] that some suitable person should be appointed guardian of the person and estate of said minor to preserve and protect his legal rights.

VI. That [your petitioner] [,], who resides at No. , in the city of , county, state of Minnesota, is over twenty-one years of age and is a suitable and competent person to act as such guardian.

VII. [That the residence and post office address of your petitioner is No. , in the city of , county, state of Minnesota.]

Wherefore your petitioner prays that [he] [said], or some other suitable person, be appointed guardian of the person and estate of said minor.

.....
Petitioner.

.....
Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

I, , hereby consent to act as the guardian of the person and estate of the minor mentioned in the foregoing petition, if appointed by the Court as prayed in such petition.

Dated 19 .

I, , sole surviving parent of , the minor mentioned in the foregoing petition, hereby assent to the granting of said petition.

Dated 19 .

1655. Order for hearing and notice on foregoing petition.

[Title as in § 1397.]

The petition of , praying for the appointment of a guardian of the person and estate of the above named minor, having been filed herein on 19 ,

It is ordered that the same be heard before this Court, at its court room in the Court-House in the city of , county, state of Minnesota, on 19 , at o'clock in the forenoon, and

that notice of said hearing be given by serving copies [of said petition and] of this order on and , in the manner of the service of a summons in a civil action, at least days prior to said day of hearing.

Dated 19 .

.....
Judge.

1656. Petition for appointment of general guardian by minor over fourteen years of age.

[Title as in § 1397.]

To the above named Court:

Your petitioner respectfully represents:

I. That he is a minor over fourteen years of age, born on 19 .

II. That he is the child of , late of , now deceased, and of , [his widow,] who resides at No. in the city of , county, state of Minnesota.

III. That your petitioner resides with and is in the custody of his [mother] at [her] said residence.

IV. That he has no testamentary or other guardian and no proceedings are pending in a District Court of this state, acting as a juvenile court, involving his care and custody.

V. That he possesses real and personal property in said county [and elsewhere] of the total approximate value of \$, and it is necessary [and convenient] that some suitable person should be appointed guardian of his person and estate to preserve and protect his legal rights.

VI. That , who resides at No. , in the city of , county, state of Minnesota, is over twenty-one years of age, [state relationship to minor if any,] and is a suitable and competent person to act as such guardian, and your petitioner hereby nominates him for appointment as such guardian by this Court.

Wherefore your petitioner prays that said be appointed guardian of the person and estate of your petitioner.

.....
Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

[Consent of guardian to act as in § 1654.]

[Assent of parent as in § 1654.]

[Order for hearing and for notice as in § 1655.]

1657. Same—Another form.

[Title as in § 1397.]

To the above named Court:

Your petitioner respectfully represents:

I. That the above named is a minor over fourteen years of age, born on 19 , and your petitioner is the [state relationship to minor].

II.—V. As in § 1654.

VI. That your petitioner resides at No. , in the city of , county, state of Minnesota, is over twenty-one years of age, and is a suitable and competent person to act as such guardian.

VII. [That by an instrument herewith presented and filed said minor has nominated your petitioner for appointment as such guardian by this Court.] [That said minor (resides out of the state) (after being duly cited by this Court on 19 , has neglected for over ten days to nominate any person for appointment as such guardian.)]

Wherefore your petitioner prays that he be appointed guardian of the person and estate of said minor.

.....
Petitioner.

.....
Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

[Assent of parent as in § 1654.]

[Order for hearing and for notice as in § 1655.]

1658. Nomination of guardian by minor.

[Title as in § 1397.]

I, , the above named minor, being over fourteen years of age, hereby nominate , residing at No. , in the city of , county, state of Minnesota, for appointment as guardian of my person and estate and request the above named Court to appoint him as such guardian.

Dated 19 .

.....

1659. Order appointing guardian of minor.

[Title as in § 1397.]

The petition of , filed herein on 19 , praying for the appointment of a guardian of the person and estate of the above named [minor], coming on for hearing on this day pursuant to an order made

by this Court on 19 , and proof of the due service of the notice of hearing required by said order having been filed, and it appearing to the satisfaction of the Court from said petition and the evidence received on the hearing that all the allegations of said petition are true and that it is necessary [and convenient] that some suitable person should be appointed guardian of the person and estate of said minor and that [the petitioner] [] [nominated by said minor for appointment as such guardian] is a suitable person to be appointed as such, [and the only surviving parent of said minor having assented thereto and no one appearing in opposition],

It is ordered that [the petitioner] [] be and he is hereby appointed guardian of the person and estate of said [minor] and that letters of guardianship issue to him accordingly, upon his filing a bond in the penal sum of \$, with sufficient sureties, conditioned as required by law and approved by the Judge of this Court.

Dated 19 .

.....

Judge.

1660. Letters of guardianship.

[Title as in § 1397.]

is hereby appointed guardian of the person and estate of , [a minor] [an insane person] [an incompetent person] [a spendthrift].

Witness the Judge of said Court and the seal thereof the day of 19 .

.....

Judge.

[Seal of court.]

1661. Bond of guardian appointed by court.

[Title as in § 1397.]

Know all men by these presents that we, , as principal, and and , as sureties, all residents of county, state of Minnesota, are bound unto , Judge of the above named Court, and his successors in office, in the sum of dollars, to the payment of which to the said Judge or his successors in office, we jointly and severally bind ourselves, our heirs, executors and administrators, by these presents.

The condition of this obligation is such that whereas the said has been appointed by the above named Court guardian of the [person and] estate of the above named [minor] [insane person] [incompetent],

Now, therefore, if the said shall faithfully discharge all the duties of his trust as such guardian according to law, then this obligation shall be void; otherwise to remain in full force.

In witness whereof we have hereunto set our hands this day
of 19 .

.....
.....
.....

Executed in presence of:
.....
.....

[Acknowledgment as in § 1407.]
[Justification of sureties as in § 1408.]

I hereby approve the foregoing bond and the sureties thereon.
Dated 19 .

.....
Judge.

1662. Oath of guardian.

[Title as in § 1397.]
[Venue.]

I, , appointed guardian of the person and estate of the above
named [minor] [insane person] [incompetent], by the above named
Court, do solemnly swear that I will faithfully perform all the duties
of such guardian according to law. So help me God.

[Jurat as in § 1406.]

.....

1663. Order appointing appraisers.

[Title as in § 1397.]

Letters of guardianship of the person and estate of the above named
ward having been granted to , and it appearing that said ward
has an estate which should be appraised, [on application of said guard-
ian],

It is ordered that and , of said county, be and they are
hereby appointed appraisers of said estate and authorized to appraise
the same according to law upon the inventory thereof to be presented to
them by said guardian.

Dated 19 .

.....
Judge.

1664. Inventory and appraisal of estate.

Follow forms under § 1497, substituting "ward" for "decedent."

1665. Acceptance of trust by testamentary guardian under G. S. 1913, § 7428.

[Title as in § 1397.]

I, _____, appointed guardian of the person and estate of the above named minor by the last will of the [father] of said minor, which was duly admitted to probate by the above named Court on _____ 19____, hereby accept said trust and consent to act as such guardian.

Dated _____ 19____.

1666. Oath of testamentary guardian.

[Title as in § 1397.]

[Venue.]

I, _____, appointed guardian of the person and estate of _____, the above named minor by the last will of the [father] of said minor, which was duly admitted to probate by the above named court on _____ 19____, do solemnly swear that I will faithfully perform all the duties of such guardian according to law. So help me God.

[Jurat as in § 1406.]

1667. Bond of testamentary guardian under G. S. 1913, § 7428.

[Same as bond under § 1661 except that following condition should be substituted.]

The condition of this obligation is such that whereas the said _____ has been appointed guardian of the above named minor by the last will of _____, [father] of said minor, and said will was duly admitted to probate by the above named Court on _____ 19____, and said _____ has accepted said trust and consented to act as such guardian,

1668. Certificate of appointment of testamentary guardian under G. S. 1913, § 7428.

[Title as in § 1397.]

I, _____, Judge of the above named Court, hereby certify that _____ was appointed guardian of the person and estate of _____, a minor [to continue during the minority of said minor,] by the last will of the [father] of said minor, which was admitted to probate by this Court on _____ 19____, and that said _____ has filed his acceptance of such trust in this Court and has duly qualified as such guardian by

filing in this Court his official oath in due form and a bond conditioned as required by law and approved by me.

In witness whereof I have hereunto set my hand and affixed the seal of the Court this day of 19 .

.....

Judge.

[Seal of court.]

1669. Petition for appointment of special guardian of minor.

[Title as in § 1397.]

To the above named Court:

Your petitioner respectfully represents:

I. That is a minor, under fourteen years of age, born on the day of 19 , and your petitioner is the [state relationship to minor].

II. That said minor is the child of , late of , now deceased, and [your petitioner] [,] his widow, who resides at No. , in the city of , county, state of Minnesota.

III. That said minor resides with and is in the custody of [your petitioner] [his mother] at No. , in the city of , county, state of Minnesota.

IV. That said minor has no testamentary or other guardian and no proceedings are pending in a District Court of this state, acting as a juvenile court, involving the care and custody of said minor.

V. That proceedings are pending in this Court for the appointment of a general guardian of the person and estate of said minor, but considerable delay will necessarily occur before such a guardian can be appointed by reason of the fact that [state cause of delay].

VI. That said minor possesses real and personal property in said county and elsewhere of the approximate value of \$.

VII. That a part of said property consists of [state nature of property needing immediate attention].

VIII. That it is necessary that a special guardian should be appointed to protect the rights of said minor and preserve said property until a general guardian of the person and estate of said minor is appointed.

IX. That [your petitioner,] [,] who resides at No. , in the city of , county, state of Minnesota, is a suitable and competent person to be appointed as such guardian, and consents to act as such.

X. [That your petitioner resides at No. , in the city of , county, state of Minnesota.]

Wherefore your petitioner prays that [said or some other suitable person] [he] be appointed special guardian of the person and estate of said minor.

.....

Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

I, the undersigned, hereby consent to act as the special guardian of the person and estate of the minor mentioned in the foregoing petition.

Dated 19 .

.....

1670. Order appointing special guardian of minor.

[Title as in § 1397.]

The petition of , filed herein on 19 , praying for the appointment of a special guardian of the person and estate of the above named minor, having been considered by the Court, and it appearing to the satisfaction of the Court that all the allegations thereof are true and that it is necessary that a special guardian be appointed as therein prayed,

It is ordered that said [petitioner] be and he is hereby appointed special guardian of the person and estate of the above named minor and that letters of special guardianship issue to him accordingly, upon his filing a bond in the penal sum of \$, with sufficient sureties, conditioned as provided by law and approved by the Judge of this Court.

Dated 19 .

.....

Judge.

1671. Letters, oath and bond of special guardian.

Follow forms under §§ 1660-1663, adding "special" before "guardian".

1672. Petition for maintenance of minor with living parent.

[Title as in § 1397.]

To the above named Court:

Your petitioner respectfully represents:

I. That he is the guardian of the person and estate of the above named minor, duly appointed as such by this Court on 19 .

II. That said minor has only one surviving parent, his father, , who resides at No. , in the city of , county, state of Minnesota.

III. That said minor has an estate of the approximate value of \$, consisting of personal property of the approximate value of \$, and real property of the approximate value of \$, and the annual income of said property is of the approximate value of \$.

IV. That [there are no claims outstanding against said minor or his estate,] [the claims outstanding against said minor and his estate do not exceed the sum of \$,] as your petitioner is informed and verily believes.

V. That said parent has an annual income of only about \$, as your petitioner is informed and believes, and said minor has property sufficient for his maintenance and education in a manner more expensive than such parent can reasonably afford to give him, under all the circumstances, and it is for the best interests of said minor that a portion of his own property should be used for his maintenance and education.

VI. That your petitioner proposes, and it is for the best interests of said minor, that he should be educated at [name institution], where his annual tuition, board and lodging, books and incidental expenses, will amount to approximately \$, annually.

VII. That the sum of \$ is a reasonable amount to be expended [annually] [monthly] out of the estate of said minor for his support, maintenance and education.

Wherefore your petitioner prays that he be authorized to expend [annually] [monthly] out of the estate of said minor the sum of \$ for his support, maintenance and education at [name institution,] [or some other similar institution,] without being required to account for each item of expenditure thereof.

.....
Petitioner.

.....
Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

I, , father of the above named minor, have an annual income of not more than \$, and request the Court to grant the foregoing petition.

Dated 19 .

.....

1673. Order for maintenance and education of ward out of estate.

[Title as in § 1397.]

[Same as in § 1675 down to "It is ordered."]

It is ordered that said guardian be and he is hereby authorized to expend out of the estate of said minor the sum of \$ [annually]

[monthly] for the support, maintenance, and education of said minor at [name institution,] [or other similar institution, in the discretion of said guardian,] without being required to account for each item of expenditure thereof.

Dated 19 .

.....

Judge.

1674. Petition of guardian for annual or monthly support of ward.

[Title as in § 1397.]

To the above named Court:

Your petitioner respectfully represents:

I. That he is the guardian of the person and estate of the above named minor, duly appointed as such by this Court on 19 .

II. That said minor has no living parent.

III. That said minor has an estate of the approximate value of \$, consisting of personal property of the approximate value of \$, and real property of the approximate value of \$, and the annual income from all of said property is of the approximate value of \$.

IV. That [there are no claims outstanding against said minor or his estate,] [the claims outstanding against said minor and his estate do not exceed the sum of \$,] as your petitioner is informed and verily believes.

V. That the sum of \$ is a reasonable sum for the [annual] [monthly] support, maintenance and education of said ward.

Wherefore your petitioner prays that he be authorized to expend [annually] [monthly] out of the estate of said minor the sum of \$ for the support, maintenance and education of said minor, without being required to account for each item of expenditure thereof.

.....

Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1675. Order for annual or monthly support of ward.

[Title as in § 1397.]

The petition of , guardian of the person and estate of the above named minor, filed herein on 19 , praying that he be authorized to expend a certain amount [annually] [monthly] for the support, maintenance and education of said ward, having been considered by the

Court, and it appearing to the satisfaction of the Court from said petition and the evidence received on the hearing, and from the files, records and prior proceedings of said guardianship, that all the allegations of said petition are true and that the sum of \$ is a reasonable amount for the [annual] [monthly] support, maintenance and education of said minor,

It is ordered that said guardian be and he is hereby authorized to expend out of the estate of said minor the sum of \$ [annually] [monthly] for the support, maintenance and education of said minor, without being required to account for each item of expenditure thereof.

Dated 19 .

.....
Judge.

1676. Petition of guardian to sell personal property of ward.

[Title as in § 1397.]

To the above named Court:

Your petitioner respectfully represents:

I. That he is the guardian of the person and estate of the above named ward, duly appointed as such by this Court on 19 .

II. That he has in his hands as such guardian, belonging to said ward only about \$, in cash.

III. That said ward possesses other personal property of the approximate value of \$ and real property of the approximate value of \$.

IV. That the debts outstanding against said ward, so far as they can be ascertained by your petitioner, amount to about \$.

V. That the future expenses for the support, maintenance and education of said ward and of said guardianship will amount to at least \$, as your petitioner verily believes.

VI. That it is necessary, and for the best interests of said ward and his estate, and of all persons interested therein, that the following described personal property of said ward [for which your petitioner has received advantageous offers as indicated below,] be sold to pay said debts and expenses, [and to be invested in approved interest bearing securities].

Description of property proposed for sale.	Appraised or estimated value.	Price offered.
.....
.....
.....
.....
Total, \$	Total, \$	

Wherefore your petitioner prays that he be licensed and authorized to sell said property, or any part thereof, for said purposes, in such manner and upon such terms as to the Court seem best.

.....
Petitioner.

.....
Attorney for Petitioner.
[Office and post office address.]
[Verification as in § 1405.]

1677. Order authorizing guardian to sell personal property.

[Title as in § 1397.]

Follow form under § 1518, substituting "guardian of the above named ward" for "representative of the above named decedent" and "ward" for "estate."

1678. Petition of guardian for compromise or arbitration of claim.

[Title as in § 1397.]

To the above named Court:

Your petitioner respectfully represents:

I. That he is the guardian of the person and estate of the above named ward, duly appointed as such by this Court on 19 .

II. That [said ward has a claim against , a resident of , county, state of ,] [, a resident of , county, state of , has a claim against said ward,] for the sum of \$, arising out of [state the ultimate facts].

III. That there is a controversy between your petitioner and said respecting the facts and amount [and validity] of said claim and there is reasonable doubt respecting the same.

IV. That it is probable that a compromise of said claim may be made on the [state terms].

V. That it is for the best interests of said ward and his estate, and of all persons interested therein, that a compromise of said claim on said terms should be made, or the claim submitted to arbitration.

Wherefore your petitioner prays that he be authorized to compromise said claim on said terms or submit it to arbitration.

.....
Petitioner.

.....
Attorney for Petitioner.
[Office and post office address.]
[Verification as in § 1405.]

1679. Order authorizing compromise or arbitration of claim.

[Title as in § 1397.]

The petition of _____, guardian of the person and estate of the above named ward, praying for authority to compromise or submit to arbitration a certain claim [of said ward against _____] [of against said ward], having been filed herein on _____ 19____, and it appearing to the satisfaction of the Court from said petition, and from an examination of said guardian, that all the allegations of said petition are true, and that it is for the best interests of said ward and of his estate, and of all persons interested therein, that said claim should be compromised or submitted to arbitration as prayed,

It is ordered that said guardian be and he is hereby authorized to compromise said claim for a sum not [less] [more] than \$ _____, or to submit the same to arbitration, as he may deem best.

Dated _____ 19____.

.....

Judge.

1680. Petition of guardian for compounding claim of ward.

[Title as in § 1397.]

To the above named Court:

Your petitioner respectfully represents:

I. That he is the guardian of the person and estate of the above named ward, duly appointed as such by this Court on _____ 19____.

II. That said ward has a claim in the sum of \$ _____, appraised at that amount in the inventory and appraisement herein, against _____, a resident of _____, county, state of _____, arising out of [state ultimate facts].

III. That said _____ is unable to pay all his debts in full and offers to enter into a composition agreement with his creditors if they will agree with him and each other to accept _____ per cent. of their respective claims in full satisfaction and discharge thereof and to release him from the balance.

IV. That said percentage is a just and fair dividend of the effects of said _____, and it is for the best interests of said ward and his estate, and of all persons interested therein, that your petitioner enter into said agreement and accept said percentage in behalf of said ward.

Wherefore your petitioner prays that he be authorized to enter into said agreement and accept said percentage of said claim in behalf of said ward.

.....

Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1681. Order authorizing guardian to compound claim of ward.

[Title as in § 1397.]

The petition of _____, guardian of the person and estate of the above named ward, praying for authority to compound a certain claim of said ward against _____, having been filed herein on _____ 19____, and it appearing to the satisfaction of the Court from said petition, and from an examination of said guardian, that all the allegations of said petition are true, and that it is for the best interests of said ward and his estate, and of all persons interested therein, that said claim should be compounded as prayed,

It is ordered that said guardian be and he is hereby authorized to enter into the composition agreement mentioned in said petition, and to accept _____ per cent. of said claim in full satisfaction and discharge thereof, and to release said _____ from the balance thereof, on behalf of said ward.

Dated _____ 19____.

.....

Judge.

1682. Petition of guardian for authority to invest funds.

[Title as in § 1397.]

To the above named Court:

Your petitioner respectfully represents:

I. That he is the guardian of the person and estate of the above named ward, duly appointed as such by this Court on _____ 19____.

II. That as such guardian he has in his hands the sum of about \$ _____ belonging to said ward which is not drawing interest and is not needed for the support and maintenance of said ward or for the expenses of said guardianship or to pay claims against said ward or his estate.

III. That [there are no claims outstanding against said ward or his estate] [the claims outstanding against said ward and his estate do not exceed the sum of \$ _____], as your petitioner is informed and verily believes.

IV. That in addition to said sum said ward possesses personal property of the approximate value of \$ _____, and real property of the approximate value of \$ _____, and the annual income from said real and personal property, exclusive of the sum proposed for investment, is approximately \$ _____.

V. That the amount required annually for the support and maintenance of said ward and for the expenses of said guardianship is approximately \$ _____.

VI. That it is for the best interest of said ward, and of his estate, and of all persons interested therein, that said first mentioned sum be invested in approved interest-bearing securities.

VII. That your petitioner proposes that said sum be invested in the following described securities at the prices specified:

Description of security.	Approximate price to be paid.
.....
.....
.....
.....
	Total, \$

	Petitioner.

.....
Attorney for Petitioner.
[Office and post office address.] •
[Verification as in § 1405.]

1683. Order for investment of funds.

[Title as in § 1397.]

The petition of _____, guardian of the person and estate of the above named ward, filed herein on _____ 19____, praying for authority to invest certain funds of said ward, having been considered by the Court, and it appearing to the satisfaction of the Court that all the allegations of said petition are true, and that said guardian has in his hands the sum of \$ _____ belonging to said ward which should be invested in approved interest-bearing securities,

It is ordered that said guardian be and he is hereby authorized to invest said sum of \$ _____ in the following described securities at prices therefor [not to exceed the prices] indicated below [by more than (five) per cent.]

Description of securities.	Prices to be paid.
.....
.....
.....
.....
Dated 19	Judge.

1684. Petition of guardian for sale of real estate of ward.

[Title as in § 1397.]

To the above named Court:

Your petitioner respectfully represents:

I. That he is the guardian of the person and estate of the above named ward, [a minor,] [an insane person,] duly appointed as such by this Court on 19 .

II. That the personal property of said ward which has come into the hands of your petitioner as such guardian, is of the following character and value:

Description.	Value.
.....
.....
.....
.....
Total, \$	

III. That your petitioner has disposed of [a part of] said property as follows:

Description.	Value.
.....
.....
.....
.....
Total, \$	

IV. That there remains in the hands of your petitioner personal property of said ward undisposed of amounting in value to \$.

V. That the future expenses for the support and maintenance of said minor and for said guardianship will amount to at least \$, as your petitioner verily believes.

VI. That the debts outstanding against said ward, so far as they can be ascertained by your petitioner, are as follows:

Name of creditor.	Residence.	Amount.
.....
.....
.....
.....
Total, \$		

VII. That the description, location, condition and value of all the real estate now owned by said ward are as follows:

Description.	Location.	Condition.	Value.
[1]
[2]
[3]
[4]
Total, \$			

VIII. That the names and places of residence of all persons interested in said real estate are as follows:

Name.	Place of residence.
.....
.....
.....
.....

IX. [That it is necessary to sell the the following described tracts out of the above mentioned real estate in order to pay said debts and to pay for the support, maintenance and education of said ward, and to pay the charges and expenses of said guardianship, on account of the insufficiency thereof of the personal property of said ward in the hands of your petitioner and the income of the estate of said ward, and for the best interests of said ward.] [That it would be for the benefit of said ward to sell the following described tracts out of the above mentioned real estate and have the proceeds thereof (put at interest) (invested in other real estate) (invested in first mortgages on real estate) (invested in bonds of the United States or of this state, or municipal or school district bonds of this state) (used for the improvement of certain other real estate of said ward as hereinafter proposed.)]

Tracts proposed to be sold.

- [1]
- [2]
- [3]
- [4]

X. [That your petitioner has received an advantageous offer for the purchase of said tracts, to wit: (State amount of offer).]

XI. [If the sale is for the improvement of other real estate describe the real estate to be improved and the proposed improvements and show the desirability thereof.]

Wherefore your petitioner prays for a license to sell said tracts at [public auction] [private sale] for said purposes according to the statutes in such case made and provided.

.....

Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1685. Petition of guardian to mortgage real estate of ward.

[Title as in § 1397.]

[Same as in § 1684 down to IX.]

IX. That owing to the insufficiency of the personal estate and income of said [ward] for the purpose, it is necessary and for the best interests of said [ward] and his estate and of all persons interested therein, that a part of said real estate should be mortgaged to raise money for the purpose of [state purpose], and that the amount necessary to raise by such means is \$, and the particular tract of said real estate proposed to be mortgaged is described as follows:

[Continue petition as in § 1520, substituting "ward" for "decedent."]

1686. Petition of guardian to lease real estate of ward.

[Title as in § 1397.]

[Same as in § 1684 down to IX.]

IX. That it is necessary and for the best interests of said ward and his estate and all persons interested therein that the real estate of said ward, hereinafter described, should be leased for a term of years for the reason that [state reason].

[Continue petition as in § 1521.]

1687. Order for hearing and for citation on petition of guardian to sell, mortgage or lease real estate of ward.

[Title as in § 1397.]

The petition of , guardian of the person and estate of the above named ward, praying for a license to [sell] [mortgage] [lease] certain real estate of said ward, having been filed in this Court on 19 ,

It is ordered [continue as in § 1400].

1688. Citation on petition of guardian to sell, mortgage or lease real estate of ward.

[Title as in § 1397.]

The State of Minnesota to all persons interested in the estate of the above named ward:

The petition of , guardian of the person and estate of said ward, praying for a license to [sell] [mortgage] [lease] certain real estate of said ward, having been filed in this Court on 19 ,

You are hereby cited [continue as in § 1401].

1689. Order authorizing guardian to sell real estate of ward.

[Title as in § 1397.]

The petition of _____, guardian of the person and estate of the above named ward, filed herein on _____ 19____, praying for a license to sell certain real estate of said ward at [public auction] [private sale], coming on for hearing on this day pursuant to an order made by this Court on _____ 19____, and proof of the due service of the citation to all persons interested in the estate of said ward required by said order having been filed, and it appearing to the satisfaction of the Court from said petition and the evidence received on the hearing, and from the files, records and prior proceedings in this guardianship, that all the allegations of said petition are true, and that it is necessary and for the best interests of said ward for the reasons and purposes stated in said petition, to sell at [public auction] [private sale] the following described tracts of land of said ward,

[Repeat descriptions as in petition.]

- [1]
- [2]
- [3]
- [4]

It is ordered that said guardian be and he is hereby licensed and authorized to sell said tracts of land for cash at [public auction] [private sale without notice, for an amount not less than the offer mentioned in said petition], [for an amount not less than their appraised value], according to the statutes in such case made and provided, [separately in such order as he may deem expedient] [separately in the order in which they are arranged above] [separately or in such combinations or order as he may deem expedient] [and _____ and _____ are hereby appointed appraisers to reappraise said tracts as provided by law].

Dated _____ 19____.

.....
Judge.

1690. Order authorizing guardian to mortgage real estate of ward.

[Title as in § 1397.]

The petition of _____, guardian of the person and estate of the above named ward, filed herein on _____ 19____, praying for a license to mortgage certain real estate of said ward, coming on for hearing on this day pursuant to an order made by this Court on _____ 19____, and proof of the due service of the citation to all persons interested in the estate of said ward required by said order, having been filed, and it appearing to the satisfaction of the Court, from said petition and the evidence received on the hearing, and from the files, records and prior proceedings

in this guardianship, that all the allegations of said petition are true, and that it is necessary and for the best interests of said ward and his estate and of all persons interested therein that the real estate of said ward hereinafter described be mortgaged as prayed in said petition, and that said interests will be better protected by mortgaging said property than by selling it,

It is ordered that the petitioner be and he is hereby licensed and authorized to mortgage the [describe property as in petition], of said ward, [continue as in § 1525].

1691. Order authorizing guardian to lease real estate of ward.

[Title as in § 1397.]

The petition of _____, guardian of the person and estate of the above named ward, filed herein on _____ 19____, praying for a license to lease certain real estate of said ward, coming on for hearing on this day pursuant to an order made by this Court on _____ 19____, and proof of the due service of the citation to all persons interested in the estate of said ward required by said order, having been filed, and it appearing to the satisfaction of the Court from said petition and the evidence received on the hearing, and from the files, records and prior proceedings in this guardianship, that all the allegations of said petition are true, and that it is necessary and for the best interests of said ward and his estate and all persons interested therein that the real estate of said ward hereinafter described be leased as prayed in said petition, and that said interests will be better protected by leasing said property than by selling it,

It is ordered that the petitioner be and he is hereby licensed and authorized to lease the [describe property as in petition], of said ward, [continue as in § 1526].

**1692. Bond of guardian before sale or mortgage of real estate under
G. S. 1913, § 7419.**

[Title as in § 1397.]

[Same as in § 1529, except the condition which should read as follows:]

The condition of this obligation is such that whereas the said _____, as guardian of the person and estate of the above named ward, has been licensed and authorized by an order of the above named Court, made on _____ 19____, to [sell] [mortgage] the following described tracts of land situated in _____ county, state of Minnesota, owned by said ward:

**1693. Oath of guardian before sale of real estate under
G. S. 1913, § 7354.**

[Title as in § 1397.]

I, _____, guardian of the person and estate of the above named ward, do solemnly swear that in disposing of the real estate of said ward, which I have been licensed to do by an order of the above named Court made on _____ 19____, I will use my best judgment in fixing on the time and place of sale thereof and will exert my utmost endeavors to dispose of the same advantageously to all persons interested therein. So help me God.

.....

[Jurat as in § 1406.]

**1694. Notice of sale of real estate by guardian at public auction under
G. S. 1913, § 7355.**

[Title as in § 1397.]

Follow form under § 1533, substituting "owned by the above named ward" for "of which said decedent died possessed," and sign as guardian.

1695. Reappraisement on private sale under G. S. 1913, § 7356.

[Title as in § 1397.]

Same as under § 1534, substituting "ward" for "decedent."

**1696. Report of sale of real estate by guardian at public auction—
Petition for confirmation.**

[Title as in § 1397.]

Follow form under § 1535, substituting "guardian of the person and estate" for "representative" and "ward" for "decedent" and "owned by said ward" for "of which said decedent died possessed."

**1697. Report of sale of real estate by guardian at private sale—
Petition for confirmation.**

[Title as in § 1397.]

Follow form under § 1536, substituting "guardian of the person and estate" for "representative" and "ward" for "decedent" and "owned by said ward" for "of which said decedent died possessed."

**1698. Order confirming sale of real estate by guardian at public auction.
See § 1537.**

**1699. Order confirming sale of real estate by guardian at private sale.
See § 1538.**

1700. Deed of guardian under license from court.

Whereas, under and in pursuance of an order of license duly made by the Probate Court of _____ county, state of Minnesota, on 19____, authorizing me as the guardian of the person and estate of _____, [a minor] [an insane person], duly appointed as such guardian by said Court on 19____, to sell at [public auction] [private sale without notice] the real estate of said ward hereinafter described and conveyed, I did, as such guardian, on 19____, at a [public auction] [private sale], sell to _____, [he being the highest bidder therefor], said real estate, for the sum of _____ dollars,

Now, therefore, in pursuance of an order made by said Court on 19____, confirming said sale and authorizing and directing this conveyance, I, as such guardian [continue as in § 1339, substituting "ward" for "deceased" and signing as guardian].

1701. Mortgage of guardian under license from court.

Follow form under § 1540, with necessary modification.

1702. Lease of guardian under license from court.

Follow form under § 1541, with necessary modification.

1703. First annual account of guardian.

[Title as in § 1397.]

The undersigned guardian of the person and estate of the above named ward respectfully submits to the Court the following first annual account of his guardianship, with accompanying vouchers, showing all his receipts, disbursements, sales and investments, from the time of his appointment to the date hereof and the property of said ward now in his hands.

RECEIPTS—DEBITS

Personal property described in inventory.....	
Personal property not included in inventory.....	
Interest and dividends on above property.....	
Increase of above property.....	
Gain by sale of personal property above appraised value	
Gain by sale of real estate above appraised value.....	
Real property as described in inventory.....	
Rents and profits of real estate.....	
Collections of claims of ward not inventoried.....	
[Add other receipts].....	
Total, \$	

DISBURSEMENTS AND CREDITS

[Continue account as in § 1708.]

1704. Order for hearing and notice on annual account.

[Title as in § 1397.]

The [first] annual account of _____, guardian of the above named ward, having been filed herein on _____ 19 _____,

It is ordered that the same be examined and settled before this Court at its court room in the Court-House in the city of _____, county, state of Minnesota, on _____ 19 _____, at _____ o'clock in the forenoon, and that notice of such hearing be given by publishing this order in the _____, a [daily] [weekly] newspaper published in said county, once each week for three successive weeks, the last publication to be at least _____ days prior to said day of hearing, [and by serving a copy thereof on said ward personally at least fourteen days before the day of hearing].

Dated _____ 19 _____.

.....
Judge.

1705. Order settling and allowing annual account without notice.

[Title as in § 1397.]

The [first] annual account of _____, guardian of the above named ward, having been filed herein on _____ 19 _____, and it appearing to the satisfaction of the Court from an examination thereof, and from the files, records and prior proceedings in said guardianship, [and from an examination of said guardian and ward], that said account is in all things true, [as corrected under the direction of the Court,]

It is ordered that said account be and the same is hereby settled and allowed.

The following is a list of the personal property of said ward remaining in the hands of said guardian on _____ 19 _____, the date of said account:

Description.	Appraised or estimated value.
.....
.....
.....
.....

Total, \$

Dated _____ 19 _____.

.....
Judge.

1706. Order settling and allowing annual account after notice.

[Title as in § 1397.]

The matter of settling and allowing the [first] annual account of , guardian of the above named ward, filed herein on 19 , coming on for hearing on this day pursuant to an order of this Court made on 19 , and proof of the due publication [and service] of said order as required therein having been filed, and it appearing to the satisfaction of the Court from an examination thereof, and from the files, records and prior proceedings in said guardianship, and from the evidence received on the hearing, that [continue as in § 1705].

1707. First and final account.

[Title as in § 1397.]

The undersigned guardian of the person and estate of the above named ward respectfully submits to the Court the following first and final account of his guardianship, with accompanying vouchers, showing all his receipts, disbursements, sales and investments for the entire period of such guardianship to the date hereof and the property of said ward now in his hands:

[Continue account as in §§ 1703, 1708.]

1708. Final account of guardian after prior settlements.

[Title as in § 1397.]

The undersigned guardian of the person and estate of the above named ward respectfully submits to the Court the following final account of his guardianship, with accompanying vouchers, showing all his receipts, disbursements, sales and investments since his last accounting on 19 , to the date hereof and the property of said ward now in his hands:

RECEIPTS—DEBITS

Property on hand at time of last accounting.....	
Interest and dividends on above property.....	
Increase of above property.....	
Gain by sale of personal property above appraised value	
Gain by sale of real estate above appraised value..	
Gain by collections of claims of ward above appraised value.....	
Collections of claims of ward not inventoried.....	
Rents and profits of real estate.....	
Total, \$	

DISBURSEMENTS—CREDITS

Disbursements in general.	Dollars. Cts.	Voucher Number.
Monthly allowances for maintenance of ward as authorized by Court.....		
Wearing apparel for ward.....		
Board and lodging for ward.....		
Education of ward.....		
Medical attendance on ward.....		
Medicines for ward.....		
Nursing and hospital charges for ward.....		
Incidental spending money allowed ward....		
Traveling expenses of ward.....		
Taxes on personal property of ward for 19 ..		
Taxes on real estate of ward for 19		
Insurance on property of ward.....		
Repairs on real estate of ward.....		
Improvements on real estate of ward author- ized by Court.....		
Expenses of collecting claim against ..		
Expenses of collecting rents and interest.....		
Expenses of sale of personal property.....		
Expenses of sale of real estate under license..		
Care and repair of personal property.....		
Care of real estate.....		
Payment of judgment in favor of		
Payment of claim of against ward for [state nature of claim].....		
Court costs allowed against ward.....		
Fees of appraisers.....		
Attorney's fees.....		
Expenses of publishing and serving orders, no- tices, etc.....		
Traveling expenses of guardian.....		
Traveling expenses of attorney.....		
Postage, stationery, etc., for guardian.....		
Compensation of guardian.....		
Credits for investments.		
Cash paid for mortgage and note of ..		
Cash paid for mortgage and note of ..		
Cash paid for bonds of		
Credits for losses.		
Loss on sale of personalty below appraised value		

Credits for losses—(Continued)	Dollars.	Cts.	Voucher Number.
Loss on sale of realty below appraised value..			
Loss of personalty by [death] [fire].....			
Loss on [compromise] [arbitration] of inven- toried claim against.....			
Loss from uncollectible claim in inventory against			
	Total, \$		

SUMMARY

Total receipts and debits.....
Total disbursements and credits.....
Balance on hand.....

PROPERTY SOLD

	Appraised value.	Amount re- ceived on sale.
Personal property.		
[Description]		
.....		
.....		
.....		
	Total, \$	
Real property.		
[Description]		
.....		
.....		
.....		
	Total, \$	

PROPERTY ON HAND

	Estimated or appraised value.
Personal property.	
[Cash]	
[Give list of other articles.].....	
.....	
	Total, \$
Real property.	
[Describe all the various tracts.].....	
.....	
.....	
.....	
	Total, \$

Dated 19 .

.....

Guardian.

[Verification as in § 1565.]

I, _____, the ward mentioned in the foregoing account, having examined the same and found it true, hereby consent and request that it be settled and allowed by the Court as above stated.

Dated _____ 19 ____.

.....

1709. Petition for allowance of final account and discharge of guardian.

[Title as in § 1397.]

To the above named Court:

Your petitioner respectfully represents:

I. That he is the guardian of the person and estate of the above named ward, duly appointed as such by this Court on _____ 19 ____.

II. That said guardianship has terminated by reason of the fact that said ward has [arrived at full age].

III. That your petitioner herewith presents and files his final account as such guardian, and is prepared to turn over to said ward, or his legal representative, all of the property belonging to said ward remaining in the hands of your petitioner.

Wherefore your petitioner prays that said account be settled and allowed and that he be discharged.

.....

Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1710. Order for hearing and notice on final account.

[Title as in § 1397.]

The petition of _____, guardian of the person and estate of the above named ward, having been filed herein on _____ 19 ____, together with the final account of the petitioner, praying that said account be settled and allowed and that the petitioner be discharged from said guardianship,

It is ordered that said petition be heard and said account settled and allowed before this Court at its court room in the Court-House in the city of _____, county, state of Minnesota, on _____ 19 ____, at _____ o'clock in the forenoon, and that a copy of this order be personally served on said ward at least fourteen days before the day of the hearing, [and that this order be published in the _____, a (daily) (weekly) newspaper published in said county, once each week for three

successive weeks, the last publication to be at least _____ days prior to said day of hearing].

Dated _____ 19 .

.....

Judge.

1711. Order settling and allowing final account and discharging guardian.

[Title as in § 1397.]

The petition of _____, guardian of the person and estate of the above named ward, filed herein on _____ 19 , praying for the settlement and allowance of his final account therewith filed and for his discharge, coming on for hearing on this day pursuant to an order of this Court made on _____ 19 , and proof of the due service of said order upon said ward [and of the publication thereof] as required by said order having been filed, and it appearing to the satisfaction of the Court from said petition, and from an examination of said account, and from the evidence received on the hearing, and from the files, records and prior proceedings in said guardianship, that all the allegations of said petition are true, and that said account is in all respects true, [as corrected under the direction of the Court,] and that said ward has [arrived at full age] [and consents to the allowance of said account] [and said ward appearing at the hearing and making no objection to said account],

It is ordered that said account be and the same is hereby settled and allowed as and for the final account of said guardian and that said guardian be and he is hereby discharged from said guardianship, upon filing in this Court a receipt from said ward, or his legal representative, for all the property of said ward remaining in the hands of said guardian upon the settlement of his final account as shown therein.

Dated _____ 19 .

.....

Judge.

1712. Petition for discharge of sureties on guardian's bond under G. S. 1913, § 7461.

[Title as in § 1397.]

To the above named Court:

Your petitioners respectfully represent:

I. That they are sureties on the bond of the guardian of the above named ward, filed herein on _____ 19 .

II. That said guardian was discharged from said guardianship by an order of this Court made on _____ 19 , and more than ninety days have elapsed since such discharge and no action has been commenced upon said bond.

Wherefore your petitioners pray that they be discharged from all liability on said bond.

.....

Petitioners.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

**1713. Order discharging sureties on bond of guardian under
 G. S. 1913, § 7461.**

[Title as in § 1397.]

The petition of and , sureties on the bond of , guardian of the above named ward, filed herein on 19 , praying that they be discharged from all liability on said bond, having been filed herein on 19 , and it appearing to the satisfaction of the Court from said petition and from the files, records and prior proceedings in this guardianship, that all the allegations of said petition are true, and that said guardian was discharged from said guardianship by an order of this Court made on 19 , and that more than ninety days have elapsed since such discharge and no action has been commenced upon said bond,

It is ordered that said sureties be and they are hereby discharged from all liability on the bond of , guardian of the above named ward, filed herein on 19 .

Dated 19 .

.....

Judge.

1714. Petition for appointment of guardian for insane person.

[Title as in § 1397.]

To the above named Court:

Your petitioner respectfully represents:

I. That , aged years, [of county, state of Minnesota] [residing at No. , in the city of , county, state of Minnesota,] is insane and by reason thereof is incompetent to have the management of his property.

II. [That said was duly adjudged insane by (this Court) (the Probate Court of county, state of Minnesota) on 19 , and duly committed to the state Hospital for the Insane at , and is now confined therein.]

III. That said incompetent possesses real and personal property in said county of the approximate value of \$, and real and personal property elsewhere in this state of the approximate value of \$,

and it is necessary that some suitable person should be appointed guardian of the [person and] estate of said incompetent, who now has no guardian.

IV. [That your petitioner is (state relationship to incompetent) and resides at No. , in the city of , county, state of Minnesota, (and is a suitable person to be appointed as such guardian).] [That , who resides at No. , in the city of , county, state of Minnesota, is a suitable person to be appointed as such guardian.]

V. That said incompetent [is unmarried] [has a husband whose name is , and who resides at No. in the city of county, state of Minnesota.]

Wherefore your petitioner prays that [he] [said], or some other suitable person, be appointed guardian of [the person and] estate of said incompetent.

.....
Petitioner.

.....
Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

I, the undersigned, hereby consent to act as the guardian of the [person and] estate of , mentioned in the foregoing petition.

Dated 19 .

.....
I, , [husband] [wife] [only surviving parent] of , mentioned in the foregoing petition, hereby assent to the granting of said petition.

Dated 19 .

.....

1715. Order for hearing and for service of notice.

[Title as in § 1397.]

The petition of , representing that the above named is insane, and praying for the appointment of a guardian of the [person and] estate of said , having been filed herein on 19 ,

It is ordered that said petition be heard before this Court at its court room in the Court-House in the city of , county, state of Minnesota, on 19 , at o'clock in the forenoon, and that a copy of this order be personally served, at least fourteen days prior to the date of such hearing, upon said , and upon , [wife] [husband] [father] [or other nearest relative or friend of the incompe-

tent] of said incompetent, residing at _____, [and upon _____, Superintendent of the State Hospital for the Insane at _____].

Dated _____ 19 ____.

.....
Judge.

1716. Order appointing guardian for insane person.

[Title as in § 1397.]

The petition of _____, representing that _____, of _____ county, state of Minnesota, is insane, and praying for the appointment of a guardian of the [person and] estate of such person, coming on for hearing on this day pursuant to an order of this Court made on _____ 19 __, and proof of the due service of a copy of said order upon the persons therein named for service having been filed, and it appearing to the satisfaction of the Court from said petition and from an examination of said _____, and from the evidence received on the hearing, that all the allegations of said petition are true, and that said _____ is insane and by reason thereof is incompetent to have the management of his property, and that it is necessary that some suitable person should be appointed guardian of the [person and] estate of said incompetent, and that [the petitioner] is a suitable person to be so appointed, [and _____, the (husband) of said incompetent having assented to the granting of said petition and no one appearing in opposition thereto],

It is ordered that [the petitioner] be and he is hereby appointed guardian of the [person and] estate of said incompetent, and that letters of guardianship issue to him accordingly, upon his filing a bond in the penal sum of \$ _____, with sufficient sureties conditioned as required by law and approved by the Judge of this Court.

Dated _____ 19 ____.

.....
Judge.

1717. Petition for appointment of guardian for incompetent or spendthrift.

[Title as in § 1397.]

To the above named Court:

Your petitioner respectfully represents:

I. That _____, residing at No. _____, in the city of _____, _____ county, state of Minnesota, is _____ years of age, and, by [reason of (old age) (the loss and imperfection of mental faculties) (old age and the loss and imperfection of mental faculties) is incompetent to have the management of his property] [excessive drinking of intoxicating liquors, gaming, idleness and debauchery so spends and wastes his estate as to be likely to expose himself and his family to want and suffering].

II. [Continue as in § 1714 beginning with III.]

For order for hearing, and notice, and order appointing guardian follow forms under §§ 1715, 1716, with necessary modifications.

1718. Petition of incompetent for restoration to capacity.

[Title as in § 1397.]

To the above named Court:

Your petitioner respectfully represents:

I. That on 19 , was appointed guardian of the person and estate of your petitioner by this Court on the ground that your petitioner was [insane and by reason thereof incompetent to have the management of his property] [incompetent to have the management of his property by reason of old age and loss and imperfection of mental faculties], and such guardianship is still in force [and your petitioner is in the custody of said guardian].

II. That your petitioner is now of sound mind and competent to have the management of his property and to take care of himself.

Wherefore your petitioner prays to have the fact of his restoration to capacity judicially determined.

.....
Petitioner.

.....
Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

**1719. Order for hearing on petition for restoration to capacity—
Notice to guardian.**

[Title as in § 1397.]

The petition of , the above named incompetent, praying for his restoration to capacity, having been filed herein on 19 ,

It is ordered that the same be heard before this Court at its court room in the Court-House in the city of , county, state of Minnesota, on 19 , at o'clock in the forenoon and that a copy of this order be personally served on , the guardian of said incompetent at least days prior to the date of the hearing.

Dated 19 .

.....
Judge.

1720. Order restoring incompetent to capacity.

[Title as in § 1397.]

The petition of _____, the above named incompetent, praying for his restoration to capacity, filed herein on _____ 19____, coming on for hearing on this day pursuant to an order made by this Court on _____ 19____, and proof of the due service of a copy of said order on the guardian of said incompetent as required by said order having been filed, and it appearing to the satisfaction of the Court from an examination of said incompetent, and from the evidence received on the hearing, that said incompetent is now of sound mind and capable of taking care of himself and his property,

It is ordered and adjudged that said incompetent be and he is hereby restored to capacity.

Dated _____ 19____.

.....

Judge.

1721. Order appointing special guardian under G. S. 1913, § 7437.

See form prescribed by State Board of Control under Laws, 1917, c. 344, § 18.

1722. Letters of special guardianship under G. S. 1913, § 7437.

[Title as in § 1397.]

_____ is hereby appointed special guardian of the estate of _____, an insane person, under the provisions of General Statutes, 1913, § 7437.

Witness the Judge of said Court and the seal thereof this day of _____ 19____.

.....

Judge.

[Seal of court.]

1723. Oath of special guardian under G. S. 1913, § 7437.

[Title as in § 1397.]

[Venue.]

I, _____, appointed special guardian of the estate of the above named insane person, by the above named Court, do solemnly swear that I will faithfully perform all the duties of such guardianship according to law. So help me God.

.....

[Jurat as in § 1406.]

1724. Bond of special guardian under G. S. 1913, § 7437.

[Title as in § 1397.]

[Same as in § 1661 except condition.]

The condition of this obligation is such that whereas the said has been appointed by the above named Court special guardian of the estate of the above named insane person, under the provisions of General Statutes, 1913, § 7437,

1725. Notice of appeal to district court.

[Title as in § 1396 or § 1397.]

To

Attorney for

Take notice that appeals to the District Court for county from the [order] [decree] [judgment] made herein on 19 , [describe order, decree or judgment].

Dated 19 .

.....

Attorney for Appellant.

[Office and post office address.]

[On back.]

Due service of the within notice of appeal is hereby admitted the day of , 19 .

.....

Attorney for

Filed the day of 19 .

.....

Judge.

1726. Bond on appeal under G. S. 1913, § 7492.

[Title as in § 1396 or § 1397.]

Know all men by these presents that we, , as principal, and and , as sureties, all residents of county, state of Minnesota, are bound unto , Judge of the above named Court, and his successors in office, in the sum of dollars, to the payment of which to the said Judge or his successors in office, we jointly and severally bind ourselves, our heirs, executors and administrators, by these presents.

The condition of this obligation is such that whereas the said has appealed to the District Court for county from [a decree] [an order] [describe decree or order], made in the above entitled proceedings on 19 ,

Now, therefore, if the said , appellant, shall prosecute his appeal with due diligence to a final determination, pay all costs and disbursements thereof, and abide the order of the court therein, [and se-

cure the estate of the said _____, deceased, from all damages and costs in consequence of said appeal, and secure the intervening damages and costs to _____, the adverse party,] then this obligation shall be void; otherwise to remain in full force.

In witness whereof we have hereunto set our hands this _____ day of _____ 19 ____ .

.....
.....
.....

Executed in presence of:

.....
.....

[Acknowledgment as in § 1407.]

[Justification of sureties as in § 1408.]

I hereby approve the foregoing bond and the sureties thereon.

Dated _____ 19 ____ .

.....
Judge.

1727. Return to district court.

[Title of proceeding in probate court as in § 1396 or § 1397.]

[Here insert copies of papers and records.]

To the Honorable District Court for _____ county:

An appeal having been perfected from an [order] [judgment] [decree], [describe order, judgment or decree in general terms,] made herein on _____ 19 __, I, _____, Judge of the above named Probate Court, hereby certify that the foregoing is a true transcript of such [order] [judgment] [decree] and of all the papers and proceedings upon which it was founded and of the notice of appeal, proof of service thereof, and the appeal bond.

Dated _____ 19 ____ .

.....
Judge.

1728. Petition for commission to take deposition of attesting witness to will.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That on _____ 19 __, he filed in this Court a petition praying that a certain instrument therewith filed, dated _____ 19 __, purporting to be the last will of the above named decedent, wherein your petitioner is named as executor thereof, be proved and allowed as the last will of said decedent.

II. That the hearing on said petition has been set for 19 , by an order of this Court, made on 19 , and notice thereof has been given as provided by law.

III. That , one of the subscribing witnesses to said instrument is dead.

IV. That , the only other subscribing witness to said instrument, is now residing at No. , in the city of , state of , and his personal attendance at said hearing cannot be procured, and it is necessary that his deposition should be taken in order to prove the due execution of said instrument.

V. That , [a notary public], residing at No. , in the city of , state of , is a suitable and competent person to take such deposition under a commission from this Court.

Wherefore your petitioner prays that a commission issue to said , or some other competent person, to take the deposition of said , [upon written interrogatories (herewith filed)], as the Court may direct.

.....
Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1729. Order for commission to take deposition.

[Title as in § 1396.]

On the petition of , filed herein on 19 ,

It is ordered that a commission issue to , of , as sole commissioner to take the deposition of , residing at , relative to the matter of , upon the interrogatories [and cross-interrogatories] to be attached to said commission; [and that said instrument (will) be attached to said commission, a certified copy of said instrument being first filed in this Court].

Dated 19 .

.....
Judge.

1730. Commission to take deposition of attesting witness to will.

[Title as in § 1396.]

To , at No. , in the city of , state of ,

Greeting:

You are hereby appointed and authorized by this Court sole commissioner to take the deposition of , residing at No. , in the city of , state of , upon the interrogatories [and

cross-interrogatories] hereto attached, relative to the execution of the instrument hereto attached, dated 19 , purporting to be the last will of , deceased, late of county, state of Minnesota.

You are directed to cause said to come before you at such time and place as you may designate and then and there examine him, under oath or affirmation that he will testify the whole truth and nothing but the truth relative to the execution of said instrument, [in answer to said interrogatories (and cross-interrogatories)]; and you shall personally reduce the testimony to writing, or cause it to be so reduced by some disinterested person in your presence and under your direction; and you shall then carefully read over to the witness his testimony and give him an opportunity to add to or qualify the same as he may desire, and then require him to sign his name or make his mark at the end thereof, as well as upon each piece of paper upon which any portion of his testimony is written.

[You are further directed not to permit any party to the above entitled matter to attend at the taking of the deposition, either personally or by agent or attorney, nor to communicate by interrogatories or suggestions with the deponent while giving his deposition. You shall take such deposition in a place separate and apart from all other persons, and permit no person to be present during such examination, except the deponent and yourself, and such disinterested person as you may think fit to appoint as a clerk or stenographer, to assist you in reducing the deposition to writing.] ¹

You shall put the several interrogatories [and cross-interrogatories] to the deponent in their order, and take the answer of the deponent to each, fully and clearly, before proceeding to the next, and not read to the deponent, nor permit him to read, a succeeding interrogatory until the answer to the preceding has been fully taken down.

You may adjourn the examination from time to time at your discretion.

When completed the deposition shall be attached to this commission together with [the papers hereto attached and] your certificate, which may be substantially in the form hereto attached, and returned by you with all convenient speed, by registered mail or private conveyance, in a sealed envelope addressed to the Judge of the Probate Court, county, , Minnesota, [U. S. A.].

Witness the Judge of said Court and the seal thereof this day of 19 .

.....

Judge.

[Seal of court.]

¹ In place of this may be substituted a direction to allow the parties to appear and take part in the examination as in the form under § 1731. See *Walker v. Barrow*, 4 Minn. 253 (178).

INTERROGATORIES

1. What is your name?
2. What is your age?
3. What is your occupation?
4. What is your residence and post office address?
5. Did you know deceased, hereinafter called the testator, late of _____, and if so, how long?
6. Did you see him sign the instrument hereto attached and now exhibited to you, purporting to be his last will, dated _____ 19____, and if so when and where?
7. If the testator did not sign said instrument in your presence did he acknowledge his signature thereon to you when you were called in to witness it, or say to you that the instrument was his will, or in any way indicate to you that he wished you to witness his will? State what he then and there said as to the nature of the instrument and as to what he wanted you to do.
8. Was the signature of the testator on said instrument plainly visible to you, or was it in any way concealed from you, when you signed the instrument?
9. Were there any other persons present when the testator signed the instrument, and if so, who?
10. Is your signature on said instrument genuine?
11. Did you sign your name on said instrument for the purpose of witnessing its execution by the testator?
12. At whose request did you sign said instrument?
13. If you signed the instrument at the request of some one other than the testator, who was it, and did the testator hear such request or acquiesce therein? State what the person requesting you to sign said in relation to your signing and what the testator said or did indicating that he consented to or acquiesced in such request, or that he did not consent to or acquiesce in such request.
14. Did you sign said instrument before or after the testator, and if before the testator, how soon before?
15. Did you sign said instrument in the presence of the testator?
16. If you did not sign said instrument in the presence of the testator, state the relative position of yourself and the testator when you signed. Describe the circumstances minutely. Could the testator by turning his head have seen you sign if he had desired? If not, what would the testator have had to do in order to see you sign? To what extent would he have had to change his position? Were you and the testator in the same room when you signed?
17. Do you know _____, whose name appears as the other witness on said instrument?
18. Did you see him sign said instrument?

19. Do you recognize his signature on said instrument and is it genuine?

20. Did he sign said instrument after the testator, and at the request and in the presence of the testator, and under the same circumstances and on the same occasion that you signed it?

21. Was the testator over twenty-one years of age when he executed said instrument?

22. Was the testator of sound mind when he executed said instrument?

23. If you know of any facts tending to show that the testator was not of sound mind when he executed said instrument, what are they?

24. Did the testator sign said instrument freely and without restraint or undue influence or fraud exerted upon him in relation thereto, so far as you know?

25. If you know of any facts showing fraud, or undue influence, or restraint upon the testator in connection with the execution of said instrument, what are they?

26. If you know of any other facts tending to show that said instrument is not the valid last will of said testator, duly executed as required by law, what are they?

.....

CERTIFICATE OF COMMISSIONER¹

[Venue.]

Be it known that I took the annexed deposition pursuant to the annexed commission; that I was then and there [title of officer]; that I exercised the power of that office in taking such deposition; that by virtue thereof I was then and there authorized to administer an oath; that the deponent, before testifying, was duly sworn by me to testify to the whole truth and nothing but the truth relative to the matter specified in said commission; that the testimony of the deponent was carefully read over to him by me before he signed the same; [that the examination was conducted on behalf of _____, by _____, and on behalf of _____, by _____].

Witness my hand [and seal] this _____ day of _____ 19 .

[Seal if any.]

.....

1731. Commission to take deposition—Another form.

[Title as in § 1396.]

To _____, of No. _____, city of _____, state of _____, Greeting:

You are hereby appointed and authorized by this Court sole commissioner to take the deposition of _____, residing at No. _____, in the

¹ See G. S. 1913, § 8388.

city of _____, state of _____, upon the interrogatories [and cross-interrogatories] hereto attached, for use in this Court in the above entitled matter on behalf of _____.

[Continue as in § 1730 except as follows.]

You are further directed to allow _____, or any of them, parties to the above entitled matter, to appear in person or by agent or attorney at the examination [and take part therein] [but they shall not be permitted to take part in the examination or add to or qualify the interrogatories hereto attached] [and (if they are all present or represented) they shall be permitted to examine and cross-examine the witness in addition to the interrogatories hereto attached and the testimony of the witness on such examination shall be reduced to writing and returned the same as his testimony in response to the written interrogatories hereto attached].

[Certificate of officer as in § 1730.]

1732. Depositions on notice or by stipulation.

[See forms in Dunnell, Minn. Pr. §§ 2482-2486.]

1733. Petition for citation for delivery of will under G. S. 1913, § 7258.

[Title as in § 1396.]

To the above named Court:

Your petitioner respectfully represents:

I. That on _____ 19____, _____ died in the city of _____, in the county of _____, state of _____, and at the time of his death resided and was domiciled in [said county] [_____ county, state of Minnesota] and left property [therein] [in the latter county] subject to administration.

II. That said decedent left a will which is now in the custody of _____, residing at No. _____, in the city of _____, county, state of Minnesota, and your petitioner believes that it is the last valid will of said decedent.

III. That said _____ has neglected to deliver said will to this Court or any other court, or to the person named therein as executor thereof, though he has had knowledge of the death of said decedent for more than _____ months.

IV. That on _____ 19____, your petitioner requested said _____ to deliver said will to this Court, but he refused and still refuses to do so.

V. That your petitioner is [a son] of said decedent and interested in the probate of said will.

VI. That the residence and post office address of your petitioner is No. _____, in the city of _____, _____ county, state of Minnesota.

Wherefore your petitioner prays that a citation issue requiring said
to deliver said will to this Court.

.....

Petitioner.

.....

Attorney for Petitioner.

[Office and post office address.]

[Verification as in § 1405.]

1734. Order for citation on petition under G. S. 1913, § 7258.

[Title as in § 1396.]

The petition of , representing that , residing at No. , in the city of , county, state of Minnesota, has in his custody a will of the above named decedent, of which this Court has jurisdiction, which he has neglected to deliver to this Court, having been filed herein,

It is ordered that a citation issue to said , requiring him forthwith to deliver to this Court any will of said decedent in his custody, or to show cause before this Court at its court room in the Court-House, in the city of , county, state of Minnesota, on 19 , at o'clock in the forenoon, why he should not so deliver the same.

And it is further ordered that said citation be personally served on said , at least days prior to 19 .

Dated 19 .

.....

Judge.

1735. Citation to deliver will into court under G. S. 1913, § 7258.

[Title as in § 1396.]

The State of Minnesota to , residing at No. , in the city of , county, state of Minnesota:

The petition of , representing that you have in your custody a will of the above named decedent of which this Court has jurisdiction, having been filed herein,

You are hereby cited and required forthwith to deliver to this Court any will of said decedent in your custody, or to show cause before this Court at its court room in the Court-House in the city of , county, state of Minnesota, on 19 , at o'clock in the forenoon, why you should not so deliver the same.

Witness the Judge of said Court and the seal thereof this day of 19 .

.....

Judge.

[Seal of court.]

1736. Affidavit of death, absence or disability of subscribing witness under G. S. 1913, § 7271.

[Title as in § 1396.]

[Venue.]

being duly sworn, says that _____, one of the subscribing witnesses to a certain written instrument, dated _____ 19 _____, purporting to be the last will of _____, late of _____, state of _____, which has been presented for probate and filed in the above named Court on _____ 19 _____, is [dead] [is now living out of this state, being a resident of _____] [is absent from this state] [is (state disability)].

.....
[Jurat as in § 1406.]

1737. Certificate of deposit of will under G. S. 1913, § 7265.

[Title of court as in § 1396.]

[Venue.]

I, _____, Judge of the above named Court, hereby certify that on this _____ day of _____ 19 _____, deposited with me for safe keeping a sealed wrapper, indorsed as follows: "Will of _____, residing at _____. Deposited with the Probate Judge of _____ county, state of Minnesota, by _____, on _____ 19 _____."

Witness my hand and the seal of said Court this _____ day of _____ 19 _____.

.....
Judge.

[Seal of court.]

1738. Bond and oath of probate judge under G. S. 1913, § 7201.

Know all men by these presents that we, _____, as principal, and _____ and _____, as sureties, all residents of _____ county, state of Minnesota, are bound unto the County Board of _____ county, state of Minnesota, and its successors in office, in the sum of one thousand dollars, to the payment of which to said County Board, or its successors in office, we jointly and severally bind ourselves, our heirs, executors and administrators, by these presents.

The condition of this obligation is such that whereas said _____ has been elected Judge of the Probate Court of _____ county, state of Minnesota, for the regular term beginning _____ 19 _____,

Now, therefore, if said _____ shall faithfully discharge all his duties as such Judge, and shall faithfully apply all moneys and effects that may come into his hands in the execution of the duties of his office as such

Judge, then this obligation shall be void; otherwise to remain in full force.

In witness whereof we have hereunto set our hands this day
of 19 .

.....
.....
.....

Executed in presence of:
.....
.....

[Acknowledgment as in § 1407]
[Justification of sureties as in § 1408.]

We, the undersigned, constituting all the members of the County Board of county, state of Minnesota, hereby approve the foregoing bond and the sureties thereon.

Dated 19 .

.....
.....
.....

[Seal of board.]

OATH OF JUDGE

[Venue.]

I, , do solemnly swear that I will support the Constitution of the United States and of the state of Minnesota, and faithfully discharge all the duties of the office of Judge of the Probate Court of county, state of Minnesota, which I now assume, to the best of my judgment and ability. So help me God.

.....

[Jurat as in § 1406.]

1739. General form of will giving everything to wife.

I, , residing and domiciled in the city of , county, Minnesota, do make and publish this my last will and hereby revoke all prior wills made by me.

I. I devise and bequeath all the property, of whatever nature and wherever situated, of which I may die seized or possessed, or to which I may be entitled, [including my cemetery lot in Cemetery in the city of ,]¹ to my wife .

II. I hereby appoint my said wife sole executrix of this will.

III. I hereby grant to my said wife, as such executrix, absolute power, during the administration of my estate, for administrative purposes or for her individual benefit as beneficiary under this will, to sell, convey, exchange, mortgage, lease, or otherwise dispose of or deal with, any of

¹ See § 368.

1742. Deed by executor under power in will.

Whereas, by virtue and in execution of a power to me granted as executor thereof by the last will of _____, deceased, late of _____, county, state of _____, which will was duly admitted to probate by the Probate Court of _____ county, Minnesota, on 19 _____, I have, as executor of said will, duly appointed as such by said Court on 19 _____, sold to _____ the real estate hereinafter described, of which said _____ died seized,

Now, therefore, I, as such executor, by virtue and in execution of said power, and in consideration of the sum of _____ dollars to me in hand paid by the said _____, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto said _____, his heirs and assigns, all the right, title, interest and estate of said _____, deceased, in and to the following described real estate [describe tract as in an ordinary deed according to plat or government survey].

In witness whereof I have hereunto set my hand this _____ day of 19 _____.

.....
 Executor of the Last Will of
 _____, deceased.

Executed in presence of:

.....

[Acknowledgment as in § 1539.]

1743. Exemplified copy of records where there is no clerk under act of Congress.

State of Minnesota

County of _____

Probate Court

I, _____, sole presiding Judge of the Probate Court of _____ county, state of Minnesota, which is a court of record having a seal under the constitution and statutes of said state, do hereby certify that I have carefully compared the foregoing copy of _____ with the original record thereof, now remaining on file and of record in the office of said Court, and the same is a true and correct transcript of the whole thereof, and that said _____ in pursuance of and agreeably to the law of the state of Minnesota.

And I further certify that there is no clerk of said Court, but that the files, records and seal thereof are in my sole custody and care as such Judge, and that this certificate is in due form of law.

Witness my hand and the seal of said Court this _____ day of 19 _____.

.....
 Judge.

[Seal of court.]

1744. Same where there is a clerk.

State of Minnesota

County of

Probate Court

I, _____, Clerk of the Probate Court of _____ county, state of Minnesota, which is a court of record having a clerk and seal under the constitution and statutes of said state, do hereby certify that I have carefully compared the foregoing copy of _____ with the original record thereof, now remaining on file and of record in the office of said Court, and the same is a true and correct transcript of the whole thereof.

Witness my hand and the seal of said Court this _____ day of 19 .

.....
Clerk.

[Seal of court.]

State of Minnesota

County of

Probate Court

I, _____, sole presiding Judge of the above named Court, do hereby certify that _____, whose genuine signature is appended to the foregoing certificate, is, and was at the time thereof, the Clerk of said Court, duly appointed, commissioned and qualified as such, and that his said certificate is in due form of law and all his acts in the premises entitled to full faith and credit.

Witness my hand and the seal of said Court this _____ day of 19 .

.....
Judge.

[Seal of court.]

There is sometimes added a certificate of the clerk as to the election and qualification of the judge and the genuineness of his signature but that is not necessary.

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